2023 REPORT

Operationalizing Indigenous Impact Assessment

Edited by Jennifer Sankey, Dayna Nadine Scott & Laura Tanguay
with contributions from Donna Ashamock, Warren Bernauer, Aaron Bruce, Veronica Guido, Dawn Hoogeveen, Sarah Morales, Jerry Natanine, and Estair Van Wagner

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Team members

Editors

Dr. Dayna Nadine Scott (primary investigator) is Associate Professor, Osgoode Hall Law School & the Faculty of Environmental and Urban Change; York Research Chair in Environmental Law & Justice in the Green Economy at York University; and co-director of Osgoode's Environmental Justice & Sustainability Clinic.

Dr. Jennifer Sankey is a Postdoctoral Visitor at Osgoode Hall Law School.

Laura Tanguay is a Ph.D. Candidate at York University.

Authors & Contributors

Donna Ashamock (Cree), is an experienced community-based researcher from Treaty No.9 and an advocate for Indigenous self-determination.

Dr. Warren Bernauer is a Postdoctoral Fellow, Department of Environment & Geography and Natural Resources Institute, University of Manitoba.

Aaron Bruce (Squamish Nation) is a Barrister and Solicitor at Aaron Bruce Law.

Veronica Guido (Anishinaabe) is a graduate of Osgoode Hall Law School's research-stream LLM program.

Dr. Dawn Hoogeveen is University Research Associate, Faculty of Health Sciences, Simon Fraser University.

Isabel McMurray is a JD student at Osgoode Hall Law School and a former student at the Environmental Justice & Sustainability Clinic.

Dr. Sarah Morales, (Su-taxwiye), is Coast Salish and a member of Cowichan Tribes. She is an Associate Professor at the University of Victoria Faculty of Law.

Jerry Natanine is the Chief Administrative Officer, Hamlet of Clyde River, Nunavut.

Dr. Estair Van Wagner is Associate Professor, Osgoode Hall Law School and co-director of Osgoode's Environmental Justice & Sustainability Clinic.

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Executive Summary

Background

Fuelled by a spreading resurgence and revitalization in placed-based Indigenous laws and legal orders, interest and expertise in Indigenous-led impact assessment (IA) models have grown in recent years. Different models of IA are being adopted by different Indigenous communities but, despite some attempts to define the concept, what characterizes an 'Indigenous-led' IA is still in a state of flux. While some argue an Indigenous-led assessment can occur when an Indigenous nation takes on the role of proponent under settler state legislation, others insist that Indigenous-led means operating outside, and independent of, settler legislative frameworks. What constitutes Indigenous authority, control or decision-making in IA is a complex question, and a crucial one when considering implementation of the UNDRIP principle of free, prior and informed consent (FPIC). In this project, we attempt to advance scholarly understanding by identifying criteria that can usefully be applied to better understand the evolving picture of how Indigenous nations participate in IA.

In our view, conceptualizing Indigenous-led IA involves investigating the strategies Indigenous nations are employing to build and strengthen their authority through IA processes; considering the level of Indigenous participation at different phases of the IA; and delineating where and why tensions occur in the IA context when Indigenous and settler jurisdictions meet. It seems to us that a critical factor in determining whether a process is 'Indigenous-led' is the ability of the Indigenous nation to use its own processes, and to apply its own laws and legal principles, to the issues the community determines to be important when it makes a decision. Our case study research has prompted us to question and consider the different contexts that can enable or inhibit this process, for example through private contracts between Indigenous nations and proponents, through government-to-government agreements between Indigenous nations and the Crown, through Indigenous nations taking on the role of proponent under settler IA law, and through the jointly governed administrative structures created under modern treaties.

We focus not only on whether an Indigenous nation had opportunity to provide consent (or not) through the IA process, but also on how the decision to provide or withhold consent for any particular project was arrived at. In other words, in delineating criteria for Indigenous-led IAs, we believe a useful starting point is to ask if and how community processes were developed to assess the project, whose laws governed at different phases of the IA, and the extent to which Indigenous protocols and laws influenced whether the project moved ahead or not.

Methodology

This project is funded by the Impact Assessment Agency of Canada through the Policy Dialogue Program (2021-2023). We obtained research ethics approval from York University. Our research team began in 2021 by conducting background research on different forms of impact and risk assessments being led or informed by Indigenous groups in Canada, Australia, and New Zealand. From there, we selected four cases for deeper study because they demonstrate different models of Indigenous-led and/or informed assessments taking place in Canada, and because members of the Indigenous communities interested in, or affected by, the proposed projects were available and willing to share their knowledge and experiences with our research team. The case studies we selected include: 1) the Squamish Nation's assessment of the Woodfibre Liquefied Natural Gas (LNG) Project near Squamish, BC; 2) the Stk'emlúpsemc te Secwepemc Nation's assessment of the Ajax Mining Project, an open-pit copper and gold mine and enrichment plant near Kamloops, BC; 3) assessments of the Martin

Falls Community Access Road and Webequie Supply Roads by proponents, Martin Falls and Webequie First Nation, in northern Ontario's Ring of Fire region; and 4) assessments of the Baffinlands Mary River Iron mine by the Nunavut Inuit Review Board (NIRB) in the Qikiqtani region of Nunavut (the Qikiqtani Inuit Association (QIA) and Hunter and Trapper Organizations (HTOs) represent the Inuit of the region).

In May 2022, our team organized and convened a workshop in Vancouver titled *Contested Authorities: Operationalizing Indigenous Impact Assessment*. The workshop was strategically held in conjunction with a 5-day International Association of Impact Assessment conference, which our research team attended. More than 50 practitioners and experts working in IA joined our workshop to hear from invited Indigenous experts about their experiences leading and developing IAs in their communities. Indigenous IA experts, Leah George-Wilson (Tsleil Waututh Nation), Aaron Bruce (Squamish Nation), and Sunny LeBourdais (Pellt'iqt te Secwepemc Nation) spoke about their experiences leading assessments for the Trans Mountain Pipeline, the Woodfibre LNG and the Ajax Mining Projects, respectively. Following their presentations, University of Victoria law professor Dr. Sarah Morales, who is Coast Salish and a member of Cowichan Tribes, discussed the theory of Indigenous-led IA as an expression of Indigenous law and jurisdiction. The workshop deepened our knowledge and generated a focussed set of questions to guide the case study research. We were able to speak to and hear from individuals who had direct experience developing Indigenous-led IAs in their own communities. The workshop provided a forum for robust discussion and debate among practitioners and experts in the field concerning effective models of Indigenous-led IAs and the relationship between Indigenous jurisdiction and the conduct of IAs in Canada. Through the conference and workshop, our research team made connections and gained insights from other Indigenous leaders from across Canada who are developing IAs and consent based decision-making models in their communities.

Research for each case study derives from documents available on the public registries of the regulators of the projects being studied, government and proponent websites, and media coverage. Knowledge of the Indigenous communities' assessment processes was largely obtained from documents and videos found on the websites of Indigenous communities, court filings, and conversations held with the Indigenous leaders and participants involved in the various Indigenous-led impact assessments, who were present at the *Contested Authorities* workshop. A few supplemental interviews were conducted. PhD dissertation research and legal commentary on the Indigenous-led IAs were also used. Two of the case studies are co-written with Indigenous authors who had direct experience leading and participating in the Indigenous-led IA being examined.

Following the workshop, our research team met to delineate a framework to guide the writing of the case studies based on what we learned about the central tenets of Indigenous-led IA from our research and from Indigenous IA experts at the workshop. Our research team concluded that the main challenge to developing an overarching framework for case study analysis of Indigenous-led IA is that Indigenous approaches and responses to Crown IAs vary greatly depending on a multiplicity of factors including the region of Canada, the absence or presence of a modern treaty, historical impacts to the territory, community capacity, and the Indigenous nation's relationship with Canadian governments and proponents. Thus, the team determined that each case study would be oriented around the broad question: "how did the Indigenous community operationalize its impact assessment in relation to the particular project," but depending on the unique nature of each project and community under investigation, the issues discussed would vary. In other words, some case studies would focus on the development of IA processes at the community level, the level of Indigenous participation at different phases of the IA, and how Indigenous processes met with Crown IA processes, whereas others would focus on the ability or inability of Indigenous peoples

to participate in government-led or co-managed processes, and what structural impediments they faced. Rather than writing each case study in accordance with a set of pre-defined categories, the team agreed that it would be more effective to provide detailed descriptive analyses of each Indigenous nation's experience with the IA in relation to the specific major project, and highlight the unique tensions experienced by that community. We decided that we would use the conclusion of this report to synthesize the central messages that could be gleaned from the case studies. That synthesis work was conducted by the research team at a writing retreat held in January 2023.

Case Study Summaries

The Squamish Nation Assessment of the Woodfibre Liquefied Natural Gas Project

In 2013, Woodfibre LNG Limited and FortisBC submitted proposals to the BC Environmental Assessment Office and Canadian Environmental Assessment Agency to develop a liquefied natural gas production facility on a privately owned brownfield site on the shores of Howe Sound, and to expand a pre-existing natural gas pipeline to deliver natural gas to the site. The site had been used by Woodfibre Pulp and Paper for over a century, but before that, it was home to a Squamish Nation village known as Swiẏát. Having experienced the negative impacts of settler industrialization in Howe Sound for over a century, Squamish Nation was not satisfied that the Crown environmental assessment (EA) process could adequately assess the impacts of the LNG projects on Squamish Nation rights, title, and interests. Thus, in 2014, the Nation decided to develop its own assessment process to determine whether it would grant or withhold consent. This case study describes how Squamish Nation designed and implemented its own assessment process separate from the Crown process using private contractual agreements with the proponents, and then reflects on the impacts the Squamish Process had on the projects and the Crown EA.

The Stk'emlúpsemc te Secwepemc Nation Assessment of Ajax Gold and Copper Mine Project

In 2011, KGHM Ajax Mining Inc. submitted a proposal to the BC Environmental Assessment Office and Canadian Environmental Assessment Act Agency to build an open-pit copper and gold mine on privately owned land adjacent to Jacko Lake in the interior of BC, an area located within the traditional territory of the Stk'emlúpsemc te Secwepemc Nation (SSN). Having long claimed jurisdiction over this territory, the SSN insisted that it must be given opportunity to assess the project in accordance with SSN law, and to decide whether to provide its free, prior, and informed consent to the project. In 2015, to facilitate informed decision-making, the SSN developed its own EA process and pressured the BC government to enter a government-to-government agreement to establish a procedural framework for how the Crown EA and the SSN EA would work in a parallel and collaborative fashion. This case study illustrates how the SSN built a community-based assessment process grounded in SSN law and used a government-to-government agreement to coordinate the relationship between the SSN EA and the Crown EA processes.

First Nation Proponents' Assessments of the Roads to the Ring of Fire

In recent years, negotiations between Ontario and a group of nine northern First Nations in proximity to the "Ring of Fire" mineral deposits broke down and two First Nations have come forward as the 'proponents for the purpose of environmental assessment' for all-season roads that would eventually connect the future mining district to the provincial highway system. These road projects are now subject to both provincial and federal environmental/impact assessments. The Impact Assessment Agency of Canada also initiated a Regional Assessment for the Ring of Fire region, which was intended to examine the cumulative impacts of all

the expected changes in the region brought about by opening up the far north. Each of these assessments is now mired in controversy about who holds jurisdiction, who can provide or withhold their consent to major projects in the region, and whose law applies when environmental/impact assessments are conducted. This case study illustrates how difficult it can be to apply a term such as "Indigenous-led impact assessment" in a context of overlapping territories, competing authorities, and multiple legal orders.

The Nunavut Impact Review Board Assessment of Baffinland's Mary River Mine
In 2012, Baffinland's proposal for the Mary River iron ore mine was approved by the Nunavut Impact Review Board (NIRB). Since the initial approval, the Mary River mine project has gone through several changes in scope which has highlighted the opportunities and limitations of the territorial IA process. Our analysis suggests that "Indigenous-led" is a poor descriptor of Nunavut's Impact Assessment (IA) process, despite that many of NIRB's unique and innovative procedures provide substantial opportunities for Inuit participation—Inuit authority over the IA process and project outcomes, however, is clearly limited. This case study illustrates that by including co-management arrangements where the Crown holds unilateral decision-making power in the category of Indigenous-led IA, we risk weakening the concept of Indigenous leadership, especially when Indigenous communities do not assert that the process is Indigenous-led. Moreover, it makes it difficult for Indigenous communities that currently have Crown-controlled co-management processes in place to use the concept of Indigenous-led IA to increase their authority over lands and resources. This case study illustrates a clear argument for extending Indigenous participation and authority beyond the initial assessment and decision to include the entire lifecycle of IA.

Key Messages

- All assessments conducted by Indigenous nations are undermined by the background conditions created under settler law which continues to fail to provide a true consent mechanism.
- The degree of authority that an Indigenous nation can achieve through Indigenous IA varies according to many factors, a crucial one of which is the legal status of the land in question under settler law.
- Despite these shortcomings and constraints, the act of engaging in Indigenous IA can energize Indigenous communities, revitalize their laws, and strengthen their life-affirming connections to their laws and territories.
- In order to reach the transformative potential of Indigenous IA, we need to continue to push for new interpretations and meaningful recognition of inherent Indigenous jurisdiction within the Canadian constitutional order.

Our research supports the following definition of Indigenous-led IA.

An Indigenous-led IA is:

1. Completed *prior* to any approvals, agreements or consent being provided for a proposed project (that is, communities should be able to apply a threshold determination as to whether a project is in line with identified priorities for the territory, or would violate established no-go zones, before they even decide to conduct an assessment);
2. Undertaken with some degree of control by affected Indigenous parties – on their own terms and subject to their approval;

3. Structured according to the relevant Indigenous nations' determination of the appropriate scope; methods for data collection; values to be protected; principles for assessment, follow-up and monitoring; and threshold for decision-making about a project (according to their own protocols);
4. Governed by a process determined by local realities, capacities, challenges, priorities, practices, knowledge, and relations; and
5. Subject to the applicable Indigenous legal order and oriented towards maintaining the life-affirming practices that flow from reciprocal relations with lands and waters.

Introduction

Recent years have ushered in an explosion of interest and expertise in place-based, Indigenous-led impact assessment models. Across Canada and beyond, Indigenous[1] communities have been developing and engaging with alternative approaches to "environmental assessment" (EA) or "impact assessment" (IA)[2] in response to proposed developments in their homelands. These efforts are borne out of deep dissatisfaction and frustration; Indigenous peoples have repeatedly pointed to the inability of settler law[3] on EA to protect their constitutionally recognized Aboriginal and Treaty rights, and to meaningfully engage with Indigenous laws,[4] values, and perspectives regarding the socio-ecological risks posed by resource development projects. The inability of EA under settler law to adequately consider Indigenous legal orders and jurisdictions has been well documented.[5] As Coast Salish legal scholar Sarah Morales

[1] The terms "Indigenous," "Aboriginal" and "First Nation" are chosen based on the context in which they are used. Indigenous nation is used most frequently when speaking of Indigenous peoples that identify as nations; however Indigenous groups or communities is used when including Inuit peoples, as some Inuit groups do not identify as nations. When referencing the Canadian Constitution or settler jurisprudence, the term Aboriginal is used as it is in those documents or judgments. "Aboriginal Law" refers to rules and doctrines enacted or made by settler governments or courts concerning Indigenous peoples, while "Indigenous law" refers to the laws of Indigenous groups/nations based on their Indigenous legal orders and traditions and specific to their territories. See further details below in footnote 4.

[2] This report uses "environmental assessment" (EA) and "impact assessment" (IA) as applicable to refer to processes used by both settler and Indigenous governments to assess major resource extraction projects.

[3] This report uses "settler law" to refer to legislation and doctrine enacted by federal, provincial and territorial governments in Canada or espoused by settler courts.

[4] Indigenous law is the law that is made by Indigenous peoples to govern their territories and peoples based on their own legal order; it is distinguishable from Canadian Aboriginal law which is the law made by Canadian governments and courts in relations to Indigenous peoples. It should be noted that Canada has three main legal traditions. Canada's common law tradition derives from the common law of England and its civil law tradition derives from Roman law and the Napoleonic Code; both the civil and common law traditions were brought to Canada through European settlement. Canada's Indigenous legal tradition is comprised of multiple Indigenous legal orders that pre-existed the common and civil law in Canada. Within these multiple Indigenous legal orders are the laws and legal processes specific to each Indigenous group. Indigenous law, like all law, is fluid not static. It continues to evolve and regenerate as lawmakers face new problems to which they must apply legal principles to solve the issues before them. For further discussion on the role of Indigenous legal traditions in Canada, see John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19 Wash UJL & Pol'y 167 online: <http://openscholarship.wustl.edu/law_journal_law_policy/vol19/iss1/13> at 174 ; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Val Napoleon, "Thinking about Indigenous Legal Orders: Research Paper for the National Centre for First Nations Governance" (10 June 2007), online (pdf): *University of Toronto Faculty of Law* <law.utoronto.ca/sites/default/files/documents/hewitt-napoleon_on_thinking_about_indigenous_legal_orders.pdf> ["Thinking about Indigenous Legal Orders"].

[5] BC First Nations Energy and Mining Council, "Environmental Assessment and First Nations in BC: Proposals for Reform" (20 August 2009) at 2–3, online (pdf): *BC First Nations Energy and Mining Council* <fnemc.ca/?portfolio=ea-proposals-for-reform> cited in West Coast Environmental Law, "Why It's Time to Reform Environmental Assessment in British Columbia" (January 2018), online (pdf): <wcel.org/sites/default/files/publications/2018-01-bc-eare-form-backgrounder-web-final.pdf> ; Annie L Booth & Norm W Skelton, "We are Fighting Ourselves – First Nations' Evaluation of British Columbia and Canadian Environmental Assessment Processes" (2011) 13:3 J Environmental Assessment Policy & Management 367 [Booth & Skelton, "We are Fighting"]; Annie L Booth & Norm W Skelton, "Industry and government perspectives on First Nations' participation in British Columbia environmental assessment process" (2011) 31:3 Environmental Impact Assessment Rev 216; Annie L Booth & Norm W Skelton, "Improving First Nations' participation in environmental assessment processes: recommendations from the field" (2011) 29:1 Impact Assessment & Project Appraisal 49; Anieka Udofia, Bram Noble & Greg Poelzer "Meaningful and efficient? Enduring challenges to Aboriginal participation in environmental assessment" (2017) 65 Environmental Impact Assessment 164; Titi Kunkel "Aboriginal values and resource development in Native Space: Lessons from British Columbia" (2017) 4:1 Extractive Industries & Society 6; Stephen S. Crawford, "The Canadian Crown's Duty to Consult Indigenous Nation's Knowledge in Federal Environmental Assessments" (2018) 9:3 Intl Indigenous Policy J; Dawn Hoogeveen, "Fish-hood: Environmental Assessment, critical Indigenous studies, and posthumanism at Fish Lake (Teztan Biny) Tsilhqot'in territory" (2016) 34:2 Society & Space 355; Canada, Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa, ON: Canadian Environmental Assessment Agency, 2017).

notes, "[m]ost Canadian Indigenous groups have not had a meaningful voice in impact assessment," and "rarely has any Indigenous group been able to exercise consent or decision making on major resource development projects."[6] More often, when Indigenous groups participate in government regulatory processes, "other parties severely limit their involvement, requesting only baseline traditional knowledge and traditional use information, without any meaningful input into or control over the process or project itself."[7] The result is that "Indigenous culture, spirituality, laws and legal processes, rights and title have not been taken into account in the Crown-led and proponent-driven Canadian environmental assessment processes."[8]

In recent years, in response to frustration with settler EA frameworks, as well as various governments' purported commitment to obtain Indigenous peoples' free, prior, and informed consent (FPIC)[9] before proceeding with resource development in Indigenous territories, Indigenous nations have been creating and using their own methods and processes to conduct their own assessments of major projects proposed for their territories. Indigenous nations have developed IA processes that reflect their own priorities and laws and are using these processes to assert their jurisdiction over their territories and to challenge the presumed unilateral authority of settler laws.

Indigenous peoples' assertion of control, or taking-back, of resource governance decisions, has sparked much interest in what is now commonly called Indigenous-led IA. And despite some attempts to define what Indigenous-led IA is,[10] our research suggests that understandings of what constitutes an "Indigenous-led" IA are still in a state of flux. Processes classified as "Indigenous-led" can vary dramatically. Indeed, some processes have been labelled Indigenous-led where Indigenous nations act as a proponent under settler IA legislation, while others insist that Indigenous-led means operating outside and independent of settler legislative frameworks. What we have learned is that context is crucial. In other words, each Indigenous community has its own set of motivations for engaging in IA, which can be directed at revitalizing and applying Indigenous law and decision-making in the community for the community, and/or resisting the unilateral imposition of settler EA law. Each Indigenous community is impacted by a different socio-historic relationship with settler governments depending on its location in Canada, which means that each Indigenous-led IA emerges from a unique set of circumstances influenced by history, geography, community capacity, and the settler legislative frameworks of the territory which often bear on the Indigenous nation's decision-making processes. Amid this wide diversity, a central aim of our research has been to identify some criteria that can usefully be applied to understanding how Indigenous nations lead and participate in IA more generally.

[6] Sarah Morales, "Indigenous-led Assessment Processes as a Way Forward" (4 July 2019), online: *Centre for International Governance and Innovation* <https://www.cigionline.org/articles/indigenous-led-assessment-processes-way-forward>. See also Gibson et al, "Impact Assessment in the Arctic: Emerging Practices of Indigenous-Led Review" (April 2018), online (pdf): Gwichin Council International <https://gwichincouncil.com/sites/default/files/Firelight%20Gwich%27in%20Indigenous%20led%20review_FINAL_web_0.pdf>.

[7] Morales, *supra* note 6.

[8] *Ibid*.

[9] The right to free, prior and informed consent (FPIC) is a principle found in Articles 10, 11, 19, 28 and 29 of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) [UNDRIP]. Canada's *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c.14 [*UNDRIP Act*] received royal asset on 21 June, 2021. The objective of the UNDRIP Act is to implement the UNDRIP in Canada; section 5 states that Canada will "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration." In 2019, British Columbia enacted similar legislation in passing the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*DRIPA*].

[10] Gibson et al, *supra* note 6. Indigenous-led IA is defined by Gibson et al as follows: "A process that is contemplated prior to any approvals or consent being provided for a proposed project, which is designed and conducted with meaningful input and an adequate degree of control by Indigenous parties – on their own terms and with their approval. The Indigenous parties are involved in the scoping, data collection, assessment, management planning, and decision-making about a project."

As the degree to which a process is "Indigenous-led" is becoming a marker of its legitimacy, it is important to develop a conceptual framework for evaluating and situating various types of Indigenous-led assessments. A useful starting point is to closely examine concrete examples of Indigenous IAs that have been carried out, or are underway, in Canada. The case study method offers an effective way to investigate and analyze what is taking place on the ground. Indeed, in our view, conceptualizing Indigenous-led IA involves investigating the strategies Indigenous nations are employing to build and strengthen their authority throughout IA processes; considering the level of Indigenous participation at different phases of the IA; and delineating where and why tensions occur in the IA context when Indigenous and settler jurisdictions meet. It seems to us that a critical factor in determining the credibility of Indigenous-led IA is the ability of Indigenous nations to use their own processes to develop and apply their own laws and legal principles to the issues their communities determine to be important. To this end, analysis of Indigenous-led IA must not only focus on whether an Indigenous nation had opportunity to provide consent (or not), but also, how the consent or rejection of a project was arrived at. In other words, it is important to consider if and how community processes were developed, and whose laws governed at different phases of the IA to arrive at the final decision. By exploring how Indigenous peoples are constructing different forms of IAs, and examining how these are operating on the ground, insights may be generated regarding how settler IA law can better articulate with, or operate alongside, Indigenous legal orders, and how Indigenous-led IA could become an important venue for the regeneration and operationalization of Indigenous law and jurisdiction in Canada.

Research Objectives

With this case study research, our team has assembled knowledge and experiences from across Canada of different forms of Indigenous leadership and participation in IA and considered whether there are key criteria emerging for classifying these processes. Our central research objective has been to learn how Indigenous communities in different parts of Canada are participating in and leading IAs with the aims of:

1. refining scholarly understanding of what constitutes Indigenous-led IA; and
2. generating insights on how settler law should evolve in order to make space for and restore Indigenous jurisdiction in the IA context.

Robust and resilient decision-making structures meaningfully incorporate the legal orders applicable to the territory in question, and honour and respect the values of those affected by the decisions. To this end, a secondary research objective has been to build knowledge about the operationalization of Indigenous law on the ground by analyzing specific, concrete examples where communities have put their legal principles and processes to work to assess major projects. By providing case studies of concrete examples, our objective has been to build understanding about how the relationships between Crown and Indigenous authorities can be structured so as to provide space and opportunity for the revitalization Indigenous law and jurisdiction in Canada.

Methodology

This project is funded by the Impact Assessment Agency of Canada through the Policy Dialogue Program (2021-2023).[11] We obtained research ethics approval from York University. Our research team began in 2021 by conducting background research on different forms of impact and risk assessments being led or informed by Indigenous groups in Canada, Australia,

[11] Professor Dayna Nadine Scott is the primary investigator on this project, entitled, "Operationalizing Indigenous Governing Authority in Impact Assessments of Major Projects."

and New Zealand.[12] From there, we selected four cases for deeper study because they demonstrate different models of Indigenous-led and/or informed assessments taking place in Canada, and because members of the Indigenous communities interested in, or affected by, the proposed projects were available and willing to share their knowledge and experiences with our research team. The case studies we selected include: 1) the Squamish Nation's assessment of the Woodfibre Liquefied Natural Gas (LNG) Project near Squamish, BC; 2) the Stk'emlúpsemc te Secwepemc Nation's assessment of the Ajax Mining Project, an open-pit copper and gold mine and enrichment plant near Kamloops, BC; 3) assessments of the Martin Falls Community Access Road and Webequie Supply Roads by proponents, Martin Falls and Webequie First Nation, in northern Ontario's Ring of Fire region; and 4) assessments of the Baffinlands Mary River Iron mine by the Nunavut Inuit Review Board (NIRB) in the Qikiqtani region of Nunavut (the Qikiqtani Inuit Association (QIA) and Hunter and Trapper Organizations (HTOs) represent the Inuit of the region).

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Research for each case study derives from documents available on the public registries of the regulators of the projects being studied, government and proponent websites, and media coverage. Knowledge of the Indigenous communities' assessment processes was largely obtained from documents and videos found on the websites of Indigenous communities, court filings, and conversations held with the Indigenous leaders and participants involved in the various Indigenous-led impact assessments, who were present at the *Contested Authorities* workshop. A few supplemental interviews were conducted. PhD dissertation research and legal commentary on the Indigenous-led IAs were also used. Two of the case studies are co-written with Indigenous authors who had direct experience leading and participating in the Indigenous-led IA being examined.

Following the workshop, our research team met to delineate a framework to guide the writing of the case studies based on what we learned about the central tenets of Indigenous-led IA from our research and from Indigenous IA experts at the workshop. Our research team concluded that the main challenge to developing an overarching framework for case study analysis of Indigenous-led IA is that Indigenous approaches and responses to Crown IAs vary

[12] This component of the project was conducted by Osgoode LL.M student Veronica Guido, Osgoode JD student Isabel McMurray, and EUC PhD Candidate Laura Tanguay.

greatly depending on a multiplicity of factors including the region of Canada, the absence or presence of a modern treaty, historical impacts to the territory, community capacity, and the Indigenous nation's relationship with Canadian governments and proponents. Thus, the team determined that each case study would be oriented around the broad question: "how did the Indigenous community operationalize its impact assessment [in relation to the particular project]?" The issues discussed in each case study would vary depending on the unique nature of each project and community under investigation. In other words, some case studies would focus on the development of IA processes at the community level, the level of Indigenous participation at different phases of the IA, and how Indigenous processes met with Crown IA processes, whereas others would focus on the ability or inability of Indigenous peoples to participate in government-led or co-managed processes, and what structural impediments they faced. Rather than writing each case study in accordance with a set of pre-defined categories, the team agreed that it would be more effective to provide detailed descriptive analyses of each Indigenous nation's experience with the IA in relation to the specific major project, and highlight the unique tensions experienced by that community. We decided that we would use the conclusion of this report to synthesize the central messages that could be gleaned from the case studies. That synthesis work was conducted by the research team at a writing retreat held in January 2023.[13]

Report Layout

This report is set out in three main parts. Part 1 provides context with a scholarly discussion of why and how Indigenous-led IA has emerged in recent years. This includes a description of specific shortfalls of past settler legislative frameworks and in particular, problems that arise due to governments' adherence to narrow interpretations of the jurisprudence on the duty to consult and accommodate. The UNDRIP and the principle of FPIC are outlined and explained in relation to Indigenous consent in Canadian settler law. Part 2 contains our four case studies: 1) the Squamish Nation's assessment of the Woodfibre Liquefied Natural Gas Project near Squamish, BC; 2) the Stk'emlúpsemc te Secwepemc Nation's assessment of the Ajax Mine Project, an open-pit copper and gold mine and enrichment plant near Kamloops, BC; 3) the First Nation proponent's assessments of the Martin Falls Community Access Road and the Webequie Supply Road, in the far north of Ontario's Ring of Fire region; and 4) the assessments of Baffinland's Mary River Iron mine by the Nunavut Inuit Review Board (NIRB) in the Qikiqtani region of Nunavut. Part 3 contains our synthesis, *Exploring the Transformative Potential of Indigenous Impact Assessment*.

[13] Participants included Donna Ashamock, Dawn Hoogeveen, Sarah Morales, Jennifer Sankey, Dayna Nadine Scott, Laura Tanguay, and Estair Van Wagner.

Part 1 – Contextualizing Indigenous-led Impact Assessment

Jennifer Sankey[1] and Laura Tanguay[2]

The inability of Crown environmental assessment (EA)[3] processes to adequately consider Indigenous peoples' rights, laws, and interests has been well documented.[4] Annie Booth and Norm Skelton's research on Indigenous experiences with Canadian EA dating back to 1995 reveals that EA legislative frameworks have failed Indigenous communities on procedural, relational and philosophical levels.[5] The procedural failures include: a lack of financial and workforce capacity in Indigenous communities to respond meaningfully to the requests for information made by the Crown and proponents in EA processes; a lack of knowledge and understanding of EA legislation and processes by Indigenous community members; and a widely held belief that Crown consultation conducted through EAs is not a meaningful dialogue.[6] Some of the more specific procedural shortfalls of EA legislative frameworks include: late engagement with Indigenous nations (i.e. consultation is not mandated until after project siting and technical design have been determined, leaving little room for Indigenous input on those matters); tight timelines, which prevent Indigenous nations from responding meaningfully to inquiries about how their interests/rights/title will be affected by proposed development; poor methodologies for obtaining data (i.e. data for assessments is obtained by proponents who choose what to include and how to present the significance of environmental impacts and mitigative measures to the decision-maker); and lack of consideration of cumulative impacts on a spatial and temporal scale that resonates with Indigenous nations (i.e. many Indigenous nations are concerned with impacts to their territory as a whole, not just the project area, and typically over a much longer time horizon).[7]

[1] Postdoctoral Visitor, York University, Osgoode Hall Law School.
[2] Doctoral Candidate, Faculty of Environmental and Urban Change, York University.
[3] This report uses "environmental assessment" (EA) and "impact assessment" (IA) interchangeably to refer to processes used by both settler and Indigenous governments to assess major resource extraction projects.
[4] BC First Nations Energy and Mining Council, "Environmental Assessment and First Nations in BC: Proposals for Reform" (20 August 2009) at 2–3, online (pdf): *BC First Nations Energy and Mining Council* <fnemc.ca/?portfolio=ea-proposals-for-reform> cited in West Coast Environmental Law, "Why It's Time to Reform Environmental Assessment in British Columbia" (January 2018), online (pdf): <wcel.org/sites/default/files/publications/2018-01-bc-eareform-backgrounder-web-final.pdf> ; Annie L Booth & Norm W Skelton, "We are Fighting Ourselves – First Nations' Evaluation of British Columbia and Canadian Environmental Assessment Processes" (2011) 13:3 J Environmental Assessment Policy & Management 367 [Booth & Skelton, "We are Fighting"]; Annie L Booth & Norm W Skelton, "Industry and government perspectives on First Nations' participation in British Columbia environmental assessment process" (2011) 31:3 Environmental Impact Assessment Rev 216; Annie L Booth & Norm W Skelton, "Improving First Nations' participation in environmental assessment processes: recommendations from the field" (2011) 29:1 Impact Assessment & Project Appraisal 49; Anieka Udofia, Bram Noble & Greg Poelzer "Meaningful and efficient? Enduring challenges to Aboriginal participation in environmental assessment" (2017) 65 Environmental Impact Assessment 164; Titi Kunkel "Aboriginal values and resource development in Native Space: Lessons from British Columbia" (2017) 4:1 Extractive Industries & Society 6; Stephen S. Crawford, "The Canadian Crown's Duty to Consult Indigenous Nation's Knowledge in Federal Environmental Assessments" (2018) 9:3 Intl Indigenous Policy J; Dawn Hoogeveen, "Fish-hood: Environmental Assessment, critical Indigenous studies, and posthumanism at Fish Lake (Teztan Biny) Tsilhqot'in territory" (2016) 34:2 Society & Space 355;.
[5] *Ibid.* It should be noted that Booth & Skelton's research stems from First Nations' (and industry) perspectives on 1992 federal EA legislation, *Canadian Environmental Assessment Act*, SC 1992, c 37, as repealed by *Canadian Environmental Assessment Act*, SC 2012, c 19 s 52; however, these concerns continued with the federal government's subsequent EA legislation, the Canadian Environmental Assessment Act, SC 2012, c 19 s 52, as repealed by *Impact Assessment Act*, SC 2019, c 28, s 1 [*CEAA* 2012]. New federal legislation came into force in 2019 with the *Impact Assessment Act*, SC 2019, c 28, s 1 [*IAA*].
[6] *Ibid.*
[7] *Ibid.*

The literature demonstrates that in addition to procedural failures, the historic mistrust between Indigenous nations and the Crown had led to relational failures within EA processes. A history of broken promises between Indigenous nations and Canadian governments often clouds consultation and negotiation processes, leading to overall dissatisfaction for Indigenous nations. Many Indigenous peoples have serious concerns about the motivations of government officials, and some have felt that government tries to "downplay data that might not lead in the direction they wished in terms of impacts."[8] Indigenous communities have also felt that government is unfair in refusing to address issues such as climate change or spirituality that are important to many Indigenous nations.[9] Scott et al observe that trust is an important element in the sharing of Indigenous knowledge (IK).[10] Indigenous knowledge systems are very important, valuable sources of knowledge when conducting assessments of developments that may impact the land and community; however, "IK knowledge was not just deliberately excluded from many environmental assessment in the past, along with the decision-making capacities of Indigenous nations, but communities have also stopped trusting the system enough to contribute their IK. This is because their traditional knowledge has in the past been 'extracted' and taken out of context, misinterpreted, or deliberately misused."[11] Research documenting the experiences of Indigenous communities affected by environmental assessments of oil sands projects in Alberta has found that "[Indigenous participants] are tired of expressing the same concerns and telling the same stories which seem to have no effect on the course of development [.]"[12] For many Indigenous nations, building trust requires moving away from models that attempt to "integrate" IK and Indigenous law into government processes,[13] toward adopting new processes that honour the integrity of IK and Indigenous law on their own terms.

Settler law on EA has also failed Indigenous communities at a philosophical level due to differences between the worldviews of many Indigenous peoples and the Western worldview that informs EA law. Scott et al note that "there are fundamental, epistemological differences between the values and ideologies that inform the standard impact assessment processes under settler law and those guiding Indigenous-led processes."[14] Booth and Skelton explain this as follows:

> All processes such as EA stem from what is categorized as a Western, scientific or techno-rational worldview. As such they have certain attributes at their core. Data are discrete measurable units. Knowledge is ahistorical and is not mediated by such subjective concerns as cultural or spirituality. Things must be broken down into discrete parts to be understood and that disassembly does no harm to understanding. Thus an EA is structured into discrete units: wildlife, plants, economic development, First Nations etc. with only minimal integration across discrete categories.[15]

Indeed, the way Western scientific processes organize and compartmentalize knowledge can pose problems for Indigenous peoples. As Chelsey Armstrong and Christie Brown point out, Western EA frameworks often separate cultural resources from natural resources and evaluate

[8] Booth & Skelton "We are Fighting," *supra* note 4 at 383.
[9] *Ibid*.
[10] Dayna Scott et al, "Synthesis Report: Implementing a Regional, Indigenous-Led and Sustainability-Informed Impact Assessment in Ontario's Ring of Fire" (14 April 2020) at 14, online (pdf): *Osgoode Digital Commons* <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3808&context=scholarly_works>
[11] *Ibid*.
[12] Janelle Marie Baker & Clinton N Westman, "Extracting knowledge: Social science, environmental impact assessment, and Indigenous consultation in the oil sands of Alberta, Canada" (2018) 5:1 Extractive Industries & Society 144 at 145, cited in Scott et al, *supra* note 10 at 14.
[13] Scott et al, supra note 10 at 14.
[14] *Ibid*.
[15] Booth & Skelton "We are Fighting", *supra* note 4 at 397.

them as separate entities—heritage/archeological assessments are used for cultural resources and environmental assessment for natural resources.[16] This separation masks the connection between cultural and natural resources and "anything cumulative or 'in between' (e.g. an important berry patch used by community members) is not assessed at all."[17]

While Indigenous worldviews are enormously diverse, there are distinct characteristics that tend to set these worldviews apart from predominant Western worldviews. These include "viewing life holistically, not seeing information as discrete data points but as interconnected, and understanding knowledge as being embedded in a culture, a history and a landscape."[18] Furthermore, different philosophical or epistemological approaches to the relationships between humans, animals, and the environment mean that Indigenous peoples may interpret information about the environment in ways that are different than a Western scientific perspective. A notable example of this is from the "Tsilhqot'in Nation during the Prosperity Mine EA, where the cultural importance of an impacted fish species was completely ignored. Impacts on the fish were defined in a purely biological sense, with no regard for its meaning to people of the Tsilhqot'in Nation."[19] Dawn Hoogeveen observed that in "Tsilhqot'in culture fish and wildlife are not separated from people in the same way they are within scientific studies."[20] She described how the Prosperity Mine proponent proposed to mitigate the destruction of fish in Fish Lake by transferring the fish to another lake, but how "the rendering of fish as brood stock to be easily transferable displaces Tsilhqot'in epistemologies that read the fish in Teztan Biny as a historic and contemporary source of sustenance and certainly as more than brood stock."[21] Hoogeveen found that the EA language was simply unable to translate the meaning of the Tsilhqot'in's relationship to fish during EA hearings and thus "translation within the formal confines of the governance process" could not fully grasp the Tsilhqot'in understanding.[22]

Another example involves the W̱SÁNEĆ legal approach to a fuel spill at SELEKTEL (Goldstream River). Robert Clifford explains how W̱SÁNEĆ law is informed by "a deep relationship between W̱SÁNEĆ people, the Earth, and other elements of creation," and that "the land is vested with much more being and agency within the W̱SÁNEĆ tradition," than is typical of Western cultures.[23] Because of this, W̱SÁNEĆ decision-making is informed by a concept that the land and people "have a series of mutual responsibilities in relation to one another."[24] Making conclusions about the reasonability of a project's impacts on the environment are inevitably connected to how one views the human relationship with the environment.

Human-centered philosophies and Western science will inevitably lead to a different set of normative conclusions about the severity of impact to the environmental versus a post-human, or de-centered human approach, which are more typical of Indigenous worldviews. The examples above clearly demonstrate why Indigenous communities need to decide for themselves the type of data that is relevant, and the methods and processes to use to interpret that data when conducting assessments of impacts to the environment in their territories. Indeed, a central concern for many Indigenous communities facing resource extraction and/or development in their ancestral homelands is the extent to which their worldviews, values and laws are brought to bear on the proposed projects; Indigenous consent is inevitably tied to a community's ability to collect culturally relevant information so that it can meaningfully

[16] Chelsey Geralda Armstrong & Christie Brown, "Frontiers are Frontlines: Ethnobiological Science Against Ongoing Colonialism" (2019) 39:1 J Ethnobiology 14 at 23.
[17] *Ibid*.
[18] Booth & Skelton, "We are Fighting," *supra* note 4 at 397.
[19] Scott et al, *supra* note 10 at 14.
[20] Hoogeveen, *supra* note 4 at 356.
[21] *Ibid* at 361.
[22] *Ibid* at 363.
[23] Robert YELḴÁTŦE Clifford, "W̱SÁNEĆ Legal Theory and the Fuel Spill at SELEKTEL (Goldstream River)" (2020) 61:4 McGill LJ 755 at 784.
[24] *Ibid* at 785.

decide and assess what the impacts of the project will be from its Indigenous perspective, guided by laws, norms, spirit, and culture.[25]

Recent Reforms in Canadian EA

Given the multi-layered failure of Crown EA law to accommodate Indigenous legal-orders in terms of risk assessment and ultimately, decision-making structures, it is not surprising that the EA arena has become a central site of tension and conflict between Indigenous nations and Canadian governments. It is why Indigenous peoples were front and center in calling for reforms to *CEAA 2012*[26] when the Trudeau government came to power in late 2015. In August 2016, the government established the Expert Panel for the Review of Environmental Assessment Processes (the "Panel") to seek recommendations regarding how to rebuild trust in Canadian EA and the Panel's terms of reference prioritized the improvement of Indigenous participation and consultation in EA. The Panel considered numerous submissions from Indigenous groups across Canada and in its final report stated:

> Indigenous Peoples bear a disproportionate burden of developmental impacts. There is widespread belief that current processes fail to adequately account for Indigenous constitutional rights. Indigenous Groups across the country express a lack of trust in current EA processes, and there is a lack of confidence in past environmental assessment decisions. EA processes are viewed as being based on flawed planning, misinformation, mischaracterization of Indigenous knowledge and Aboriginal and treaty rights, and opaque decision-making. Many Indigenous Groups decide to not participate in EA processes, while others create their own parallel or independent assessment processes. Instead of advancing reconciliation, EA processes have increased the potential for conflict, increased the capacity burden on under-resourced Indigenous Groups and minimized Indigenous concerns and jurisdiction.[27]

The resounding consensus from Indigenous submissions to the Panel was that EA needs to be conducted by an independent body, using new assessment methods and models to consider impacts to Aboriginal rights and title from Indigenous perspectives and most importantly, governments need to recognize Indigenous jurisdiction and engage with Indigenous peoples at a nation-to-nation level.[28] Indigenous nations have continually expressed desire for legislation that recognizes and acknowledges their inherent decision-making power, and creates space for Indigenous-led assessment processes. Indigenous nations want to use their own methods and processes to make decisions on whether to provide or withhold consent to projects based

[25] Jason MacLean, "Indigenizing Environmental Assessment" in Aimee Craft & Jill Blakley, eds, *"In Our Backyard"—The Legacy of Hydroelectric Development in Northern Manitoba: The Keeyask Experience* (Winnipeg: University of Manitoba Press) [forthcoming].
[26] *CEAA 2012, supra* note 5.
[27] See Canada, Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa, ON: Canadian Environmental Assessment Agency, 2017).
[28] *Ibid.*

on their own environmental values and laws.[29] To this end, the Panel made recommendations to the government in relation to 5 main topics including: 1) UNDRIP[30] principles, 2) assessing impacts to Aboriginal and Treaty rights in IA, 3) capacity, 4) Indigenous knowledge, and 5) impact benefit agreements. The Panel's recommendations were as follows:

- The Panel recommends that Indigenous Peoples be included in decision-making at all stages of IA, in accordance with their own laws and customs.
- The Panel recommends that IA processes require the assessment of impacts to asserted or established Aboriginal or treaty rights and interests across all components of sustainability.
- The Panel recommends that any IA authority be designated an agent of the Crown and, through a collaborative process, thus be accountable for the duty to consult and accommodate, the conduct of consultation, and the adequacy of consultation. The fulfilment of this duty must occur under a collaborative framework developed in partnership with impacted Indigenous Groups.
- The Panel recommends that any IA authority increase its capacity to meaningfully engage with and respect Indigenous Peoples, by improving knowledge of Indigenous Peoples and their rights, history and culture.
- The Panel recommends that a funding program be developed to provide long-term, ongoing IA capacity development that is responsive to the specific needs and contexts of diverse Indigenous Groups.
- The Panel recommends that IA-specific funding programs be enhanced to provide adequate support throughout the whole IA process, in a manner that is responsive to the specific needs and contexts of diverse Indigenous Groups.
- The Panel recommends that IA legislation require that Indigenous knowledge be integrated into all phases of IA, in collaboration with, and with the permission and oversight of, Indigenous Groups.
- The Panel recommends that IA legislation confirm Indigenous ownership of Indigenous knowledge and include provisions to protect Indigenous knowledge from/against its unauthorized use, disclosure, or release.

On 8 February 2018, the federal government tabled Bill C-69 containing the proposed *Impact Assessment Act (IAA)*[31] which would replace *CEAA 2012*; it came into force in 2019. To the dismay of many, the *IAA* does not mention the UNDRIP principle of free, prior, and informed consent (FPIC). The new Planning Phase of the Act has the potential to facilitate early dialogue between the Crown and Indigenous nations which is necessary if collaboration is to occur, but the Act does not require the federal government to enter a government-to-government

[29] For a good discussion of BC Indigenous nations' perspective on decision-making in EA see BC First Nations Energy and Mining Council, "Environmental Assessment – Draft Discussion Paper on Outstanding Issues" (27 November 2017), online (pdf): <fnemc.ca/wp-content/uploads/2015/07/2017-11-27-FNEMC-EA-Discussion-Paper.pdf>. The BC First Nations Energy and Mining Council (BCFNEMC) states that lack of decision-making power is the crux of First Nations' frustration and lack of trust in EA, and that movement forward requires legislation that recognizes Indigenous nations' inherent jurisdiction, enables Indigenous nations to trigger higher level planning and assessment (to address cumulative effects to entire territory) in addition to project assessments, and provides nations with sufficient funding and time to enable Indigenous nations to carry out their own assessments. It further contends that "flexibility to accommodate the laws and needs of individual nations in relation to EA processes should be enabled through a requirement for up-front government agreements about the terms of reference of specific assessments." From the point of a government-to-government agreement, the EA may be carried out by the Indigenous nation, a jointly appointed panel, or another type of legal mechanism agreed upon by both the Crown and the Indigenous nation(s) involved. See also BC First Nations Energy and Mining Council, "Recent Experiences with Indigenous-led Assessments: A BC Perspectives" (November 2019) at 5, online (pdf): <fnemc.ca/wp-content/uploads/2015/07/Recent-Experience-With-Indigenous-Led-Assessments-A-BC-Perspective.pdf>.

[30] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UNGAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) [UNDRIP].

[31] *IAA*, *supra* note 5.

collaboration agreement prior to commencing an assessment or reaching a decision. It also does not require the Minister or Cabinet to collaborate with Indigenous Peoples before reaching a final decision on the assessment. Furthermore, the Act does not acknowledge Indigenous Peoples' inherent jurisdiction—only Indigenous nations with modern self-government agreements or IA powers under other federal statutes are recognized as "jurisdictions" for the purpose of an IA. Under s. 114 of the Act, it is possible for an Indigenous nation/group to be recognized as an Indigenous governing body to conduct an Indigenous-led IA, but regulations are required to determine the process and these are still a work in progress. Also, to carry out an IA, the Indigenous group requires the federal government to agree to treat them as a jurisdiction, and to enter into an agreement with the Indigenous group specifying the powers, duties, or functions it would have in carrying out the IA. Hence, Indigenous-led IAs conceived of under the *IAA* do not provide Indigenous nations with robust decision-making power, as they must be conducted in accordance with federal law and process rather than Indigenous Peoples' law and inherent jurisdiction. Section 22(1)(q) of the *IAA* is deserving of attention, as it requires the federal government to consider "any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project."[32] While the parameters of this section are unclear, it may provide an opening for development of a collaboration mechanism between the federal government and Indigenous nations conducting Indigenous assessments outside the *IAA*. It should also be noted that like its predecessor *CEAA 2012*, the *IAA* provides for bi-lateral substitution agreements with provincial EA authorities and thus, substitution could be beneficial to Indigenous nations if provincial legislation enables more robust Indigenous participation and decision-making power. For example, the BC *Environmental Assessment Act (EAA)* requires provincial authorities to seek to achieve consensus with participating Indigenous nations at various stages of the assessment,[33] and therefore federal assessments coordinated with BC have potential to result in greater respect for Indigenous rights and authority, though not final decision-making.[34]

UNDRIP, FPIC and the Duty to Consult & Accommodate under Settler Law

As noted above, a glaring issue with the *IAA* is its failure to embrace the UNDRIP principle of free, prior, and informed consent (FPIC).[35] The UNDRIP was adopted by the General Assembly in 2007; however, Canada's Conservative government of the day led by Stephen Harper refused to sign until 2010. The Harper government did not think that FPIC was aligned with Canadian law, particularly the duty to consult. In 2016, Justin Trudeau's Liberal government fully embraced UNDRIP without qualification when Minister Bennett addressed the Permanent Forum on Indigenous Issues at the UN stating, "We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution."[36]

FPIC is found in six articles of the UNDRIP (10,11, 19, 28, 29, and 32), and Articles 19 and 32 are particularly relevant to the EA context. Article 32 requires states to obtain from Indigenous Peoples their "free prior and informed consent prior to the approval of any project affecting their lands or territories and other resources."[37] Article 19 requires states to consult and cooperate in good faith with the affected Indigenous Peoples "through their own representative institutions in order to obtain their free, prior and informed consent before adopting

[32] *Ibid.*

[33] *Environmental Assessment Act,* SBC 2018, c 51, ss 16(1), 19(1), 19(2)(b), 27(5), 28(3), 29(3), 29(6)(b), 31(5), 32(7) – (8), 34(3), 35(2), 73(2).

[34] Anna Johnston et al, "Is Canada's Impact Assessment Act Working?" (May 2021) at 22, online (pdf): *West Coast Environmental Law* <wcel.org/sites/default/files/publications/2021-impact-assessment-act-report-en-web.pdf>.

[35] FPIC is a principle found in Articles 10, 11, 19, 28 and 29 of the UNDRIP, *supra* note 30.

[36] See Larry Chartrand, Oonagh E. Fitzgerald & Risa Schwartz, "Preface" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019).

[37] UNDRIP, *supra* note 30 at Article 32.

and implementing legislative or administrative measures that affect them."[38] When it comes to interpreting the meaning of UNDRIP principles, Cathal Doyle notes that a significant outcome of the UNDRIP is the "affirmation of indigenous peoples' right to self-determination in Article 1(1)."[39] He explains that the right of self-determination "serves to inform and condition the constellation of indigenous rights and associated State obligations" found throughout the UNDRIP.[40] If the central purpose of FPIC is to foster Indigenous self-determination, then a robust approach must be adopted to interpret its scope, and to implement it meaningfully. Thus, in the context of development projects, implementing FPIC requires enabling Indigenous nations to develop and use their own decision-making structures/institutions and their own laws to determine whether they will grant consent to a project in their territory.

Canada has enacted legislation to implement the UNDRIP with the *United Nations Declaration on the Rights of Indigenous Peoples Act (UNDRIP Act)*; it received royal assent on 21 June 2021.[41] Section 5 of the *UNDRIP Act* states that Canada will "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."[42] However, while the language of the Act is strong, it is yet to be seen how this will play out on the ground in EA contexts, particularly in light of the Supreme Court of Canada's interpretation of when Indigenous consent is required under the duty to consult and accommodate doctrine established in the *Haida Nation v British Columbia (Minister of Forests)*[43] case.

In the 2004 *Haida* decision, and its companion case *Taku River Tlinget First Nation v British Columbia (Project Assessment Director)*,[44] the Supreme Court of Canada (SCC) set out the fundamental principles of the duty to consult and accommodate stating that when the Crown contemplates an activity with real or constructive knowledge that Aboriginal rights and/or title may be adversely affected, the Crown has a duty to consult with the affected Indigenous nations and, if necessary, accommodate their interests. Drawing on its 1997 *Delgamuukw v British Columbia*[45] decision, the SCC ruled that the level of consultation required by the Crown should be determined based on a spectrum analysis—if the strength of the Aboriginal rights or title claimed is strong and the potential for adverse effects high, then a greater level of consultation and accommodation is required than if a claim is weak and/or potential adverse impacts are minimal. The duty can range from the need to provide notice at the low end, to the need to obtain consent from the Indigenous nations at the high end. The Court stipulated, however, that the duty to consult and accommodate does not "give Aboriginal groups a veto over what can be done with land pending final proof of the claim," and that the requirement for consent that was established in *Delgamuukw* "is appropriate only in cases of established rights, and then by no means in every case."[46] The Court emphasized that what is required "is a process of balancing interests,"[47] and in subsequent cases has ruled the Indigenous nations, too, are required to engage in consultation processes with the Crown.[48]

Haida and *Taku* initially appeared to have the potential to encourage more honourable

[38] UNDRIP, *supra* note 30 at Article 19.

[39] Cathal M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (London: Routledge, 2017) at 117.

[40] *Ibid.*

[41] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDRIP Act*]. Some provincial governments have enacted similar legislation. For example, in November 2019, BC enacted the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*DRIPA*]. Section 7 of the BC *DRIPA* allows the Province to negotiate and enter into agreements with Indigenous governing bodies that require Indigenous consent before a Ministerial decision is made. And, under Section 7 of BC's *Environmental Assessment Act*, *supra* note 32, a reviewable project subject to a DRIPA Agreement cannot proceed without the Indigenous nation's consent.

[42] *UNDRIP Act, supra* note 41 at 5.

[43] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 *[Haida].*

[44] *Taku River Tlinget First Nation v British Columbia (Project Assessment Director),* 2004 SCC 74.

[45] *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010.

[46] *Haida, supra* note 43 at para 48.

[47] *Ibid.*

negotiations between Indigenous nations and the Crown when development projects were proposed in Indigenous-claimed territories; however, as the consultation jurisprudence developed, the capacity of the duty to consult to bring Indigenous nations and the Crown closer together in negotiations over land-use diminished. The SCC's interpretation of the parameters of Aboriginal consultation resulted in the duty to consult becoming heavily integrated into Crown regulatory frameworks, and oriented around process rather than outcome. Indigenous Peoples' have often described consultation in EA as a box-checking exercise rather than a meaningful collaborative dialogue. Most critically, it is still uncertain how the duty to consult fits with FPIC. Even in cases where courts have adopted robust interpretations of the duty to consult, decisions fall short of embracing a fulsome understanding of FPIC.[49] Instead, courts continues to rule that so long as the Crown's process of consultation was reasonable, projects can proceed despite Indigenous contestation.[50] What is clear is that the consultation jurisprudence is not evolving in a manner that sets a solid foundation for building true partnership and shared decision-making between the Crown and Indigenous nations at a government-to-government level.

In 2014, the SCC handed down the *Tsilhqot'in Nation v British Columbia*[51] decision, where it made its first declaration of Aboriginal title and addressed Indigenous consent (while not referencing FPIC). *Tsilhqot'in* did not deviate from *Haida* (the SCC ruled that the duty to consult and accommodate does not provide Indigenous nations with a right to decide how the land is used and managed until after Aboriginal title is established), but the SCC did emphasize the advantage of obtaining consent from Indigenous nations before resource development takes place in Indigenous territories: "[g]overnments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."[52] The SCC maintained its position that consent is required only after Aboriginal title is proven, but encouraged government and industry to seek agreements with Indigenous nations beforehand. The Court also clarified what is required by the Crown to justify infringement of Aboriginal rights and title.[53]

The time and expense of proving Aboriginal title through litigation in a Canadian court is unattainable for most Indigenous nations. Furthermore, it unfairly places the burden of proving contested jurisdiction on Indigenous communities who lack the resources to be able to do so. Robert Hamilton and Joshua Nichols attribute the limitations of the duty to consult to the SCC's flawed interpretation of the meaning and purpose of section 35 of the Constitution, i.e. the Court's presumption without doubt that the Crown asserted of sovereignty over Indigenous Peoples.[54] They explain that by ruling the duty to consult is a right to a process, not an outcome, the Court can maintain its precarious position on the assertion of Crown

[48] For more discussion on the requirement of Indigenous nations to engage in consultation with the Crown see Erin Hanson, Coast Salish *Law and Jurisdiction over Natural Resources: A Case Study of Tsleil-Waututh First Nation* (MA Thesis, University of British Columbia, 2018).

[49] See, for example, *Gitxaala Nation v Canada*, 2016 FCA 187 and *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153. See also *Ktunaxa Nation v British Columba (Forest Lands and Natural Resource Operations),* 2017 SCC 54.

[50] See, for example, *Coldwater First Nation v Canada (Attorney General),* 2020 FCA 34.

[51] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [Tsilhqot'in].

[52] *Ibid* at para 97.

[53] The Court said that a justification for infringement requires the government demonstrate "both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group. This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, and the duty infuses an obligation of proportionality into the justification process: the incursion must be necessary to achieve the government's goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest (proportionality of impact)." *Ibid* at 261.

sovereignty, and find that Ministerial decision-making is reasonable, without questioning whether Minsters had the authority to make the decisions in the first place. This interpretation inhibits the reconciliatory potential of the duty to consult because it fails to recognize the unsettled, competing claims of jurisdiction, and provides the Crown with unilateral authority to determine what the process of consultation will look like. The unquestioned assumption of the Crown's ability to assert sovereignty over Indigenous lands perpetuates the colonial doctrine of discovery and limits the potential of s. 35 to achieve reconciliation between Canadian governments and Indigenous peoples.[55]

John Borrows makes a similar point about the limiting effect of the Court's interpretation of Crown sovereignty in his critique of the *Tsilhqot'in* decision. He points out that while heralded as the first SCC declaration of Aboriginal title in Canada, the decision contains a major inconsistency: *Tsilhqot'in* states that the doctrine of *terra nullius* never applied in Canada, at the same time it asserts that the Crown acquired radical, or underlying, title to all the land in the province of BC upon assertion of Crown sovereignty.[56] This inconsistency was recently referenced by the BC Supreme Court in *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc,*[57] a case where the Saik'uz Nation invoked Aboriginal rights as the basis for bringing common law tort claims against Rio Tinto for nuisance and breach of riparian rights. Justice Kent stated:

If the doctrines of discovery and *terra nullius* are indeed "legally invalid" or simply inapplicable in Canadian law, what then is the legal justification validating the assertion of Crown sovereignty over Indigenous peoples and Indigenous lands?

In the very same paragraph in which the Supreme Court of Canada in *Tsilhqot'in* denied application of the doctrine of *terra nullius* in Canada, the Court simply restated:

> At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival . . . The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.
>
> This construct has become a fundamental part of the framework animating Aboriginal law jurisprudence following 1982, when s. 35 of the *Constitution Act, 1982* formally recognized and affirmed the existing Aboriginal rights of the Indigenous peoples in Canada. But, one may rightly ask, if the land and its resources were owned by Indigenous peoples before the arrival of Europeans, how, as a matter of law, does the mere assertion of European sovereignty result in the Crown acquiring radical or underlying title? How and why does pre-existing Indigenous title somehow become subordinate?
>
> Rather remarkably, the Supreme Court of Canada has never directly answered this question even though the Court itself noted in *Delgamuukw* at para. 145, "it does not make sense to speak of a burden on the underlying title before that title existed".
>
> True, in the same paragraph, the Supreme Court suggests that Aboriginal title "crystallized" at the same time sovereignty was asserted, hence presumably permitting

[54] Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729. See also: *R v Sparrow,* [1990] 1 SCR 1075.

[55] For discussion on how to reconcile Crown and Indigenous sovereignty within Canadian law see Felix Hoehn, Reconciling Sovereignties: Aboriginal Nations in Canada (Saskatoon, SK: Native Law Centre, University of Saskatchewan, 2012). See also Joshua Ben David Nichols, *A Reconciliation without Recollection?: An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020).

[56] John Borrows, Laws Indigenous Ethics (Toronto: University of Toronto Press, 2019) 105–13; John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701. See also Gordon Christie, "Who Makes Decisions on Aboriginal Title Lands?" (2015) 48:3 UBC L Rev 743.

[57] *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc,* 2022 BCSC 15.

> the layering/burdening of radical title, but the logic of this is perplexing. Some argue, in my view correctly, that the whole construct is simply a legal fiction to justify the *de facto* seizure and control of the land and resources formerly owned by the original inhabitants of what is now Canada.[58]

Thomas and Saik'uz First Nation is particularly noteworthy because the presiding judge discussed the implications of UNDRIP when making his decision, although he did not rely on UNDRIP for the outcome:

> *UNDRIP* states in plain English that Indigenous peoples such as the plaintiff First Nations in this case have the right to own, use, and control their traditional lands and territories, including the waters and other resources within such lands and territories. It is not difficult to see how such principles might readily apply to the plaintiffs' claims in this case.
>
> Both the provincial and federal legislation was passed after the start of the trial in this case. It is therefore not surprising that the legislation does not appear in the pleadings. It did, however, feature in the parties' final submissions at the end of the trial.
>
> The plaintiffs say that the extent to which *UNDRIP* creates substantive rights is not an issue that needs to be resolved in this case. However, they also say that *UNDRIP* can and should be used as an interpretive tool in support of robust recognition and accommodation of Aboriginal rights enjoying recognition under s. 35(1) of the *Constitution Act*, 1982. They emphasize that s. 1(4) of *DRIPA* expressly states that "Nothing in this Act is to be construed as delaying the application of the Declaration to the laws of British Columbia".
>
> The defendants say that *UNDRIP* is merely an international declaration of a sort that has never been implemented as law in Canada. They point out that, on the other hand, international treaties and conventions can obtain the force of law in Canada but only when they are expressly implemented by statute. They say the recent *UNDRIP* legislation has no immediate impact on existing law and is simply "a forward-looking" statement of intent that contemplates an "action plan" yet to be prepared and implemented by either level of government.
>
> It remains to be seen whether the passage of *UNDRIP* legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title. Even if it is simply a statement of future intent, I agree it is one that supports a robust interpretation of Aboriginal rights. Nonetheless, as noted above, I am still bound by precedent to apply the principles enunciated by the Supreme Court of Canada to the facts of this particular case and I will leave it to that Court to determine what effect, if any, *UNDRIP* legislation has on the common law. [59]

It is too early to assess the impact of the federal *UNDRIP Act*, but to Justice Kent's point, if the legislation is to become more than "simply vacuous political bromide," the government will need to embrace more robust interpretations of the meaning of Indigenous consent than it has in the past. This will require abandoning the narrow conception of when Indigenous consent is required, as per the duty to consult doctrine, and rebuilding legislative frameworks to reflect consent-based models that recognize Indigenous jurisdiction over territory.

[58] *Ibid* at para 194–98.
[59] *Ibid* at paras 208–12.

Indigenous Consent and the Limits of Impact Benefit Agreements

While government EA processes have been largely structured around fulfilling the Crown's constitutional duty to consult Indigenous nations, Indigenous interactions with industry have shifted in the post-*Haida* and post-*Tsilhqot'in* era. Because failure to fulfill the duty to consult and accommodate can result in legal action that can substantially delay or derail projects, many proponents seek to build relationships with Indigenous nations to obtain their upfront consent to projects. Impact benefit agreements (IBAs) are the legal vehicle through which industry proponents obtain consent from Indigenous nations, and they often play a critical role in fulfilling the Crown's duty to consult and accommodate. IBAs are private, confidential agreements which have now become standard practice between Indigenous nations and industry in resource development contexts.[60] However, while IBAs can bring immediate economic resources to a community, and are a way of ensuring Indigenous peoples receive some benefit from projects where they tend to bear a disproportionate amount of the burden, they are an impoverished means of attaining Indigenous consent.[61] IBAs reduce consent to a monetary question when Indigenous consent is, at its core, a principle of self-determination. Indigenous consent, as contemplated by UNDRIP, is meant to build and strengthen Indigenous jurisdiction within states; it is not simply about Indigenous nations receiving some economic benefits on a case-by-case basis.

Using private contracts to express Indigenous consent raises a host of concerns. Natasha Affolder's work on the role of private agreements in transnational environmental governance offers insights.[62] She warns that invoking private law to execute public law matters can de-politicize issues and render important matters invisible that should be subject to public discussion. Dayna Nadine Scott raises similar concerns and further points out that "we cannot simply see the turn to contracts as an expression of autonomy or self-determination without investigating the background context for the negotiations, including the underlying power relations."[63] In examining this background context she notes, as does David Szablowski, that the state's "regulatory regime forms the 'skeleton' that supports and structures the engagement process, providing valuable resources and bargaining entitlements to the parties."[64] In other words, "settler law's allocation of legal rights and duties come to shape the private ordering," and Scott argues, "the most crucial of these allocations is that the Crown claims underlying title to, and jurisdiction over, all of the lands within the settler state's borders."[65] Scott concludes that IBAs are a means through which the state facilitates the dispossession of Indigenous peoples from their lands, rather than providing state recognition of Indigenous jurisdiction.[66] While IBAs can be constructed as separate or apart from EA/IA processes, because they are a central consent mechanism operating as part of the prevailing public law framework for decision-making in relation to lands and resources, they also form a crucial part of the background legal context for Indigenous-led IA.

[60] Brad Gilmour & Bruce Mellett, "The Role of Impact Benefit Agreements in the Resolution of Issues with First Nations" (2013) 51:2 Alta L Rev 385.

[61] For more discussion on the narrow vision of IBAs see Martin Papillon & Thierry Rodin, "Proponent-Indigenous agreements and the implementation of the right to free, prior and informed consent in Canada" (2017) 62 Environmental Impact Assessment Rev 216; Dayna Nadine Scott, "Extraction Contracting: The Struggle for Control of Indigenous Lands" (2020) 119:2 South Atlantic Q 270; Ciaran O'Faircheallaigh, "Shaping projects, shaping impacts: Community-controlled impact assessments and negotiated agreements" (2017) 38:5 Third World Q 1181; Courtney Fidler & Michael Hitch, "Impact Benefit Agreements: A Contentious Issue for Environmental Justice" (2007) 35:2 Environments 49.

[62] See Natasha Affolder, "The Private Life of Environmental Treaties" (2009) 103:3 Am J Intl L 510; Natasha Affolder, "Transnational Conservation Contracts" (2012) 25:2 Leiden J Int'l L 443; Natasha Affolder, "Transnational Carbon Contracting: Why Law's Invisibility Matters" in A. Claire Cutler and Thomas Dietz, eds, *The Politics of Private Transnational Governance by Contract* (London: Routledge, 2017) 215.

[63] Scott, *supra* note 61 at 280.

[64] *Ibid* at 281.

[65] *Ibid.*

[66] *Ibid.*

Conclusion

Setter EA law has yet to resolve how to implement FPIC in a satisfactory manner to Indigenous peoples that is consistent with the right of self-determination under the UNDRIP. Indigenous nations continue to argue that consent requires decision-making power with respect to if, and how, resource development can take place in their territories, while settler governments and the judiciary continue adopt a much narrower view, favouring consultative processes verses a consent model. This has led to increased judicial review of development projects and direct action by Indigenous groups across Canada in recent years. It has also led to more Indigenous nations putting forth their own models and decision-making structures to assess projects being proposed in their traditional territories. What is becoming increasingly clear is that unless Indigenous nations play a key role in defining what Indigenous consent means for their communities at a local level, frustration and uncertainty are bound to continue. Part 2 of our report contains the case studies which examine decision-making structures put forth by Indigenous communities in the context of IA.

The Stk'emlúpsemc te Secwepemc Nation Assessment of the Ajax-Abacus Copper and Gold Mine Project

Jennifer Sankey[1]

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Abstract

In 2011, KGHM Ajax Mining Inc. submitted a proposal to the BC Environmental Assessment Office and Canadian Environmental Assessment Agency to build an open-pit copper and gold mine adjacent to Jacko Lake in the interior of BC, an area located within the traditional territory of the Stk'emlúpsemc te Secwepemc Nation (SSN). Having long claimed jurisdiction over this territory, the SSN insisted that it must be given an opportunity to assess the project per SSN law, and to decide whether to provide its free, prior, and informed consent to the project. To facilitate informed decision-making, the SSN developed its own environmental assessment (EA) process and pressured the BC government to enter a government-to-government agreement to establish a procedural framework for how the Crown EA and the SSN EA would work in a parallel and collaborative fashion. This case study illustrates how the SSN built a community-based assessment process grounded in SSN law and used a government-to-government agreement to coordinate the relationship between the SSN EA and the Crown EA processes.

Introduction

Jacko Lake is located close to the City of Kamloops in the Thompson Nichola Regional District of the interior of BC. It spans 46 hectares and is one of only 12 lakes in the region that is found in the grasslands, making it a prime location for freshwater fishing.[2] Indeed, Jacko Lake is frequented by both Indigenous and non-Indigenous anglers seeking to catch the large rainbow trout that reside within its waters.[3] Under settler law, Jacko Lake and the roadway leading to the lake are Crown-owned, while the area surrounding the lake is owned in fee simple by a mining company named KGHM Mining Inc (KGHM).[4] To the Secwepemc People, Jacko Lake and the surrounding grasslands are known as Pipsell, an area of irreplaceable historical,

[1] Postdoctoral Visitor, Osgoode Hall Law School, York University.
[2] Glynn Brothen, "What exactly is Jacko Lake?", *Kamloops News* (15 October 2015), online: <https://infotel.ca/news-item/what-exactly-is-jacko-lake/it24332>.
[3] *Ibid.*
[4] British Columbia Environmental Assessment Office, "Summary Assessment Report for Ajax Mine Project", (20 November 2017) [Ajax Summary Assessment Report].

cultural, spiritual, and ecological value.[5] According to Chief Ron Ignace, Pipsell is "one of the first areas in spring that we come to get our first proteins of fish, our medicine, our plants,"[6] and Simon Fraser University anthropologist, Marianne Ignace, explains that "human artifacts dating back 7,000 years have been found at the lake."[7] Research also confirms that "Jacko Lake and the surrounding area form the location of a Secwepemc legend called The Trout Children."[8] The Secwepemc have lived on, and governed, this territory for millennia and as Chief Ignace points out: "We've never ceded or surrendered our ownership and jurisdiction of this land," and "We're wondering when the province will recognize and do the right thing by us."[9]

This case study describes the Stk'emlúpsemc te Secwepemc Nation's (SSN) assessment of the Ajax-Abacus Mine Project (Ajax Mine Project), an open-pit copper and gold mine proposed by KGHM in the area directly adjacent to Jacko Lake/Pipsell. The study begins with the history and territory of the Secwepemc People. It then describes KGHM's proposal to build the mine and examines how the SSN's frustration with the Crown environmental assessment (EA) process motivated it to create the SSN Assessment Process (SSNAP), a community-based assessment informed by SSN laws, customs, and traditions. The study discusses how the SSN negotiated the Ajax Mine Project Government to Government Framework Agreement [Ajax G2G Agreement][10] with the BC Ministry of Energy and Mines to ensure formal recognition of the SSNAP by the provincial government, and to provide a procedural framework for how the SSNAP and the Crown EA would operate in a parallel and collaborative fashion. It also describes the different phases of the SSNAP and how the SSN and the BC Environmental Assessment Office (BC EAO) co-ordinated decision-making on the Project. The central aims of this case study are: 1) to illustrate how the SSN built a community-based assessment process grounded in SSN law; and 2) to learn the context in which the SSN negotiated the Ajax G2G Agreement to co-ordinate the outcomes of the SSNAP and Crown EA process.

Research for this case study derives from publicly available regulatory documents filed with the BC EAO in relation to the Ajax Mine Project.[11] Knowledge of the SSN and SSNAP has been obtained from the multiple documents, videos, and community bulletins available on the SSN website,[12] the SSN Notice of Civil Claim an Amended Notice of Civil Claim filed in BC Supreme Court against BC, KGHM, and Canada,[13] and through a presentation by Sunny

[5] Stk'emlúpsemc te Secwepemc Nation,"Pipsell – a Secwepemc Nation Cultural Heritage Site" (2017), online (video): <https://vimeo.com/222291883> [Pipsell Video].
[6] Chad Klassen, "Secwepemc Nation shows off importance of Jacko Lake", *CFJC Today* (27 April 2016), online: <https://cfjctoday.com/2016/04/28/secwepemc-nation-shows-off-importance-of-jacko-lake/>.
[7] Cam Fortems, "The epic tale that is Jacko Lake", *KTW* (9 December 2015), online: <https://www.kamloopsthisweek.com/archive/environment/the-epic-tale-that-is-jacko-lake-4381196>.
[8] *Ibid.*
[9] Klassen, *supra* note 6.
[10] *Ajax Mine Project Government to Government Framework Agreement Between Stk'emlúpsemc te Secwepemc Nation and Her Majesty the Queen in Right of the Province of British Columbia* (6 September 2016), online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/working-with-other-agencies/eao-mous-and-agreements/eao-government-to-government-framework-for-ajax-mine.pdf> [Ajax G2G Agreement].
[11] All documents filed with the BC EAO in relation to the Ajax Mine Project are available online: https://projects.eao.gov.bc.ca/p/58851197aaecd9001b8227cc/project-details. The Ajax Mine Project was subject to both federal and provincial EAs, but BC EAO conducted the assessment pursuant to a cooperation agreement between BC and Canada and therefore the BC EAO documents provide the necessary information for this case study. Federal regulatory documents relating to the Ajax Mine Project are found at: https://iaac-aeic.gc.ca/050/evaluations/exploration?projDocs=62225.
[12] See Stk'emlúpsemc te Secwepemc Nation, "KGHM AJAX Review Process" (2017), online: *Stk'emlúpsemc te Secwepemc Nation* <https://stkemlups.ca/process/> [SSN Assessment].
[13] See *Chief Ron Ignace and Chief Shane Gottfriedson on behalf of all other members of the Stk'emlúpsemc te Secwepemc of the Secwepemc Nation v British Columbia, KGHM Ajax Mining Inc., and Canada* (21 September 2015), Kamloops, BCSC 051952 (Notice of Civil Claim) [Notice of Claim]; see also *Chief Ron Ignace and Chief Shane Gottfriedson on behalf of all other members of the Stk'emlúpsemc te Secwepemc of the Secwepemc Nation v British Columbia, KGHM Ajax Mining Inc., and Canada* (18 October 2016), Kamloops, BCSC 051952 (Amended Notice of Civil Claim) [Amended Notice of Claim].

LeBourdais, SSN Project Coordinator for the Ajax Project, at the "Contested Authorities: Operationalizing Indigenous Impact Assessment" Workshop held 5 May 2022 in Vancouver. [14] Further data has been obtained through analysis of the Mining and Minerals Agreement Between British Columbia and Stk'emlúpsemc te Secwepemc Nation [SSN - BC Mining Agreement]; [15] the Ajax G2G Agreement; [16] and the SSN submission to the federal government appointed Expert Panel Review of Environmental Assessment Processes. [17]

Stk'emlúpsemc te Secwepemc People and Territory

The Skeetchestn Nation and the Tk'emlups te Secwempenc (Kamloops) Nation are Indigenous nations within the larger Secwepemc First Nation from the interior of British Columbia near Kamloops Lake. They historically formed the Kamloops Division of the Secwepemc Nation's seven historic divisions. [18] They are Interior Salish People who were once semi-nomadic; Secwepemc ancestors spent their winters in pit house villages along both sides of Kamloops Lake and "during the spring, summer, and fall they would travel throughout their territory to gather important resources at critical times and places." [19]

In 2007, the Skeetchestn and the Tk'emlups te Secwepemc Nations officially formed the SSN governance group by signing a "Resource Sharing Protocol MOU to manage the conservation, negotiations and management of resources on Tk'emlúps te Secwepemc and Skeetchestn Indian Band's shared territory." [20] Tk'emlups te Secwepemc has 6 reserves in the Kamloops area (surrounding Kamloops Lake), and Skeetchestn has 4 reserves located along the northern bank of the Thompson River, roughly 50 kms west of Kamloops. [21] SSN has not entered the BC Treaty Process, but on 21 September 2015, it filed a claim in BC Supreme Court seeking a declaration of Aboriginal rights and title to its traditional territory (SSN Territory). [22] SSN's Territory lies within the southern region of Secwepemc Nation's broader territory which spans 180,000 square kilometers. The borders of Secwepemc Nation's traditional territory can be roughly traced from Ashcroft on the Thompson River and an area west of the Fraser River to Quesnel in the north, then east to Windermere, then along the northern part of Arrow Lakes to the Salmon River and Enderby, and then to the Logan Lake Plateau south of Kamloops and back to Ashcroft. [23]

The Secwepemc people have long resisted colonial expropriation of their land base and have continuously asserted their right to occupy and govern their territory in accordance with their laws. According to the SSN Amended Notice of Claim:

> The Secwepemc's Stsq'ey' (indigenous law) govern the boundaries of Secwepemc Traditional Territory, the Secwepemc's relationships with outsiders (or guests on their land), land access and tenure within Secwepemc Territory, and the Secwepemc's reciprocal accountability with all living things on the land. The Stsq'ey' reflect

[14] Sunny LeBourdais, "Stk'emlúpsemc te Secwepemc Nation Assessment Process" (Presentation delivered at Contested Authorities: Operationalizing Indigenous Impact Assessments Workshop, Vancouver, 5 May 2022), online (video): <https://vimeo.com/709738681/9f74aa7910> [LeBourdais Workshop Presentation].
[15] *Mining and Minerals Agreement Between Her Majesty the Queen in Right of the Province of British Columbia and Stk'emlúpsemc te Secwepemc Nation* (7 April 2009) [SSN-BC Mining Agreement].
[16] Ajax G2G Agreement, *supra* note 10.
[17] Stk'emlúpsemc te Secwepemc Nation, "SSN Lessons from the Land: Written Submission Prepared for CEAA Expert Panel" (22 December 2016) [SSN CEAA Panel Submission]. See also Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa, ON: Canadian Environmental Assessment Agency, 2017).
[18] Tk'emlúps, "Our History" (2023), online: *Tk'emlúps* <https://tkemlups.ca/profile/history/>.
[19] Tk'emlúps, "Our Land" (2023), online: *Tk'emlúps* <https://tkemlups.ca/profile/history/our-land/>.
[20] Stk'emlúpsemc te Secwepemc Nation (SSN), "History" (2023), online: <https://stkemlups.ca/history/>.
[21] Tk'emlúps, *supra* note 18.
[22] Notice of Claim, *supra* note 13.
[23] For a map of Secwepemc traditional territory see: <https://native-land.ca/maps/territories/secwepemc-secwepemculecw/>.

> Secwepemc spirituality and the Secwepemc connection to their Territory.
>
> The Stsqu'ey' comprise the experiences and deeds of Secwepemc ancestors on the land. Tellquel'mucw (transformers) vanquished and harnessed the adverse forces of nature, transforming the land and commemorating their deeds in the landscape. The resulting Stsqu'ey' are written in physical markings on the land itself and told in Secwepemc stories. [24]

Notably, in 1910, Secwepemc chiefs met with Sir Wilfred Laurier to present him with a document, known as a Memorial, which stated:

> So long as what we consider justice is withheld from us, so long will dissatisfaction and unrest exist among us, and we will continue to struggle to better ourselves. For the accomplishment of this end we and other Indian tribes of this country are now uniting and we ask the help of yourself and government in this fight for our rights. We believe it is not the desire nor policy of your government that these conditions exist. We demand that our land question be settled, and ask that treaties be made between the government and each of our tribes, in the same manner as accomplished with the Indian tribes of the other provinces of Canada, and in the neighboring parts of the United States. We desire that every matter of importance to each tribe be a subject of treaty so we may have a definite understanding with the government on all questions of moment between us and them. [25]

The Memorial to Sir Wilfred Laurier is an important document for the Secwepemc People, demonstrating the continuity of Secwepemc land claims against settler governments over time. To this day, no treaty has been signed by the Skeetchestn or the Tk'emlups te Secwepemc Nations with Canada and/or BC. These Nations, like many from the Interior of the province, have refused to participate in the BC Treaty Process because they view the mandate of the Treaty Commission as an unacceptable extinguishment policy. [26] SSN takes issue with the fact that under the BC Treaty Process, First Nations must convert "undefined" Aboriginal rights into clearly defined treaty rights and surrender all their Aboriginal rights not entrenched within the treaty to the Crown.

Over the past two decades, the Skeetchestn and the Tk'emlups te Secwepemc Nations have together and separately entered various consultation, revenue sharing, and reconciliation agreements with BC and industry. Both Nations have signed Forest and Range Consultation and Revenue Sharing Agreements with BC, which set out processes for consultation and revenue-sharing relating to forest development in their territories. [27] In 2008, SSN signed the New Afton Participation Agreement with Newgold Inc. to establish a co-operative and mutually beneficial relationship between SSN and the company in its development of the New Afton gold mine. [28] In 2009, the SSN entered the SSN-BC Mining Agreement,[29] and in 2010, SSN entered

[24] Amended Notice of Claim, *supra* note 13 at 10.
[25] Chiefs of the Shuswap, Okanagan and Couteau or Thompson Tribes, "Memorial to Sir Wilfred Laurier" (25 August 1910), online: <http://www.skeetchestn.ca/files/documents/Governance/memorialtosirwilfredlaurier1910.pdf>.
[26] The Union of BC Indian Chiefs has continually refused to endorse the BCTP for this reason.
[27] For a list of these agreements see: https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/tk-eml-ps-te-secwepemc-kamloops-indian-band and https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/skeetchestn-indian-band.
[28] In October 2021, SSN and New Gold replaced the original agreement with a new Cooperation Agreement.
[29] SSN-BC Mining Agreement, *supra* note 15.

the Economic and Community Development Agreement with BC. [30] The SSN-BC Mining Agreement set out processes and structures for BC's engagement with the First Nations in relation to consultation, shared decision-making, and revenue sharing from mining activities and other resource development in their traditional territory, while the Economic and Community Development Agreement outlines a framework for mineral tax-revenue sharing with the government. In 2016, the SSN finalized the Ajax G2G Agreement with BC, [31] which contained an EA Collaboration Plan for the BC EAO and the SSN in relation to the Ajax Mine Project. This agreement came after 5 years of disputes between the SSN and the BC EAO concerning how SSN's jurisdiction and decision-making would be recognized within the Crown EA process for the Ajax Mine Project. The remainder of this case study focuses on how the SSN developed the SSNAP and negotiated the Ajax G2G Agreement.

The Crown EA and the Ajax Mine Project

In 2011, Polish mining company KGHM Ajax Mining Inc. (KGHM) [32] submitted a project description to the BC EAO and the Canadian Environmental Assessment Agency (the "CEA Agency") proposing to build, operate, and decommission an open-pit copper and gold mine (the "Ajax Mine Project" or the "Project") 10 kilometers southwest of Kamloops in an area adjacent to Jacko Lake, or Pipsell to the SSN. [33] The Project's footprint is mostly fee simple land owned by KGHM, with a small portion being Crown land. [34] The Project would span roughly 1700 hectares and would include an open pit, ore processing plant, tailings storage facility, mine rock storage facilities, and water and water management systems. [35] The Project would process up to 65,000 tonnes of ore per day over an operating mine life of up to 23 years. [36] It would also include upgrades to an existing water intake on Kamloops Lake, a new 16 kilometre water line to transport water to the mine site, and a new 5.3 kilometre natural gas pipeline

[30] *Economic and Community Development Agreement between BC (as represented by the Minister of Energy, Mines and Petroleum Resources) and Stk'emlúpsemc te Secwepemc Nation* (24 August 2010) online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/ecda_secwepemc.pdf>.
[31] Ajax G2G Agreement, *supra* note 10.
[32] Polish company KGHM Polska Miedz S.A. entered a joint venture with Vancouver-based Abacus Mining and Exploration Corporation and formed KGHM Ajax Mining Inc. to carry out the project.
[33] Ajax Summary Assessment Report, *supra* note 4 at 2.
[34] *Ibid* at 1.
[35] *Ibid*.
[36] *Ibid* at 2.

connecting with the Fortis pipeline near the community of Knutsford. [37] BC Hydro would supply electricity to the mine through a new 9 kilometre, 230 kilovolt transmission line that would connect to an existing power line. [38]

The Project was subject to review under both federal [39] and provincial [40] EA legislation, and the governments determined that a cooperative environmental assessment would be carried out in accordance with the Canada-BC Agreement for Environmental Assessment Cooperation (2004). Together the BC EAO and the CEA Agency would conduct the EA and prepare a joint federal Comprehensive Study/Provincial Assessment Report [41] to meet the requirements of the provincial and federal Acts, and to present their findings to provincial and federal Ministers on whether the mine was likely to cause significant adverse effects, taking into account the implementation of mitigation measures and the EAO's proposed Environmental Assessment Certificate conditions. [42]

In February 2011, the BC EAO issued a Section 10 Order requiring an EA certificate for the Project and notified the SSN that an assessment would be conducted. [43] BC EAO sent further letters in April 2011, explaining how it would be conducting a strength of claim analysis to determine the appropriate level of Aboriginal consultation with the SSN such that the Crown could fulfill its constitutional duty to consult and accommodate the Nations. [44] The SSN responded by writing letters to the BC EAO, CEA Agency and the BC Minister of the Environment expressing dissatisfaction with the consultation process under the Crown EA, and pointing out that the governments should be engaging with the SSN at a government-to-government level particularly because the SSN had signed the SSN-BC Mining Agreement with BC in 2009 where the parties agreed to engage in a government-to-government manner and to establish a mutually beneficial relationship with respect to mining activities in SSN Territory. [45] In its letter to the BC Minister of the Environment, the SSN indicated that the government needed to be open to modifying the EA process to better meet the needs of First Nations:

> There is growing, widespread concern amongst many First Nations in BC about the EAO's ability to conduct fair, independent and rigorous reviews of mining projects in traditional territories. The recent Prosperity Mine review conducted by the EAO is a dramatic example of how BC's process lacked integrity and rigour, and failed in the end

[37] *Ibid*.
[38] *Ibid*.
[39] The Project was subject to federal review because of possible impact to fish and fish habitat and because the Project was listed on the Comprehensive Study List Regulations under *Canadian Environmental Assessment Act SC* 1992 c 33 [CEAA 1992]. CEAA 2012 came into force after submission of the application and thus the Joint Federal Comprehensive Study/Provincial Assessment Report was conducted pursuant to CEAA 1992.
[40] The Project constituted a reviewable project pursuant to Part 3 of the *Reviewable Projects Regulation*, BC Reg 370/02 since it was a new mining facility that, during operations, would have a production capacity of 75,000 tonnes or more of mineral ore. See In the Matter of the Environmental Assessment Act SBC 2002, c 43 and An Environmental Assessment of the Proposed Ajax Project 10(1)(c), (25 February 2011).
[41] The CEA Agency and BC EAO prepared a joint study to meet the requirements of CEAA 1992 and the *Environmental Assessment Act* SBC 2002 c 43. See Canada Environmental Assessment Agency and BC Environmental Assessment Office, Ajax Mine Project: Joint Federal Comprehensive Study/Provincial Report (August 2017), online: <https://iaac-aeic.gc.ca/050/evaluations/document/120717> [Joint Comprehensive Study].
[42] *Ibid*. at iii.
[43] Letter from Nicole Vinette, BC EAO Project Manager to Chiefs Rick Deneault and Shane Gottfriedson, SSN (25 Feb 2011).
[44] Letter from Nicole Vinette, BC EAO Project Manager to Chiefs Rick Deneault and Shane Gottfriedson, SSN (1 April 2011).
[45] Letter from Chiefs Rick Deneault and Shane Gottfriedson, SSN to BC EAO and CEA Agency (13 April 2011) and Letter from Chiefs Rick Deneault and Shane Gottfriedson, SSN to BC Minister of the Environment, Terry Lake (5 May 2011) [Terry Lake Letter].

> to deliver a credible result for the affected First Nations and the public. There are now a number of law suits in the courts against the EAO, as well as various critiques of the process from a variety of Aboriginal and academic perspectives. Both the First Nations Summit and the Union of BC Indian Chiefs have called for major legislative reform of BC's EA process.
>
> As a result of this situation, SSN does not want to enter the EA process currently conducted by the EAO. However, we are interested in participating in a process that both BC and ourselves have confidence will produce honest results. From our perspective this can only happen if we discuss with you how the EA process and the Crown consultation process should unfold. The BC Environmental Assessment Act appears to give substantial discretion to the Executive Director to design and conduct the EA process, although to date EAO executive directors have not been willing to modify the assessment process to better accommodate the procedural needs of many First Nations. We would like to talk with you about how such changes could be made that would enable us to participate in a meaningful way. [46]

The SSN requested that the BC EAO and CEA Agency honour the spirit of the SSN-BC Mining Agreement and engage with the SSN in "a government-to-government fashion through the project evaluation stage of the Ajax project." [47] In August 2011, the BC EAO responded to the SSN indicating that the SSN-BC Mining Agreement did "not apply to an application for an EA certificate under the BC Environmental Act," but rather was limited to "mining activities" as defined in the SSN-BC Mining Agreement itself. [48] Notwithstanding, the BC EAO stated that it may be possible to, "incorporate some elements and concepts from the Agreement into the consultation process with the SSN for the EA of the proposed Project." [49]

Throughout the next several years, the SSN continued to challenge the Crown EA process, arguing that the Ajax Mine Project should be subject to an independent review panel under federal EA legislation and moreover, that BC and Canada should enter a formal agreement with the SSN to move beyond the typical consultation model carried out under Crown EA legislation. The SSN wanted a formal government-to-government agreement that would acknowledge that SSN would develop and carry out its own assessment process parallel to the Crown EA process. Upon its completion, the SSN would then participate in joint decision-making with the Crown with respect to Project approval. On several occasions the SSN requested the BC EAO and CEA Agency cease their EA, arguing that the Project site was sacred to the SSN and home to hunting blind complexes, transformation sites, prayer sites, lakes and creeks, and medicinal plants. [50] The SSN also argued that the BC EAO's original strength of claim analysis was flawed as it did not appreciate the full scope of SSN's claim to the territory, and that the governments and/or the proponent must fund a SSN Cultural Heritage Study to fully understand SSN's Aboriginal rights and title to the Project area. [51]

In June 2013, the BC EAO approved KGHM's original Application Information Requirement (AIR) document, indicating that it was moving forward with the Crown EA process

[46] Terry Lake Letter, *supra* note 45.
[47] *Ibid* at 2.
[48] Letter from Nicole Vinette, BC EAO Project Manager to Chiefs Rick Deneault and Shane Gottfriedson, SSN (5 August 2011).
[49] *Ibid*.
[50] Letter from Chiefs Rick Deneault and Shane Gottfriedson, SSN to Michelle Carr, BC EAO (6 July 2012).
[51] In November 2011, the BC EAO had completed a strength of claim assessment of the Secwepemc's Aboriginal rights and title for the original Project footprint and found a strong prima facie case for Aboriginal rights, and a weak prima facie case for Aboriginal title. SSN was advised that Aboriginal consultation would be led by the BC Ministry of Forests, Lands, and Natural Resource Operations.

despite SSN's contestations. One year later, the BC EAO notified SSN that KGHM had submitted changes to the original Project site plan and the AIR would be modified. [52] Throughout 2014 and 2015, SSN corresponded with the BC EAO and the CEA Agency arguing that material changes to the site plan required KGHM to restart the Crown EA process. SSN took issue with the fact that the EAO was permitting the proponent to "tweak" its original application, rather than start again. [53] The SSN also argued that the site plan changes required the SSN to broaden its Cultural Heritage Study, for which it required more funding, and that the BC EAO must revise its strength of claim analysis to account for the changes, which the BC EAO eventually did.

In June 2015, after years of frustration with the Crown EA process, SSN wrote to the BC EAO and CEA Agency advising that it was developing its own environmental assessment process for the Ajax Project within its community; the process was called the SSN Assessment Process (SSNAP). [54] The SSN argued that in light of the Supreme Court of Canada's (SCC) 2014 *Tsilhqot'in* [55] decision, and SSN's strong claim to Aboriginal title over the Project area, the BC EAO and CEA Agency must "modernize the existing Environmental Assessment Process (including the development of an EA collaborative agreement)" and formally recognize the SSNAP.[56] *Tsilhqot'in* did not deviate from the spectrum approach to consultation and consent established in Haida [57] (i.e. the SCC maintained that the duty to consult and accommodate does not provide Indigenous nations with a "veto" before Aboriginal title is established), but the SCC did emphasize the advantage of obtaining consent from Indigenous nations before resource development takes place in Indigenous territories. [58] With this as the backdrop, on 21 September 2015, the SSN filed a Notice of Civil Claim in BC Supreme Court seeking a declaration of Aboriginal rights and title to its traditional territory, [59] and issued a press release stating that their communities had approved the SSNAP and would be moving forward with that process:

> SSN have moved beyond the strength of claim to the pre-declaration stage identified in the *Tsilhqot'in* decision for Title and Rights. SSN have given notice to the government that this project cannot be assessed using the same consultation based status quo Environmental Assessment methods and process, and assumptions. The SSN like others have been requesting an Independent Review Panel process for the assessment

[52] In November 2014, KGHM shifted and expanded the southern part of the Project footprint and changed technology and design; it filed a revised AIR with the BC EAO on 7 November 2014.
[53] Letter from Sarah Hansen, Lawyer for SSN to Scott Bailey and Kristen Worsley, BC EAO (29 August 2014).
[54] Letter from Sunny LeBourdais, KGHM Project Specialist SSN to Scott Bailey, BC EAO and Kevin Inouye, CEA Agency (29 June 2015) [LeBourdais June 29 Letter].
[55] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*]. In *Tsilhqot'in* at para 73, the SCC ruled that once Aboriginal title is proven it includes the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land. In listing the rights associated with Aboriginal title, the SCC indicated that the correct approach is a territorial approach which contemplates governance rights in relation to the territory.
[56] LeBourdais June 29 Letter, *supra* note 54.
[57] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*].
[58] In *Tsilhqot'in, supra* note 55 at para 97 the SCC stated: "[g]overnments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group." The SCC also clarified what is required by the Crown to justify infringement of Aboriginal rights and title. The Court said that a justification for infringement requires the government demonstrate "both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group. This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, and the duty infuses an obligation of proportionality into the justification process: the incursion must be necessary to achieve the government's goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest (proportionality of impact)" at para 87.
[59] Notice of Claim, *supra* note 13.

of the Ajax Mine Project. This level of review continues to be denied and has prompted the development of the SSN project assessment process. [60]

The SSN's position was that the Crown EA process "must not interfere with SSN's Title and the right to decide the use and preservation of the land and resources for future generations." [61]

Over the next year, the SSN began implementing the SSNAP while still taking part in the Crown EA. However, it continued to communicate to the BC EAO and the CEA Agency that the consultation requests under the Crown EA were onerous and the capacity funding offered to SSN was insufficient in the timelines provided, particularly given the amount of work the SSN faced navigating different government bureaucracies and implementing its own SSNAP. In addition, because SSN was still negotiating the Ajax G2G Agreement with the BC Ministry of Energy and Mines, SSN wanted the BC EAO and the CEA Agency to slow their EA process to synchronize their timelines with the completion of that agreement. [62]

On 6 September 2016, the SSN and BC signed the Ajax G2G Agreement, [63] where the parties expressed their intent to implement the SSNAP through a Collaboration Plan contained in the agreement (the "Ajax Collaboration Plan"). They also agreed to develop an Ajax Permitting Collaboration Plan, should that be necessary in the future. Through the Ajax G2G Agreement the parties aimed to develop collaborative processes "to support efficient and fully informed shared decision making on the Project as part of the provincial regulatory process and the SSN Assessment Process." [64] In the Ajax Collaboration Plan, the BC EAO and SSN committed to developing an approach that would embed the SSNAP in the Crown EA. [65] The Ajax G2G Agreement distinguishes the SSNAP from other Indigenous-led EAs that had taken place (or were taking place) in BC because the SSN formalized an agreement with the BC government that contained a procedural framework for how the SSNAP would work in conjunction with the Crown EA (as well as the permitting process through the Major Mines Permitting Office). The Ajax G2G Agreement therefore helped mitigate against uncertainty caused by the overlapping jurisdiction of the SSN and the Crown. [66]

The SSN Assessment Process (SSNAP) for the Ajax Mine Project

Initial Motivation

As noted, the SSN engaged in years of negotiations with the BC EAO and the CEA Agency and grew increasingly frustrated with the Crown EA bureaucracy, timelines, and its overall inability to meet the needs and interests of the SSN, who had claimed Aboriginal title to the Project

[60] Stk'emlupsemc te Secwepemc Nation, Press Release, "Stk'emlupsemc te Secwepemc Nation implement its own Assessment Process for the proposed Ajax Project" (10 September 2015).
[61] LeBourdais June 29 Letter, *supra* note 54.
[62] Letter from Fred Seymour, SSN to Scott Bailey, BC EAO, Peter Robb MMPO, Kevin Inouye CEAA and Tim Archer, Major Projects (17 December 2015).
[63] Ajax G2G Agreement, *supra* note 10.
[64] *Ibid* at 1 (clause E).
[65] *Ibid* at Schedule 1 Part A. The Ajax Collaboration Plan states that the parties are "seeking an approach to collaboration that will embed SSN and the SSN Project Assessment in the BC EA process."
[66] It should be noted that the Ajax G2G Agreement was between the SSN and BC only. There was no type of agreement entered by the SSN and the federal government and thus it was uncertain how the CEA Agency would recognize the SSNAP in its final decision making. It should also be noted that new legislation in BC has established a process for how Indigenous and Crown EAs may better work together, which also incorporates the requirement of Indigenous consent. BC's newest EA legislation, the *Environmental Assessment Act* SBC 2018, c 51, and its *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [DRIPA] establish procedures for BC to seek the consent of Indigenous Nations prior to authorizing development projects which would impact Indigenous rights and lands. The legislation provides BC with authority under provincial law to enter into agreements with Indigenous Nations that require Indigenous consent before a proposed project is allowed to proceed. The *Tahltan Declaration Act Consent Decision-Making Agreement for the Eskay Project* is the first of such agreements to emerge pursuant to the new legislative framework. It is uncertain at this point how open BC will be to entering these types of agreements with Indigenous Nations, and/or whether they will be reserved for Nations with strong Aboriginal title claims to the territory.

area and demanded that its jurisdiction be recognized. The SSN was motivated to develop the SSNAP because its request for for an Independent Review Panel pursuant to federal legislation had been denied, and because it wanted an EA process that would facilitate informed decision making by the SSN communities in a manner consistent with SSN laws, traditions, and customs. [67] In the SSN's view, this could not occur through the Crown EA and so it developed a parallel process where the SSN would be in control of the method of assessment, the laws that were applied, and final decision-making via its own governing body. According to LeBourdais, the Ajax G2G Agreement and the Ajax Collaboration Plan were tools the SSN would use to have its laws and processes recognized by the BC government. [68] In other words, once the SSN had completed its assessment, these agreements would enable the SSN to collaborate with the BC government in accordance with the framework set out in the Ajax Collaboration Plan to ensure that the SSN had direct input into the provincial decision-making process and to ensure that the SSN's input was adequately considered in the Crown EA process. [69]

Legal Underpinnings of the SSNAP

At the 7 May 2022 Workshop, Contested Authorities: Operationalizing Indigenous Impact Assessment, LeBourdais explained how the SSNAP was grounded in the Trout Children stspetékwll (oral telling). [70] This oral telling is deeply connected to Pipsell, the territory of the proposed mine site, and reflects the SSN's interconnectedness to the land, water, and sky worlds. [71] The SSN explains the significance of the Trout Children stspetékwll as follows:

> We as Stk'emlupsemc te Secwepemc have an irreplaceable historical, cultural and spiritual connection to Pípsell which derives from one of our stseptékwll the Trout Children stseptékwll. It is inseparably connected to the place of the proposed Ajax mine site and it encapsulates and expresses our human connection, as Stk'emlupsemc te Secwepemc, to Pípsell. It sustains our Indigenous law about our conduct on the land and our reciprocal accountability to living beings on the land, our social conduct across generations and within generations. It also gives us spiritual, cultural, and environmental teachings. [72]

> Our process was built on the very foundation of the Trout Children Story Stseptékwll. The Trout Children Stseptékwll is a key component of SSN's unique Indigenous culture. It embodies a worldview, provides guidance, and is at the heart of ceremony and spiritual connectedness that are fundamental to the continuance of SSN culture. It encompasses all aspects of the SSN world, including but not limited to: the Sky World, the Water World and Mother Earth including the minerals (green stone). The Trout Children Stseptékwll is marked on the land and takes place in the area including Pípsell (Jacko Lake) and its acquifers, the Prayer Tree, the red headed woodpecker and chickadee habitats, the Hunting Blind Complex and associated grasslands. [73]

According to LeBourdais, the Trout Children stspetékwll is an epic story that contains lessons, laws, and teachings, passed down from SSN ancestors, that illuminate the need to preserve the interconnectedness of the Secwepemc People with the Sky World, Water World,

[67] Stk'emlupsemc te Secwepemc Nation, Community Bulletin, "SSN Project Assessment Process Proposed Ajax Project" (2015).
[68] LeBourdais Workshop Presentation, *supra* note 14.
[69] Ajax G2G Agreement, *supra* note 10 at Schedule 1 (Ajax Collaboration Plan).
[70] LeBourdais Workshop Presentation, *supra* note 14.
[71] *Ibid*.
[72] Stk'emlupsemc te Secwepemc Nation, *SSN Panel Recommendations Report for the proposed KGHM Ajax Project at Pipsell* (17 February 2017) [SSN Panel Report] at 7.
[73] SSN CEAA Panel Submission, *supra* note 17 at 36.

Prayer Tree, and those who inhabit those different worlds. [74]

LeBourdais also explained how the SSN law of x7ensqt (the power of place) guided the SSNAP. X7enq't stipulates that there are consequences to the people for not respecting the land – if proper respect is not given, the "land and sky will turn on you". [75] The law of x7enq't "expresses the respect for certain places on the land that are imbued with spiritual power that derives from past events and experiences of ancestors as deeds to present generations." [76] Respect is shown by blackening one's face and making "offerings that express respect and show gratitude to the power inherent in the place." [77] Today, x7enq't translates into a deep sense of responsibility on the part of the SSN to protect and steward their land. [78] To this end, maintaining interconnectedness and acknowledging respect and responsibility for the land were key SSN legal principles that grounded and guided the SSNAP.

The SSNAP was also rooted in the "Principle of Walking on Two Legs." [79] LeBourdais explained that the SSN view successful EAs as requiring "equity between Indigenous and Western ways of knowing, describing and understanding the world," [80] which is encapsulated in the principle of "Walking on Two Legs." [81] This principle is derived from ancestral teachings and stories regarding the importance of remaining true to one's being and the inherent risks involved in imitating others. [82] LeBourdais explained:

> Secwepemc Ancestors have told us the importance of remaining true to our ways of being, and the inherent risk of imitating others in the stspetékwll (oral tellings) of Coyote (Sk'elép) and his hosts. In this telling, the Ancestors warn of the bad things which may happen when Coyote attempts to copy his hosts, first with Skiat'uzkelesti'mt (Fat-man) Stiauzka'instimt (Fish-Oil man) Skala'uztimt (Beaver man) and finally with Tsalasti'mt (Kingfisher man). In each instance, Coyote falls into peril upon trying to imitate the other and his attempt to steal these ways results in direct harm and is the reason Sk'elép to this day has shrunken and withered hands. These are the lessons from the Secwepemc Ancestors warning us of copying or imitating others' ways. [83]

Based on the law reflected in this story, the SSN assert that they cannot simply follow Crown EA processes. They envision Crown and Indigenous processes operating independently, but also respecting the knowledge that each can unearth to create the best assessment possible:

> Environmental assessment processes must be built on a principle whereby we do not attempt to imitate or emulate one another but rather respect each of our ways of being, our knowledge, our gifts and our responsibilities which have been bestowed upon us. These processes must respect each jurisdictional body within the rights and responsibilities instructed to us. Due recognition must be given to our Indigenous laws, traditions, customs and land tenure systems in order to obtain our free and informed consent and it

[74] LeBourdais Workshop Presentation, *supra* note 14.
[75] *Ibid*.
[76] SSN Panel Report, *supra* note 72 at 10.
[77] *Ibid*.
[78] LeBourdais Workshop Presentation, *supra* note 14.
[79] SSN Panel Report, *supra* note 72.
[80] British Columbia First Nations Energy Mining Council, "Recent Experiences with Indigenous-led Assessments: A BC Perspectives" (November 2019) online: <http://fnemc.ca/wp-content/uploads/2015/07/Recent-Experience-With-Indigenous-Led-Assessments-A-BC-Perspective.pdf> at 5.
[81] Sunny LeBourdais, "Porcupine or Coyote? Written Submission Prepared for the CEAA Expert Panel" (16 January 2016). For more discussion on Secwepemc laws see Marianne Ignace and Ronald Ignace, *Secwepemc People, Land and Laws* (Montreal-Kingston: McGill-Queens University Press, 2017).
[82] *Ibid*.
[83] *Ibid* at 1.

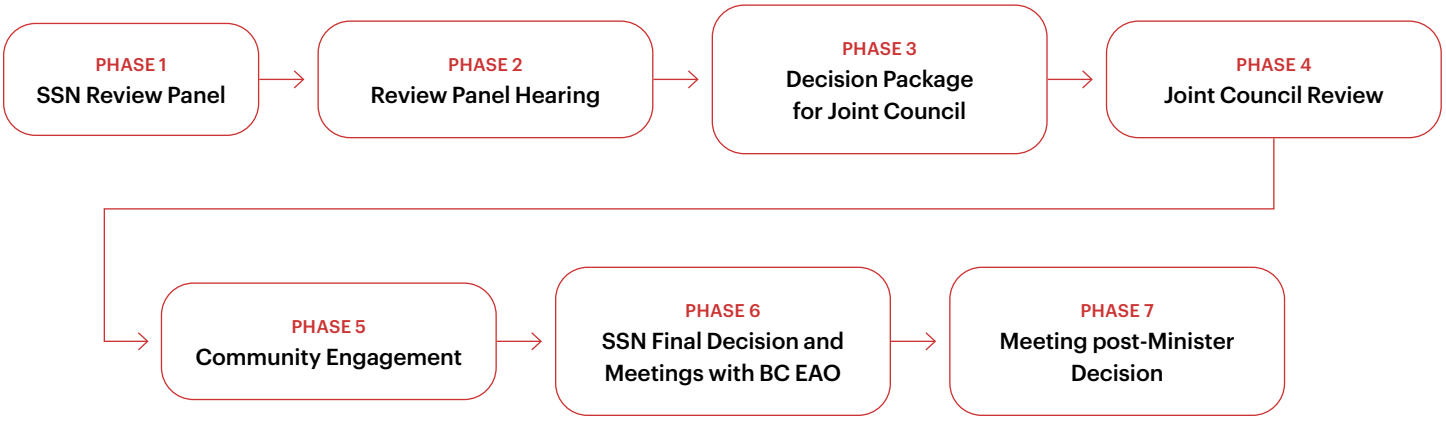
> is the integration of processes and decisions from each of these jurisdictions which must be carefully and purposefully agreed upon before embarking the Environmental Assessment Process. [84]

The principle of Walking on Two Legs "emphasizes Secwepemc knowledge and worldview while also considering 'Western' knowledge that is developed through European-derived societies." [85] To this end, the SSNAP is grounded in both Indigenous and settler law, including the Trout Children stseptékwll, the 1910 Memorial to Sir Wilfred Laurier, and Canadian and international laws such as the United Nations Declaration on the Rights of Indigenous Peoples. [86]

SSNAP Structure

The central components of the SSNAP included: assembling a SSN Review Panel, conducting a Review Panel Hearing, producing a Review Panel Report and Decision Package, SSN Joint Council decision-making, and meetings between SSN and BC EAO to harmonize their separate decisions. [87] Table 1 outlines the phases of the SSNAP as they are set out in the Ajax G2G Agreement.

SSNAP Structure Diagram



According to the Ajax Collaboration Plan, the SSN would seek to "complete the SSN Review Panel hearing proceedings 70 days before the end of the 180-day provincial application Review and provided the Decision Package to the EAO no later than day 150." [88]

[84] *Ibid*.
[85] BCFNEMC, *supra* note 80 at 6.
[86] *Ibid*.
[87] Ajax G2G Agreement, *supra* note 10.
[88] It should be noted that the 180-day timeline proved unattainable, and the BC EAO did suspend its assessment at Day 107 to enable the SSN Review Panel to complete its assessment and produce its report.

Table 1

PHASE	DESCRIPTION	TASK
Phase 1	**SSN Review Panel**	• SSN selects representatives for SSN Review Panel
Phase 2	**Review Panel Hearing**	• SSN Review Panel conducts oral proceedings to consider the Project and its impacts, using Secwepemc laws, traditions, customs, and land tenure systems • Submissions made from SSN Knowledge Keepers, SSN community members, SSN technical experts, other experts, other First Nations, KGHM, and the Crown
Phase 3	**Decision Package for Joint Council**	• Following oral proceedings, SSN Review Panel prepares a Decision Package (containing Review Panel Report) for the SSN Joint Council (Chiefs and Council from both Skeetchestn and Tk'emlups te Secwempenc Nations) • Decision Package aims to answer following question: does the SSN give their free, prior and informed consent to change the land use objective for Pipsell to allow for development of the lands and resources for the purposes of the Ajax Mine Project in accordance with the SSN's laws, traditions, customs and land tenure?
Phase 4	**Joint Council Review**	• Joint Council (i.e. Chief and Council of both Nations) considers and reviews Decision Package including any negotiated accommodation packages pursuant to the Ajax G2G Agreement • Joint Council tentatively decide whether SSN supports the Project and on what conditions
Phase 5	**Community Engagement**	• Prior to SSN Joint Council making final decision, SSN holds a community engagement meeting to discuss results of Decision Package
Phase 6	**SSN Final Decision and Meetings with BC EAO**	• Joint Council makes final decision on the significance of the impacts of the Project • Joint Council provides BC EAO and CEA Agency with Decision Package • EAO and SSN meet to discuss outcome of SSN Assessment and Decision Package and how to integrate SSN Decision Package into BC EAO with Aboriginal Consultation Report for the provincial Ministers • If SSN and BC EAO do not agree, they will implement an issue resolution process set out in Collaboration Plan • BC EAO will submit SSN Decision Package to Provincial Ministers along with its Aboriginal Consultation Report
Phase 7	**Meeting post-Minister Decision**	• BC EAO meets with SSN to discuss Ministers' decisions

SSN Review Panel, Hearing, and Recommendations

Community engagement and respect for kinship systems were central considerations for the SSN in developing the SSNAP and thus, the Review Panel was structured to include elected Chiefs and Councilors from both Skeetchestn and Tk'emlups te Secwepemc Nations, as well as appointed representatives from 13 families from the communities, and elders and youth (for a total of 46 people). [89] The Review Panel oral hearing took place in May 2016 over a 5-day period. The structure of the Review Panel Hearing is set out in Table 2 below. [90]

Table 2

DATE	TYPE OF INFORMATION
Prior to Oral Hearing	• Submission of written material to Review Panel by SSN Members, Secwepemc Nation Members, Crown, KGHM, Public
Days 1-4 Oral Hearing	• Trout Children Story told • Evidence called relating to Secwepemc, SSN governance, relationship to the site, to the lands, and to each other, to outsiders • Evidence called relating to minerals, lands, trees and other land based matters, • Evidence called relating to water and issues relating to water (fisheries) • Evidence called relating to the air, sky, and climate change • Evidence called relating to economic matters
Day 5 Oral Hearing	• KGHM and Crown present their accommodation packages to the Panel • SSN Assessment Team address Panel and comment on accommodation packages

During the hearing, the Review Panel received oral evidence from 76 witnesses, including 17 KGHM witnesses, 30 Secwepemc knowledge keepers and community members, 25 technical experts not associated with KGHM, 3 provincial representatives, and 1 federal representative. Once the hearing was over, the Review Panel representatives were responsible for deliberating and making "the best decisions for the long-term well-being of our [SSN] people and land," as well as sharing the information they learned with their respective families and communities. [91] The deliberation process took 9 months.

On 23 February 2017, the Review Panel released the SSN Panel Recommendations Report. [92] It contained the Review Panel's assessment and analysis of the Ajax Mine Project in relation to the following interconnected areas: Water Beings and Water World, Fisheries, Flora, Fauna, Sky World and Grandfather Sky, Mining and Minerals, Holistic Health, Indigenomics, and Intergenerational Teachings and Knowledge Transfer. Based on all the evidence heard and received, and upon application of SSN law, the Review Panel concluded that the Project was not acceptable:

> The conclusion of the Panel is that the Project is not acceptable as the impacts to Pipsell and our ability to use, manage and protect Pipsell in accordance with our stsq'ey' (laws) will be too severe. We cannot accept the impacts as reasonable or sustainable. The construction of the Project violates our stq'ey' and our way of life, and will result in

[89] SSN Panel Report, *supra* note 72 at 4.
[90] Stk'emlupsemc te Secwepemc Nation, Community Bulletin, "SSN Review Process Impacts and Infringement Report, Decision and Recommendations" (February 2016).
[91] SSN Panel Report, *supra* note 72 at 4.
[92] *Ibid.*

> permanent, significant, and irreparable harm to the land, water, sky, All Our Relations, and the Secwepemc people. [93]

The Panel set forth 9 recommendations for the SSN Joint Council to consider in making its final decision on whether or not to grant consent. Table 3 outlines the Panel's recommendations. [94]

Table 3

NUMBER	RECOMMENDATION
1	The Ajax Mine Project proposal advanced by KGHM will result in severe adverse impacts to the land and the use of lands and resources by the Secwepemc for our traditional and spiritual purposes, archaeological and historical sites, and cultural heritage, and those impacts cannot be mitigated. As a result no consent shall be given by the SSN to the Ajax Mine Project.
2	The SSN, *"re Stk'emlupsemc w7ec te tsyecwminst.ses re Pipsell"* the Stk'emlupsemc who are the caretakers of Pipsell on behalf of the Secwepemc, shall exercise management authority over Pipsell.
3	The SSN will take all steps, in conjunction with the federal and provincial governments, to protect Pipsell and surrounding area from any uses inconsistent with the following land use objective: Pipsell is a cultural keystone area which must be preserved in a state consistent with the traditional importance of the site to the Secwepemc people. Pipsell must only be used in ways which preserve and sustain the land, and which allow for the culture of the Secwepemc people to be exercised and maintained.
4	SSN will take all steps necessary to protect and recognize the cultural heritage status of the lands, including working with the federal and provincial governments to ensure such status is recognized.
5	SSN together with the federal and provincial governments will restore and revitalize the SSN fishery at Pipsell and Peterson Creek.
6	SSN will demand that the federal and provincial governments restore and revitalize Pipsell to its historical state prior to non-indigenous use, as an act of reconciliation.
7	SSN together with the federal and provincial governments will return full access to Pipsell and the surrounding areas for SSN and the Secwepemc people to permit the exercise of all aboriginal rights and management authority.
8	KGHM must be required to restore and reclaim all areas affected by the existing mining uses at the site, including the old tailing site.
9	KGHM must be immediately required to remove all barriers to full access to the Secwepemc people to Pipsell.

[93] SSN Panel Report, *supra* note 72 at 25.
[94] *Ibid* at 24.

SSN Decision Making

On 4 March 2017, the SSN Joint Council issued its final decision on the Ajax Mine Project:

> The SSN does not give its free, prior and informed consent to the development of the lands and resources at Pipsell for the purposes of the Ajax Mine Project. The Ajax Mine Project in its proposed location at Pipsell is fundamentally in opposition to the SSN land use objective for this sacred site.
>
> Pipsell is a cultural keystone area which must be preserved in a state consistent with the traditional importance of the site to the Secwepemc people. Pipsell must only be used in ways which preserve and sustain the area, which allow for the culture of the Secwepemc people to be exercised and maintained, and which preserve the use of Pipsell for all Canadians in accordance with Sewepemc law.
>
> The decision of the SSN Joint Council is made in accordance with Stk'emlúpsemc te Secwepemc Nation's laws, traditions, customs, and land tenure systems supported by evidence and assessments as presented in the Pipsell Report and SSN Panel Recommendations Report, and in recognition that Pipsell is a cultural keystone area with significant spiritual and historical importance to the Stk'emlúpsemc te Secwepemc Nation, which significance is fundamental and undiminished. [95]

To meet the needs of its community members, the SSN published the Joint Council Decision in both English and the SSN language, Sewepemcstin. It also provided a short, illustrated Summary Report explaining the results of the Review Panel, and produced several videos describing the Review Panel and the importance of Pipsell to the SSN. [96] The SSN notified the BC EAO of its final decision and invited Crown representatives to attend the formal announcement:

> We are seeking your support to stand beside us in solidarity when we announce our decision. It is our duty to our future generations to hold the provincial and federal governments accountable regarding any proposed development that will impact the territory that we have the sacred obligation of being stewards of. All activities and developments on SSN Territory must be consistent with Secwepemc Laws. We are occupying the Environmental Assessment field with Secwepemc Laws, governance, traditional knowledge and process. Regardless of the decision that is brought forward, this process is an exercise in self-governance. We have put KGHM Ajax and the federal and provincial governments on notice that no project will proceed except with the informed consent of SSN. [97]

The BC EAO responded to the SSN stating that it could not attend but that it would consider the information that comes forward in the SSN Decision Package. It also stated that it hoped the SSN would remain committed to fulfilling the consultation requirements necessary to complete the Crown EA process, as per the Ajax Collaboration Agreement.

[95] Stk'emlupsemc te Secwepemc Nation, *Decision of the SSN Joint Council on the Proposed KGHM Ajax* (4 March 2017) at 8.
[96] See Pipsell Video, *supra* note 5; see also Stk'emlúpsemc te Secwepemc Nation, "Honouring Our Sacred Connection to Pipsell" (2017), online (video): <https://vimeo.com/210983969?embedded=true&source=video_title&owner=59942129> and Stk'emlúpsemc te Secwepemc Nation, "Honouring the Vision of Our Ancestors" (2017), online (video): <https://vimeo.com/194534066?embedded=true&source=video_title&owner=59942129>.
[97] Letter from Fred Seymour and Ron Ignace, SSN to Tracy James, BC EAO (8 February 2017).

The Crown EA Decision

In April 2017, KGHM submitted its final Aboriginal Consultation Report to the BC EAO and in August 2017, the BC EAO and CEA Agency published the Joint Comprehensive Study [98] to be sent to the applicable provincial and federal Ministers for final decision-making. The Joint Comprehensive Study stated:

> Overall, the Agency and EAO conclude that the Ajax Mine Project is likely to cause significant adverse effects to heritage and to the current use of lands and resources for traditional purposes by aboriginal persons. The Agency and EAO also conclude that the effects of the Ajax Mine Project in combination with the effects of past and present activities is likely to cause significant cumulative effects to heritage and current use of lands and resources for traditional purposes. For other valued components examined under the former Act [federal] and BC *Environmental Assessment Ac*t, the Report concludes that the Ajax Mine Project is not likely to cause significant adverse effects. These conclusions were reached taking into account the implementation of mitigation measures and the EAO's proposed Environmental Assessment Certificate conditions that would become legally-binding in the event an Environmental Assessment Certificate is issued. [99]

On 13 December 2017, the BC Minister of Environment and Climate Change Strategy and the BC Minister of Energy, Mines and Petroleum Resources issued their final decision refusing to grant KGHM an EA Certificate. Notably, their decision stated:

> We note that the EAO and SSN signed an EA collaboration agreement to ensure, in addition to SSN's participation in the provincial EA, that SSN's community-based assessment process and the provincial EA process would be fully informed by each other. We have considered the SSN's Decision Package, which was provided in our referral materials. We note that the SSN's information and materials were also considered in the EAO's analysis and conclusions. [100]

In line with the BC EAO recommendation, the BC Ministers concluded that "Ajax would result in significant adverse effects to Indigenous heritage and to the current use of lands and resources for traditional purposes." [101] The Ministers further concluded that the proposed mitigation measures and conditions were not sufficient to minimize the adverse effects and thus they decided not to issue an EA Certificate for the Ajax Mine Project. The SSN heralded the Ministers' decision and in a statement following the announcement, SSN Chief Fred Seymour stated, "The British Columbia Government, in choosing to refuse KGHM Ajax's environmental assessment, are enacting their commitment to uphold the United Nations Declaration on Indigenous Rights." [102] In response to Chief Seymour's statement, BC Minister of Energy and Mines, George Heyman, was quick "to clarify the government's rejection of the mine did not constitute an Indigenous veto of the project." [103] He stated: "I would not say this decision paves the way for vetoes or even that, were this decision made solely on the United Nations Declaration of the Rights of Indigenous Peoples, which it wasn't, that it constituted a veto." [104]

[98] Joint Comprehensive Study, *supra* note 41.
[99] *Ibid* at v.
[100] British Columbia, "Ministers' Reasons for Decision Ajax Mine Project proposed by KGHM Ajax Mining Inc.", (13 December 2017) at 5.
[101] *Ibid* at 7.
[102] Carol Linnitt, "BC Denies Ajax Mine Permit Citing Adverse Impacts to Indigenous Peoples, Environment" *The Narwhal* (14 December 2017), online: <https://thenarwhal.ca/b-c-denies-ajax-mine-permit-citing-adverse-impacts-indigenous-peoples-environment/>.
[102] *Ibid*.
[103] *Ibid*.
[104] *Ibid*.

On 14 December 2017, the federal Minister of Environment issued a statement also finding that the Ajax mine was "likely to cause significant adverse environmental effects and cumulative effects to Indigenous heritage and the current use of lands and resources for traditional purposes by Indigenous purposes." [104] The Minister referred the Project back to the Ministries of Fisheries and Oceans and Natural Resources and on 27 June 2018 these Ministers announced that Canada had rejected the Ajax Mine Project.

Conclusion

The SSN assessment of the Ajax Mine Project provides an example of how an Indigenous nation developed an EA based on its own laws, traditions, and customs and used a government-to-government agreement as a tool to facilitate communication between its EA process and the Crown's. The case study reveals some possibilities and limitations of using G2G agreements to structure the relationship between Indigenous and Crown EA processes. While the Ajax G2G Agreement provided a means to coordinate the outcomes of the SSNAP within the Crown EA, and ensure the SSN had direct input into the provincial decision-making process, ultimately, the final decision on whether the Ajax Mine Project could proceed still rested with the provincial and federal Ministers. In this case, the provincial and federal Ministers appear to have been particularly swayed by the BC EAO and CEA Agency findings, informed by the SSNAP, that the Ajax Mine Project would have significant adverse effects on the SSN's cultural heritage and its current use of the lands and resources for traditional purposes. The SSN's ability to reveal to the Ministers the scope of adverse impacts to the SSN and its territory indicates the possibilities of using this model. That said, the model does fall short of embracing a robust understanding of free, prior, and informed consent in that the SSN did not have the final say, and had the Ministers chosen to allow the Project to proceed, the SSN would have had to resort to different methods to attempt to halt the Project.

In conclusion, it is important to note the impact this Indigenous-led assessment had at the SSN community level. At the Workshop, LeBourdais explained the historic importance of kinship systems to the Secwepemc people and how the development of the SSNAP created a space for families to connect back to the land and particularly the place known as Pipsell. [105] According to LeBourdais, the process of developing modern SSN decision-making institutions such as the Review Panel and Panel Hearing, rooted in stories such as the Trout Children stspetékwll and the SSN law of x7ensqt, had the effect of revitalizing SSN law. This fulfilled a broader aim of the SSN which is to engage in nation-building processes. Thus, when considering best practices for structuring relationships between Indigenous and Crown EAs, and the overall objective of building Indigenous jurisdiction in accordance with the United Nations Declaration on the Rights of Indigenous Peoples, it is imperative to consider how various EA models can provide communities with the time, funding, and capacity to effectively develop, apply and deliver their laws in ways that are meaningful to the communities themselves.

[105] Government of Canada, News Release, "Environmental Assessment Decision Statement Ajax Mine Project, British Columbia" (14 December 2017).
[106] LeBourdais Workshop Presentation, *supra* note 14.

The Squamish Nation Assessment of Liquefied Natural Gas Projects in Howe Sound

Jennifer Sankey[1] and Aaron Bruce[2]

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Abstract

In 2013, Woodfibre LNG Limited and FortisBC submitted proposals to the BC Environmental Assessment Office and Canadian Environmental Assessment Agency to develop a liquefied natural gas (LNG) production facility on a privately owned brownfield site on the shores of Howe Sound, and to expand a pre-existing natural gas pipeline to deliver natural gas to the site. The site had been used by Woodfibre Pulp and Paper for over a century, but before that, it was home to a Squamish Nation village known as Swiỳát. Having experienced the negative impacts of settler industrialization in Howe Sound for over a century, Squamish Nation was not satisfied that the Crown environmental assessment (EA) process could adequately assess the impacts of the LNG projects on Squamish Nation rights, title, and interests. The Nation thus decided to develop its own assessment process to determine whether it would grant or withhold consent. This case study describes how Squamish Nation designed and implemented its own assessment process separate from the Crown process, and then reflects on the impacts the Squamish Process had on the projects and the Crown EA.

Introduction

The traditional unceded territory of the Squamish Nation/Skwxú7mesh Uxwumixw[3] spans 6,732 square kilometres and encompasses parts of the cities of Vancouver, Burnaby, New

[1] Postdoctoral Visitor, Osgoode Hall Law School, York University.
[2] Barrister and Solicitor, Aaron Bruce Law.
[3] This spelling is consistent with the Squamish Nation Education Department, *Skwxwú7mesh Snichim – Xwelíten Snichim Skexwts Squamish-English Dictionary* (North Vancouver and Seattle, University of Washington Press, 2011) [*Squamish-English Language Dictionary*].

Westminster, and Port Moody, as well as North and West Vancouver. It runs north to encompass the District of Squamish and the Resort Municipality of Whistler (Squamish Territory). [4] Howe Sound, known as Átl'ka7tsem or Txwnéwu7ts in the Squamish language, [5] is located within these boundaries and holds great significance to the Squamish Nation. This deep and narrow fjord runs 42 kilometers from West Vancouver to the District of Squamish. [6] Tall granite mountains, covered in coastal temperate rainforest and topped with snowfields and glaciers, rise from this ocean strip. The diverse marine life of the Howe Sound waters and the terrestrial species that inhabit the surrounding land have sustained the Squamish Nation people for millennia. [7] Indeed, the Squamish Nation's system of governance, traditional and cultural practices, spirituality, and harvesting activities are inextricably linked to the lands, waters, and resources of this territory. [8]

It is at Howe Sound that settler society opened the Britannia Copper Mine in 1905, the Port Melon Pulp Mill in 1908, and the Woodfibre Pulp Mill in 1912. [9] A railway linking Squamish to North Vancouver was built in 1956, and a chlor-alkali chemical plant was opened on the Squamish waterfront in 1965. [10] Through this development, the Squamish Nation way of managing the land was replaced with a different vision of how human beings relate to their natural environment. [11] The extent and speed of settler industrialization left the waters of Howe Sound polluted, and the surrounding environment damaged for decades. The health of the Howe Sound ecosystem has begun to recover through government remediation and collaborative revitalization programs, [12] but the exploitation of the territory by settler society has left Squamish Nation people with a mistrust of industry and government, and a deep desire to ensure its territory is governed in accordance with its land management laws and values. To this end, in recent decades, the Nation has carved a path to strengthen its decision-making power over land and resource use in Squamish Territory. [13]

This case study describes the Squamish Nation's experience in developing an environmental assessment process for the the proposed Woodfibre LNG production facility and FortisBC natural gas pipeline expansion in Howe Sound. [14] The study begins by discussing the

[4] The boundaries of Squamish Territory are described in the Squamish Nation Statement of Intent filed with British Columbia Treaty Commission as follows: Lower Mainland region of BC from Point Grey on the south to Roberts Creek on the west; then north along the height of land to the Elaho River headwaters including all the islands in Howe Sound and the Sound drainages; then southeast to the confluence of the Soo and Green Rivers north from Whistler; then south along the height of land to the Port Moody area including the entire Mamquam River and Indian Arm drainages; then west along the height of land to Point Grey; see Squamish Nation, "Statement of Intent filed with BC Treaty Commission", (1993), online: <http://www.bctreaty.ca/squamish-nation>.

[5] In the Squamish language, Átl'ka7tsem means travelling north through the fjord and Txwnéwu7ts means travelling south through the fjord. See *Squamish-English Language Dictionary, supra* note 3.

[6] Feet Banks, "The Life and Hard Times of Howe Sound", *Mountain Life* (9 May 2016), online: <https://www.mountainlifemedia.ca/2016/05/life-hard-times-howe-sound>. See also WG Smitheringale, "Great Mining Camps of Canada 5. Britannia Mines, British Columbia," (2011) 38:3 Geoscience Canada 97, online: <https://journals.lib.unb.ca/index.php/gc/article/view/18783/20600>.

[7] Squamish Nation, "Written Evidence of the Squamish Nation," Westridge Delivery Line Relocation Hearing Order MH-048-2018 File No. OF-FAC-Oil-T260-2017-10 01 (July 27, 2018), online: <https://apps.cer-rec.gc.ca/REGDOCS/File/Download/3593638>.

[8] *Ibid.*

[9] Banks, *supra* note 6.

[10] *Ibid.*

[11] For discussion on human relationships and reconciliation with the earth see John Borrows, "Earth-Bound: Indigenous Resurgence and Environmental Reconciliation" in Michael Asch, John Borrows and James Tully eds. *Resurgence and Reconciliation Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 49.

[12] Ocean Wise Research Institution, "Ocean Watch: Átl'ka7tsem/Txwnéwu7ts/Howe Sound Edition" (2018), online: <https://oceanwatch.ca/howesound>.

[13] Squamish Nation has sought to acquire leverage to strengthen its decision-making power over its traditional territory through various agreements with government and proponents rather than actively participating in the BC Treaty Process.

[14] Squamish Nation refers to its environmental/impact assessment process as the Squamish Process.

significance of Howe Sound to the Squamish Nation people, outlining some of the significant cumulative impacts settler development has had on the region, and explaining what actions Squamish Nation has taken to protect its territory in past decades. The project proposals are described followed by a discussion of how the Squamish Nation designed and implemented its own assessment to determine whether it would grant or withhold consent to the projects.

The central aims of this case study are twofold: 1) to describe how Squamish Nation built its assessment process; and 2) to reflect on the impact the Squamish Process had on the projects and the Crown EA. The Squamish Process involved Squamish Nation completing an assessment at the community level, separate from, but roughly parallel to, the Crown EA process. Through its assessment, the Nation delineated a set of conditions to be placed on the proponents in carrying out the projects (the Squamish Conditions). It then used private contracts to legally bind each proponent to perform the Squamish Conditions in exchange for Squamish Nation's consent. By explaining the nuances of this model and the tensions that arose as the Nation sought to carve out a process separate from the Crown processes, this case study aims to provide insights into how Canadian environmental/impact assessment legislation might better work in conjunction with Indigenous legal orders.

Research for this case study derives from regulatory documents filed with the BC Environmental Assessment Office (BC EAO) in relation to both the Woodfibre LNG Project and the FortisBC Eagle Mountain Pipeline Project.[15] It has also been informed by interviews of the Squamish Nation team that designed and implemented the Squamish Process. These interviews were conducted in 2019 by Jennifer Sankey in completing her PhD dissertation. [16] Further information on Squamish Nation environmental governance and the Squamish Process was obtained through analysis of Squamish Nation documents and publications including: Xay Temíxw;[17] the Squamish First Nation and BC Land Use Planning Agreement; [18] the Squamish Nation Environmental Assessment Agreement between Squamish Nation and Woodfibre LNG Limited; [19] and the Squamish Nation Environmental Assessment Agreement between Squamish Nation and FortisBC Energy Inc;[20] Squamish Nation's submission to the federal government appointed Expert Panel Review of Environmental Assessment Processes, [21] legal commentary written by lawyers Aaron Bruce and Emma Hume on the Squamish Process, [22] multiple bulletins and press releases issued by Squamish Nation regarding the Squamish Process, and through a presentation by Squamish Nation member and lawyer, Aaron Bruce, at the "Contested Authorities: Operationalizing Indigenous Impact Assessment" Workshop held 5 May 2022 in Vancouver. [23]

[15] All of the documents for both projects are filed with the EAO and are available online: <https://projects.eao.gov.bc.ca/>.
[16] Jennifer Sankey, *Using Indigenous Legal Processes to Strengthen Indigenous Jurisdiction: Squamish Nation Land Use Planning and the Squamish Nation Assessment of the Woodfibre Liquefied Natural Gas Projects,* (PhD Dissertation, University of British Columbia, 2021) [Sankey Dissertation].
[17] Squamish Nation (Land and Resources Committee), Xay Temíxw Land Use Plan for the Forests and Wilderness of the Squamish Nation Traditional Territory, First Draft, (May 2001) [Xay Temíxw].
[18] *Agreement on Land Use Planning Between The Squamish First Nation And The Province of British Columbia* as represented by the Minister of Agriculture and Lands, 14 June 2007, online (pdf): <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/government-land/land-use-plans-and-objectives/southcoast-region/seatosky-lrmp/agreements/seatosky_lrmp_squamish_agreement_26jul2007.pdf> [SFN-BC LUP Agreement].
[19] Squamish Nation Environmental Assessment Agreement Between Squamish Nation and Woodfibre LNG Limited, (14 October 2015) [unpublished on file with authors] [SN-EA Agreement].
[20] Squamish Nation Environmental Assessment Agreement Between Squamish Nation and FortisBC Energy Inc. (22 June 2016) [unpublished on file with authors] [SN-EA Agreement].
[21] Squamish Nation, "Written Submission to CEAA Review Expert Panel," (23 December 2016) [SN-CEAA Review Panel Submission].
[22] Aaron Bruce and Emma Hume, "The Squamish Nation Assessment Process: Getting to Consent" (November 2015) [unpublished].
[23] Aaron Bruce, "The Squamish Process" (Presentation delivered at Contested Authorities: Operationalizing Indigenous Impact Assessments Workshop, Vancouver, 5 May 2022), online (video): <https://vimeo.com/709738681/9f74aa7910>.

Squamish Nation People and Territory

No treaty has ever been signed between Squamish Nation and Canadian governments, and the Squamish have always maintained their inherent right to govern Squamish Territory. [24] Despite this jurisdictional uncertainty, settler authorities such as the province and municipalities have permitted and approved a vast amount of urban and industrial development of Squamish Territory without Squamish Nation's consent. The cumulative impacts of settler development in and around Howe Sound are extensive. In 1888, copper was discovered near Britannia Creek which quickly led to copper extraction at the Britannia Mines beginning in 1905. [25] Copper mining caused significant pollution to the area, as mining drainage was not properly managed during mine operations, resulting in widespread contamination of Britannia Creek and Howe Sound waters. [26] At the same time the copper mines were being developed, two pulp mills were established in the same vicinity – Howe Sound Pulp and Paper (HSPP) at Port Mellon was established in 1908 (and still operates today), and the Woodfibre Pulp and Paper mill was established on the shores of Howe Sound near Mill Creek in 1912. Woodfibre operated as a pulp mill from 1912 to 2006 and is currently owned by Woodfibre LNG Limited. A chlor-alkali chemical plant was also built near the Squamish River estuary in 1965 by FMC Canada. [27] It operated from 1965 to 1991, producing "caustic soda, hydrochloric acid, and chlorine" materials used in pulp and paper production. [28]

Pollution of Howe Sound alienated the Squamish Nation from its territory. Over the decades, the effluent from the pulp mills significantly impacted the Howe Sound waters, including "oxygen depletion, smothering of local seafloors with fine fibre beads, reduced light penetration leading to lower phytoplankton production, and impacts from a variety of chemical contaminants, including dioxins and furans." [29] The chlor-alkali plant used mercury-cell technology which resulted in "losses of mercury to the environment via plant exhaust and effluent." [30] Contamination from these industrial operations "resulted in closure of fisheries in most of Howe Sound in the 1980s." [31] Squamish Nation's ability to harvest the marine resources that sustained its people for millennia was interrupted by developments that profited settler society without any meaningful consultation, consent, or economic benefit flowing to Squamish Nation. The Howe Sound ecosystem has now begun to recover through remediation and collaborative revitalization programs established by segments of settler society and the Squamish Nation. [32] However, the experience has left Squamish Nation people with a mistrust of government and industry, and a deep desire for the Nation to have more robust decision-making power over any future development in Howe Sound.

[24] "See Squamish Nation, "About Our Nation" (2023), online: Skwxú7mesh Uxwumixw Squamish Nation <https://www.squamish.net/about-our-nation/>.
[25] WG Smitheringale, "Great Mining Camps of Canada 5. Britannia Mines, British Columbia," (2011) 38:3 Geoscience Canada 97, online: <https://journals.lib.unb.ca/index.php/gc/article/view/18783/20600> at para 37.
[26] In the early 2000s, a complex remediation plan for the Britannia Mines site was developed through a settlement agreement between the province and the potentially responsible parties. The plan involved plugging a tunnel that discharged acid rock drainage into Britannia Creek, and the development of a water treatment facility.
[27] British Columbia Ministry of the Environment, "Nexen: Former Chlor-Alkali Plant, Squamish, BC" (2009).
[28] *Ibid*.
[29] Juan Jose Alava, "Dioxin and furan contamination from pulp mills: A successful history of source control and regulations" (2016), online (pdf): *Ocean Watch* <https://oceanwatch.ca/howesound/wp-content/uploads/sites/2/2016/12/OceanWatch-HoweSoundReport-PulpMill-1.pdf> at 156.
[30] *Ibid*. In 1989, the plant was sold by FMC Canada to Nexen, which assumed environmental liability for the site and in 1991, the BC Ministry of the Environment shut the plant down due to mercury contamination. An extensive remediation was ordered by the province, which was completed in 2004. BC then transferred the site to the District of Squamish.
[31] Alava, *supra* note 29 at 156.
[32] *Ibid*.

Squamish Nation's formal actions to protect its lands, waters, and resources from settler development have intensified in the past few decades. In the early 2000s, when much industrial logging was taking place in the northern part of Squamish Territory, the Squamish Nation community came together to develop the Xay Temíxw Land Use Plan for the Forests and Wilderness of the Squamish Nation Traditional Territory (Xay Temíxw).[33] The Nation strongly felt that it needed to take a stand against the expropriation of forest lands in Squamish Territory by third parties, and a land use plan was a means of doing this. In a film documentary on the development of Xay Temíxw, Squamish Nation Hereditary Chief Bill Williams stated:

> If we, as Squamish people, don't stand up right now and define what our interest is in our territory, all of the other competing interests will feel that they have primary jurisdiction over our land which is unceded, which is still part of the treaty process.[34]

For the Squamish, developing Xay Temíxw was a way to build community consensus around the Nation's environmental priorities and to create a clear plan on how the land and forests in its territory should be managed.[35] In other words, with Xay Temíxw, the Squamish Nation felt it could assert its jurisdiction by defining for government and third parties how the land and forests of Squamish Territory should be managed based on the community's values and laws.

Squamish Nation developed Xay Temixw at the community level, and it later became the basis from which the Nation negotiated an agreement with the BC government, the 2007 Agreement on Land Use Planning Between the Squamish First Nation and the Province of British Columbia (the "SFN-BC LUP Agreement").[36] BC's recognition of Squamish Nation's land use objectives and laws in the SFN-BC LUP Agreement (and subsequent statutory protections) has helped Squamish Nation gain leverage and have greater influence over proposed developments in Squamish Territory. This is because proposed projects often intersect with Squamish Nation cultural sites set out in Xay Temíxw and recognized in the SFN-BC LUP Agreement. Thus, third parties are often more compelled to accommodate Squamish Nation perspectives and interests in their project plans. This sets context for the way the LNG projects that are the focus of this case study came to be received by the Squamish Nation in 2013.

Liquefied Natural Gas Projects Proposed in Howe Sound

Woodfibre LNG Project

In 2013, Christy Clark's Liberal government won the provincial election on the campaign promise that by developing an LNG industry, the BC government could create enough revenue to wipe out its debt.[37] Global demand for LNG exports was strong, and Clark argued it was the right time to build an LNG industry. In her view, not only would LNG produce 100,000

[33] Xay Temíxw, *supra* note 17.
[34] *Xay Temíxw Sacred Land:* 2002, DVD: (North Vancouver: Squamish First Nation, 2002), online (video): <https://www.youtube.com/watch?v=EXTZRSajc1Q>.
[35] According to Jessica Clogg of West Coast Environmental Law, land use plans are not only a powerful way for Indigenous nations to exercise Aboriginal title, but they also enable Indigenous nations to translate laws and wisdom of Elders into "maps and written rules that communicate its choices about land and water use to the Government and third parties". See Jessica Clogg, "Land Use Planning: Law Reform" West Coast Environmental Law / Law Reform Papers, September 2007 at 1.
[36] SFN-BC LUP Agreement, *supra* note 18.
[37] Richard Zussman, "BC Premier Christy Clark still trying to deliver on LNG Promise", *CBC* (6 February 2016), online: <https://www.cbc.ca/news/canada/british-columbia/christy-clark-lng-promise-1.3436887>.

local jobs and generate a $100-billion prosperity fund, but LNG exports could also lead China to decrease its reliance on coal production. In Clark's words, "There are 150 coal plants on the books to be built in China. They're not going to stop building those coal plants if they don't have an alternative to provide the energy." [38]

With heightened political will to expand LNG production in BC, Woodfibre LNG Limited (Woodfibre LNG), an entity wholly owned by Pacific Oil & Gas Limited (an energy company within the Royal Golden Eagle group of companies located in Singapore), [39] submitted a project description to the BC EAO and the Canadian Environmental Assessment Agency (CEA Agency), proposing to construct and operate an LNG production, storage, and marine carrier transfer facility (the "Woodfibre LNG Project" or the "Project") on the previous Woodfibre Pulp and Paper Mill site, formerly the site of the Squamish Nation village called Swiy̓át. [40] The location would be approximately 7 kms from the District of Squamish and was selected because it was a privately-owned, industrially zoned, brownfield site that included a deep-water harbor. [41] Woodfibre LNG's proposal involved the construction, operation, and eventual decommissioning of an LNG facility, as well as LNG transport (via shipping) within Howe Sound. [42] The facility would operate for a minimum of 25 years, and produce 2.4 million tons of LNG per year. [43] It would receive approximately 40 LNG carrier ships per year, with the ships using existing marine shipping lanes within Howe Sound where there is currently a high volume of large marine vessel traffic. [44] The proposal foresaw that natural gas would be supplied to the Woodfibre LNG facility from Western market hubs through the expansion of an existing pipeline by FortisBC, [45] and that BC Hydro would provide the electrical power through an existing BC Hydro transmission grid. [46]

The Woodfibre LNG Project was subject to environmental assessments under both BC's former *Environmental Assessment Act* [47] (BC EAA) and the former *Canadian Environmental Assessment Act* 2012, (CEAA 2012), [48] and in March 2013, the BC EAO and the CEA Agency entered a memorandum of understanding agreeing to a substituted process. This meant the BC EAO would conduct just one EA for both the provincial and the federal governments. [49]

[38] Andrew MacLeod, "Christy Clark Fields Tough Questions on LNG Promises", *The Tyee* (14 December 2015), online: <https://thetyee.ca/News/2015/12/14/Christy-Clark-LNG-Promises/>.

[39] British Columbia Environmental Assessment Office, "Woodfibre LNG Project: Summary Assessment Report", (19 August 2015) [Woodfibre Summary Assessment Report].

[40] Squamish Nation, "Squamish Nation/Woodfibre LNG /Proposal", *Squamish Nation Update Issue* 1 (2014).

[41] Woodfibre Summary Assessment Report, *supra* note 39 at 1. The LNG facility would include the following infrastructure:

1) Two LNG processing or production units (trains), where natural gas is converted to liquid comprised of gas treatment and liquefaction facilities;
2) Floating storage and offloading unit (FSO), including mooring and marine terminal for carriers, consisting of two converted LNG carriers with a total capacity of 250,000 cubic meters;
3) A condensate storage tank with a volume of approximately 300 cubic meters;
4) A seawater cooling system;
5) Wastewater treatment facilities; and
6) Flare systems with a flare derrick of approximately 140m.

[42] *Ibid* at 2.

[43] *Ibid*.

[44] *Ibid*.

[45] Woodfibre LNG, "Woodfibre LNG Updated Project Description," (5 June 2014) [Woodfibre LNG Updated Project Description Report] at 1 [Woodfibre Updated Project Description].

[46] *Ibid*.

[47] *Environmental Assessment Act*, SBC 2002, c 43 [repealed by *Environmental Assessment Act*, SBC 2018, c 51 s 81].

[48] *Canadian Environmental Assessment Act*, SC 2012, c 19 s 52 [repealed by *Impact Assessment Act*, SC 2019, c 28, s 1].

[49] Woodfibre Updated Project Description, *supra* note 45 at 5.

One year later, the BC EAO issued a Section 11 Order for the Project, [50] setting out the scope, procedures, methods for the EA, as well as setting the guidelines for how the BC EAO would meet the governments' constitutional duty to consult the Indigenous nations impacted by the Project. [51] Under the Crown process, consultation occurs with the regulator determining which Indigenous nations have the strongest claim to the territory and are most likely to be impacted by a project. These nations are invited to participate in an advisory working group for the project (the "Working Group"), which is also comprised of provincial (and federal in substituted EAs) and local government representatives. According to the Section 11 Order in this case, Woodfibre LNG was supposed to consult Squamish Nation on all Project components, Tsleil-Waututh Nation was to be consulted on all off-site components, and eight other Indigenous nations were to receive notification of aspects of the Project, and comment on various stages of the process. [52] Squamish Nation and Tsleil-Waututh Nation were invited to participate in the Working Group for the Woodfibre LNG Project, but as will be discussed, Squamish Nation refused to participate other than by sending an environmental consultant to obtain technical information because, in its view, the Crown process was not structured to adequately account for Squamish Nation's jurisdiction. [53]

Eagle Mountain Pipeline Project

In conjunction with Woodfibre LNG's project proposal, in 2013, FortisBC submitted a project description to BC EAO to build the Eagle Mountain Pipeline Project (the "Pipeline Project" or the "Project"), which would bring the natural gas to the Woodfibre facility. [54] The Pipeline Project involved a proposal to construct and operate a natural gas pipeline parallel to an existing transmission pipeline from the area north of the Coquitlam Watershed in Metro Vancouver to the Woodfibre LNG facility. The Pipeline Project aimed to utilize an existing pipeline that cuts

[50] In the Matter of the Environmental Assessment Act SBC 2002, c 43 and An Environmental Assessment of the Proposed Woodfibre LNG Project, Order Under Section 11, Schedule B-D, (21 March 2014) [Woodfibre LNG Section 11 Order].

[51] In *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*] and its companion case, *Taku River Tlinget First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 [*Taku*], the Supreme Court of Canada ruled that that there is a constitutional obligation on the Crown to consult with Indigenous nations when their Aboriginal or treaty rights could be adversely affected by Crown-authorized activities. It ruled that when the Crown contemplates an activity with real or constructive knowledge that Aboriginal rights and/or title may be adversely affected, the Crown has a duty to consult with the affected Indigenous nations and, if necessary, accommodate their interests. Drawing on *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*], it ruled that the level of consultation required by the Crown should be determined based on a spectrum analysis – if the strength of the Aboriginal rights or title claimed is strong and the potential for adverse effects high, then a greater level of consultation and accommodation is required than if a claim is weak and/or potential adverse impacts are minimal. The duty can range from the need to provide notice at the low end, to the need to obtain consent from the Indigenous nations at the high end. The Court stipulated, however, that the duty to consult and accommodate does not "give Aboriginal groups a veto over what can be done with land pending final proof of the claim," and that the requirement for consent that was established in *Delgamuukw* "is appropriate only in cases of established rights, and then by no means in every case," at para 48.

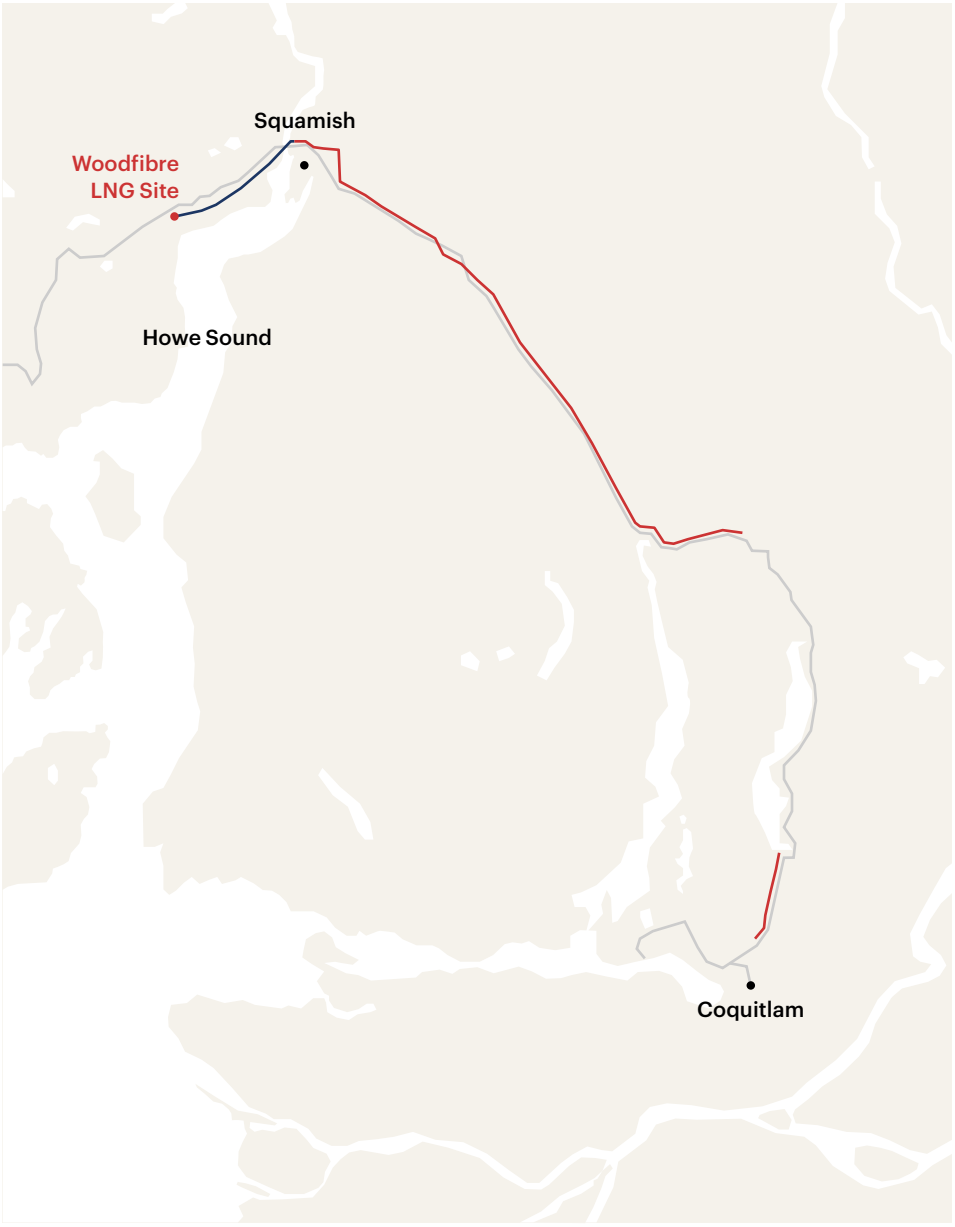
[52] The following First Nations are listed in Schedule D of the Woodfibre LNG Section 11 Order: Musqueam First Nation, Cowichan Tribes First Nation, Halalt First Nation, Lake Cowichan First Nation, Lyackson First Nation, Penelakut Tribe, Stzuminus First Nation, Metis Nation of British Columbia.

[53] The focus of this case study is Squamish Nation's experience. However, it should be noted that Tsleil-Waututh did participate in the Working Group. It concluded in the end that the EAO and Woodfibre did not properly assess the Project's potential to cause adverse impacts to the Tsleil-Waututh title, rights and interests and that BC did not discharge its duty to consult through the Crown process. It was not opposed to the Woodfibre LNG Project but felt that certain conditions must be met to address Tsleil-Waututh concerns, and further consultation was needed to discharge the government's duty to consult. For more information see 18 August 2015 letter from Tsleil-Waututh Nation to Minister of the Environment and BC Minister of Natural Gas Development available on BC EAO EPIC website online: <https://projects.eao.gov.bc.ca>.

[54] British Columbia Environmental Assessment Office, "Eagle Mountain – Woodfibre Gas Pipeline Project Assessment Report," (22 July 2016) [FortisBC Assessment Report] at 1.

Woodfibre LNG Project Map

- Gas pipeline expansion
- Tunnel for gas pipeline
- Existing gas pipeline



through various Indigenous nations' territories before arriving at Woodfibre in Howe Sound. The proposed pipeline would "generally parallel (i.e. loop) the existing FortisBC pipeline that is part of the natural gas transmission system that services Squamish, the Resort Municipality of Whistler, the Sunshine Coast and Vancouver Island." [55] It would increase the overall natural gas transmission capacity of the FortisBC pipeline so that it could provide natural gas to the new Woodfibre LNG facility and continue to provide natural gas to existing and future customers. [56] The BC EAO issued a Section 11 Order for the Pipeline Project in November 2013, setting out the scope, procedures, and methods for the EA, as well as the process and level of consultation for the potentially affected Indigenous nations. [57] In this case, the BC EAO Working Group was comprised of provincial and local government representatives, along with the Tsleil Waututh Nation, Squamish Nation, and Kwikwetlem Nation, who were to be consulted on the high end of the consultation spectrum. [58] Again, Squamish Nation refused to participate in this EA process, other than by sending an environmental consultant to obtain technical information because, in its view, the Crown process was not structured to account for Squamish Nation's jurisdiction. Rather than participate in the Crown's deficient EA process, Squamish Nation decided to build its own Squamish Process, and based on that process decide whether to grant or withhold consent to the projects. Figure 1 below illustrates the timing of the three assessment processes.

Figure 1

DATE	SQUAMISH PROCESS FOR WOODFIBRE FACILITY AND PIPELINE	CROWN EA PROCESS FOR EAGLE MOUNTAIN PIPELINE	CROWN EA PROCESS FOR WOODFIBRE LNG FACILITY
July 2013		FortisBC submits project description for pipeline to BC EAO	
Aug 2013		EAO issues Section 10 Order indicating Project requires EA Certificate	

[55] *Ibid.*

[56] The Pipeline Project would include the following infrastructure:

1) Construction and operation of an approximately 47 km long, 24-inch diameter sweet natural gas pipeline from an area north of the Coquitlam Watershed in Metro Vancouver to the Woodfibre LNG facility;
2) Construction and operation of 10-inch lateral pipelines from the existing right of way to the Mt. Mulligan compressor station;
3) Abandonment and relocation of a short section of the existing 10-inch pipeline located near the Stawamus River;
4) Installation of electric-drive compression adjacent to the existing compressor station located at Eagle Mountain in Coquitlam, and of a new gas turbine-powered compressor station outside the District of Squamish, near Mt. Mulligan;
5) Development of supporting infrastructure, such as mainline block valves, a supervisory control and data acquisition system, in-line inspection facilities, cathodic protection measures, new electrical substations and transmission lines, new access roads and workspace, and a temporary worker construction camp that may be built west of the Squamish River; and Use of two existing barge landing sites, one at Indian Arm to access portions of the proposed route in the Indian River Valley and the other at Woodfibre near the terminus of the proposed pipeline.

[57] In the Matter of The Environmental Assessment Act S.B.C. 2002, c.43 and An Environmental Assessment of the Proposed Eagle Mountain Woodfibre Gas Pipeline, Order Under Section 11, (5 November 2013) [FortisBC Section 11 Order].

[58] *Ibid.* The Musqueam Nation was entitled to be notified and consulted on the low end of the spectrum.

DATE	SQUAMISH PROCESS FOR WOODFIBRE FACILITY AND PIPELINE	CROWN EA PROCESS FOR EAGLE MOUNTAIN PIPELINE	CROWN EA PROCESS FOR WOODFIBRE LNG FACILITY
Sept 2013		Valued Components Selected	
Nov 2013		EAO issues Section 11 Order establishing scope, procedures, methods, and Indigenous consultation requirements	EAO issues Section 10 Order indicating Project requires EA Certificate
Dec 2013			Woodfibre submits project description for pipeline to BC EAO and CEA Agency
Feb 2014			Federal Minister agrees to substituted assessment process to be carried out by BC EAO
March 2014			EAO issues Section 11 Order establishing scope, procedures, methods, and Indigenous consultation requirements
July 2014	Squamish Nation (SN) begins its independent assessment of the Woodfibre Project (includes both facility and pipeline projects). SN does not participate in Crown process but does send consultant to Working Group meetings to obtain technical data for its process		

The Squamish Process

Squamish Nation has typically felt that Crown EAs do not adequately account for Indigenous jurisdiction and that the Crown treats Indigenous Nations as stakeholders rather than jurisdictional partners.[59] Furthermore, from its perspective, Crown EAs have failed to enshrine the UNDRIP[60] principle of Indigenous free, prior and informed consent, which, in its view, includes a right to obtain the type of information Squamish Nation deems necessary to make decisions about resource activity in its territory; the ability to decide where development can take place based on Squamish Nation perspectives of impacts to its Aboriginal rights and title; and if consent is given, a right to govern the implementation of resource projects such that Squamish Nation can ensure proponents are meeting the conditions placed upon them.[61] Squamish Nation's position is that the Nation holds an inherent right to govern its lands, waters, and resources and that Indigenous consent requires establishing mutually agreed

[59] Bruce and Hume, *supra* note 22.
[60] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008). The Indigenous right to free, prior, and informed consent (FPIC) is found in six articles of the UNDRIP (10,11, 19, 28, 29, and 32).
[61] Bruce and Hume, *supra* note 22.

upon decision-making mechanisms between Squamish Nation and provincial and/or federal governments. [62] This position was reflected in the submission Squamish Nation made to the CEAA Review Expert Panel [63] concerning reform of CEAA:

> [W]hat is clear is that First Nations have a right, an inherent and constitutional right, to make a decision on a project. So we think what we are really talking about, when we look at consent in the context of reconciliation, is building a true government to government relationship where First Nations and other levels of government collaboratively develop governance structures and processes to make consensus based decisions on natural resource projects. This consensus-based decision-making must be built into the legislation. But before you can build such structures and processes you need to find out from First Nations what consent means to them. The federal government cannot make that determination unilaterally. [64]

For the Woodfibre LNG and Pipeline Projects (hereinafter cumulatively referred to as the Woodfibre LNG Project or the Projects), Squamish Nation decided it would take a stand against the unilateral imposition of the Crown EA and instead develop its own assessment process. This commenced in July 2014.

Building the Squamish Process

Squamish Nation faced two central challenges at the outset: 1) how to develop a method of assessment grounded in Squamish Nation values, laws, and worldviews; and 2) how to compel the proponents to participate in this independent process. The Squamish Process thus evolved into four main stages: 1) entering Framework Agreements with the proponents to contractually bind them to participate in the Squamish Process; 2) engaging with the community to determine how the Nation would develop and conduct a Squamish Nation assessment; 3) decision-making by the Squamish Nation Council on whether to grant or withhold consent to the Projects; and 4) entering into final Environmental Assessment Agreements with the proponents to hold them accountable to Squamish Nation's Conditions of consent. [65]

Stage 1 - Framework Agreements with Proponents

The proponents had entered the Crown EA processes in late 2013, and in 2014, Squamish Nation requested they also participate in a separate, Squamish-led process, which would be enshrined in private contractual agreements between the proponents and Squamish Nation. Woodfibre LNG and FortisBC agreed and entered Framework Agreements with Squamish Nation in July 2014. The Framework Agreements contained various items including the following crucial terms:

- the Squamish will undertake their own, independent assessment and make their own determination on impacts to their Aboriginal right and title;
- the Squamish Process is confidential – the proponent cannot share the information they obtain with the Government without the Nation's consent;

[62] *Ibid*.

[63] On August 15, 2016, the Canadian Minister of Environment and Climate Changed announced the establishment of our four-person Expert Panel (the Panel) to conduct a review of the *Canadian Environmental Assessment Act* with these objectives: to restore public trust in EA; to introduce new, fair processes; and to get resources to market. The Panel engaged broadly with Canadians, Indigenous Peoples, provinces and territories, and key stakeholders to develop recommendations to the Minister on how to improve federal EA processes. See: Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa, ON: Canadian Environmental Assessment Agency, 2017).

[64] SN CEAA Review Panel Submission, *supra* note 21 at 2.

[65] *Ibid* at 6.

- the Nation will not participate in the Government EA process other than sending a technical environmental consultant to gather pertinent technical info;
- the Squamish Process will parallel the Government process to the extent it is possible to provide some certainty to the proponent;
- the proponent agrees to provide supplemental information to the Squamish should it be requested;
- the proponent agrees to pay for the Squamish Process;
- the Squamish Nation will decide on whether to approve the project and if it does, will issue an Environmental Certificate subject to conditions to the proponent; and
- the issuing of an Environmental Certificate does not eliminate need for later negotiation of an Impacts Benefit Agreement between Squamish and the proponent. [66]

The proponents' decisions to enter the Squamish Process (through signing the Framework Agreements) were voluntary; however, the proponents were keen to build positive working relationships with Squamish Nation to avoid potential problems and delays down the road. To this end, the proponents were strongly compelled to participate in the Squamish Process as a means of maintaining positive relationships with the Nation. [67]

Central to the Framework Agreements were the confidentiality provisions. Squamish Nation wanted the Squamish Process to operate independent of the Crown EAs, and for this to occur, it needed to build strict confidentiality into the Framework Agreements. The aim was to prevent the proponents from sharing information learned through the Squamish Process with the BC EAO because Squamish did not want the Squamish Process to become a vehicle through which the proponents would fulfill the Crown's consultation requirements based on the government's understanding of what discharge of the duty to consult requires. In other words, it wanted the Crown's consultation record to remain blank. From Squamish Nation's perspective, without confidentiality, the Squamish Process could be rendered moot because it could potentially eliminate the leverage Squamish Nation had to compel the proponents to participate. By having the proponents agree to keep the information obtained through the Squamish Process confidential, Squamish Nation attempted to create a barrier between its Indigenous-led process and the Crown process. The aim was to strengthen the independence of the Squamish Process. [68]

Stage 2 - The Squamish Assessment

Once the Framework Agreements binding the proponents to the Squamish Process were in place, Squamish Nation began developing a method of assessing the Projects that would consider Squamish laws, values, and worldviews, and provide the Nation's decision-maker (the Squamish Council) with the information it needed to determine whether, or not, to give its consent. In this case, the Squamish Nation team overseeing the Squamish Process (the "Team") [69] wanted community engagement to be central to the assessment methodology. The challenges the Team faced were to: determine the best way to educate the community on the proposed Projects; learn the community's concerns about the Projects; access Squamish

[66] Bruce and Hume, *supra* note 22 at 7.
[67] *Ibid.*
[68] In its reports to the Ministers, the Government did draw the conclusion that the proponents' participation in the Squamish Process demonstrated consultation, despite the fact that Squamish Nation contested this point and argued that only the issuance of a Squamish Nation EA Certificate is demonstrative of adequate consultation and consent under Squamish Nation law.
[69] The team tasked with developing the Squamish Process included Hereditary Chief Ian Campbell; Hereditary Chief Bill Williams; former Squamish Nation Councilor, Chris Lewis; Squamish Nation lawyer and Squamish Nation member, Aaron Bruce; and Senior Environmental Consultant, Tyler Gray, of PGL Environmental Consultants (collectively the "Team").

knowledge-holders' information about the land, resources, and spiritual/cultural values; and conduct an independent review of the proponents' information to assess the Projects from a distinctly Squamish lens, all within the timeframe dictated by provincial legislation. Squamish Nation wanted to complete the Squamish Process within the same timeframe as the Crown EAs because it hoped that there would be an opportunity to collaborate with the Crown and potentially harmonize the results of their separate processes once they were all completed.

The Team decided that the method of assessment for the Squamish Process would combine knowledge derived from community engagement and an independent technical review of the proponents' data conducted by PGL Environmental Consultants (PGL), led by Tyler Gray. Knowledge gleaned from these processes would be brought together in an Assessment Report that would be presented to the Squamish Nation community, and then to the Council for a vote on whether to approve the Projects. The central objective of the Assessment Report would be to provide the Squamish Nation decision-makers with information, informed by Squamish values and concerns, from which it could make an informed decision on whether to grant or withhold consent to the Projects.

Gathering Information from the Community

Community dialogue and input were central components of the method of assessment used in the Squamish Process. The Team departed from the typical Crown EA method which categorizes the environment in terms of separately valued components (VCs) and measures the significance of impacts to each VC separately. [70] This does not reflect how Squamish Nation views the natural world and the Team wished to adopt a more holistic approach, recognizing the interconnectedness of the elements of the environment. [71] To this end, the Team developed 6 guiding topics to elicit discussions with Squamish community members. The aim was to better understand community values and laws surrounding uses of land and water, and what the community sees as the potential impacts of the Projects. [72] The 6 guiding topics included: marine environment; terrestrial and freshwater environment; lands in which the Squamish Nation has formal governance and/or defined management objectives; use and occupancy in the impacted region; transmission of culture and history; and growth and revitalization of the Squamish language. [73]

Through community dialogue the Team aimed to distill the community's central concerns, and then use that information to shape the technical review of the Project by PGL. In its initial discussions, the Team considered the best methods to engage with the community and determined engagement would take the form of focus groups, larger community meetings, and direct engagement with knowledge holders to complete a traditional use and occupancy study (TUOS). [74] Community members would also be advised that they could submit comments or raise concerns with Team members through emails, telephone calls, and one-on-one meetings.

The values and principles articulated by community members in the Squamish Process were akin to those articulated in the development of Xay Temíxw. Squamish Nation members' connections with their territory and their responsibility to preserve the land, water and resources for future generations, dictate their level of tolerance for adverse impacts created by development projects. This responsibility must take priority and be balanced against the

[70] Bruce and Hume, *supra* note 22 at 13.
[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid*.
[74] Sankey Dissertation, *supra* note 16 at 246.

economic benefits that will flow to the community. One significant Squamish value revealed through the Squamish Process was that Squamish members rely on their territory as a whole, not just specific sites. [75] Members' willingness to be on the land is impacted by their ability to move around their territory freely, to use available natural resources, and to know those resources are safe. [76] Another significant point was that members' current use of land and resources is not the desired use. [77] Pollution and contamination have hindered Squamish Nation members from using their land and resources fully, and they are working to regenerate areas to enable deeper engagement with the land and waters. Furthermore, the Team learned that impacts can extend beyond the physical impact to a specific site. [78] For example, visual impacts and peoples' historic memory affect their sense of place and willingness to be on the land. [79] Members need to feel safe to engage in activities such as bathing and other spiritual cleansing practices that require a sense of privacy and the ability to move freely throughout the territory to access meaningful places. [80]

Community Values as Context for Technical Review

Community engagement revealed the community's concerns about the Projects, the community's values and priorities, and the legal principles that guide members in their relationship with their land and resources. Squamish members view the potential impacts of the Projects in unique ways. [81] For example, Squamish people tend to see themselves as part of the land – their identity is inscribed in the landscape, and it is maintained and strengthened through their ability to continue to use the land and resources for cultural, spiritual, and economic purposes. [82] Thus, the risks associated with environmental impact affect the Squamish Nation people not only physically, but also on cultural and spiritual levels; this lowers their tolerance for risk or uncertainties. The Squamish Nation peoples' tolerance for risk is a product of their relationship with the land and is also connected to the fact that Squamish people have not benefitted from earlier industrial projects in Howe Sound. [83] As noted, Squamish people have experienced alienation caused by industrialization for over a century without any consultation or meaningful economic benefit flowing to their communities. [84]

Through the Squamish Process, the Squamish Nation community expressed concern about the industrial pollution of Howe Sound and the need to continue to foster its health. Marine life has begun to recover in the area, including the return of herring, which had been decimated from decades of habitat degradation. Tyler Gray explained that a prominent problem in Howe Sound has been herring spawning on creosote piles where they don't survive. [85] Squamish Nation members were also very concerned with impacts on the Squamish River estuary and the health and safety of the community located near project infrastructure.

After gathering community feedback, it became evident to the Team that the concerns of the community would direct the areas of focus in the technical review, as well as provide a context for understanding the impacts to the areas covered by the technical review. Some of the broad themes the Team distilled from community input were:

- the desire of members to stay connected to their lands;
- the sacredness of Howe Sound and the need to rebuild its health;

[75] *Ibid* at 252
[76] *Ibid.*
[77] *Ibid* at 253.
[78] *Ibid.*
[79] *Ibid.*
[80] *Ibid.*
[81] *Ibid* at 255.
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid* at 257.

- the duty of the Squamish people to protect their lands from industrialization; and
- an overall mistrust of industry and government due to the legacy of colonialism and pollution caused in historical industrialization of Howe Sound. [86]

Specific concerns included:

- impacts to marine life caused by the seawater cooling technology proposed for the Woodfibre facility;
- impacts to Skwelwil'em Squamish River Estuary Wildlife Management Area caused by digging and placement of the pipeline;
- accidents caused by chemicals, fires or possible explosions that could harm local communities;
- the location of the compressor station;
- visual impacts of the Projects;
- impingement on untouched areas of Squamish Territory; and
- lack of benefits flowing to the Squamish community. [87]

These concerns became the focal points in the technical review of the proponents' material. [88] In other words, a Squamish lens was placed on the material so that the particular areas of concern for Squamish Nation could be explored and analyzed in further detail. The technical review involved filtering through the proponents' material to identify proponent bias, locate gaps in the information provided, and request follow-up information related to Squamish-specific concerns.

Preparing the Assessment Report

The Team prepared the Assessment Report as a confidential internal document specifically for the Squamish community and the Squamish Council. It aimed to provide the community and Council with community-specific information on the environmental, cultural, and safety aspects of the Project so that the Council could make an informed decision on whether, or not, to provide consent. [89] The Report included the material obtained through community engagement and the technical review of the proponents' data prepared by PGL. It also included all notes from the focus groups and community meetings, reflecting a range of views expressed by Squamish Nation members. The Assessment Report made recommendations regarding the type of mitigation measures that could address the central concerns of the community through imposing a set of Squamish defined conditions (the Squamish Conditions) on the proponents in carrying out the Projects. The Report also acknowledged that the mitigation measures could not guarantee zero impact on the environment. [90] Importantly, unlike the Crown EA, the Report did not specify whether an impact was acceptable or not because the objective was to allow the decision-makers to make that determination on their own. The Team felt it was important that Squamish decision-makers decide whether the level of impacts to Aboriginal rights and title were tolerable because it would be different for each individual based on their family background, where they live and what their values are. [91] The aim of the Assessment Report, therefore, was not to determine what impacts were acceptable or unacceptable based on a significance determination, but to "describe potential impacts, identify potential mitigation to make the project as 'good' as it could possibly be, and to summarize the Review conclusions." [92] Squamish Nation decision-

[86] *Ibid* at 258.
[87] *Ibid*.
[88] *Ibid*.
[89] *Ibid* at 265.
[90] *Ibid* at 267.
[91] *Ibid*.
[92] Aaron Bruce and Emma Hume, *supra* note 22 at 15.

makers would decide what was acceptable based on their considerations.

Stage 3 - Squamish Nation Decision-making

The Team presented the Assessment Report to the Squamish community at a meeting held 11 June 2015. [93] The community had the opportunity to consider and provide input in regard to the findings of the Assessment Report. The community was not united in its perspective regarding the Projects. [94] Some members voiced strong opposition to the Projects. [95] Many community members supported the Squamish Process itself, but some did not support the Projects, because, as the Assessment Report indicated, there could be negative impacts, despite the imposition of Squamish Conditions on the Projects. [96] Some community members believed that there should be zero impact whatsoever, and thus the decision-makers, the Squamish Council, had to consider divergent community perspectives. [97]

At the community and Council meetings, Squamish Nation lawyer, Aaron Bruce, presented the legal position of the Squamish Nation and the result of opposing the Projects under current Canadian law. A vote by Council against the Projects would not guarantee that the Projects would not proceed. [98] Trying to halt the Projects would likely mean a court battle and given that the location of the Woodfibre facility is on a privately-owned, brownfield site, Squamish Nation's legal position to argue adverse impacts to Aboriginal rights and title was complicated and uncertain. [99] Imposing legally binding conditions on the proponents through private contracts represented a way to apply Squamish law to the Projects, and to enable Squamish Nation oversight and governance over the future development and implementation of the Projects. [100] In other words, the Squamish Process provided Squamish Nation with a means to create a new governance structure over the Projects through the use of private contracts; however, constraints still remained due to the concurrent operation of the Crown EA and limited recognition of Indigenous jurisdiction in Canadian law more generally.

The Team presented the Assessment Report to the Council on 25 June 2015, along with the Squamish Conditions. The Team had distilled the central concerns from the community and drafted 25 Squamish Conditions that could be placed on the proponents and the province, through contractual agreements, should the Council vote in favour of the Projects. On 26 June 2015, the Squamish Council voted on whether to consent to the Projects subject to the 25 Squamish Condition – 12 Council members voted in favour, 2 opposed, and 2 abstained from voting. [101]

Stage 4 - Squamish Nation Conditions, Environmental Assessment Agreements and Certificates

Once the Council voted to proceed with the Projects, Squamish Nation negotiated Squamish Nation Environmental Agreements ("SN-EA Agreements") with Woodfibre LNG and

[93] Squamish Nation, "Squamish Nation Process/Woodfibre LNG Project Update" *Squamish Nation Update Issue 4* (2016) Issue 4 [SN Bulletin-LNG 4].
[94] Sankey Dissertation, *supra* note 16 at 267.
[95] *Ibid*.
[96] *Ibid*.
[97] *Ibid*.
[98] *Ibid*.
[99] *Ibid*.
[100] *Ibid*.
[101] SN Bulletin-LNG 4, *supra* note 93. See also: Larry Pynn, "Squamish First Nation outlines five major conditions for Woodfibre LNG plant", *Vancouver Sun* (6 June 2015) online: <https://vancouversun.com/business/squamish-first-nation-outlines-five-major-conditions-for-woodfibre-lng-plant>.

FortisBC [102] to legally bind them to perform the Squamish Conditions in exchange for Squamish Nation providing its consent to the Projects. Squamish Nation Environmental Certificates were issued within the SN-EA Agreements and can be revoked if the proponents breach the Squamish Conditions (if this occurs, the Projects will be placed on uncertain grounds because despite the Crown EA finding that the duty to consult Squamish Nation was met under its process, Squamish Nation did not participate in the Crown EAs and would have grounds to argue that consultation did not occur, or was not sufficient). Of the 25 Squamish Conditions, 13 apply to Woodfibre LNG and 9 apply to FortisBC. [103] Appendix A contains the 25 Squamish Conditions and the corresponding contractual obligations found in the SN-EA Agreements with the proponents. [104] The Conditions placed on BC are found in the Squamish LNG Benefits Agreement between Squamish Nation, BC, and BC Hydro. [105]

Final Decisions of the Crown EA Processes

In August 2015, the BC EAO issued its final Assessment Report on the Woodfibre LNG Project for the provincial and federal ministerial decision-makers, concluding that while the Project would result in a number of key residual adverse effects to aspects of the environment protected under both the BC EAA and CEAA, the Project would not result in significant adverse effects. [106] On 26 October 2015, the BC Minister of the Environment and the BC Minister of Natural Gas Development issued an EA Certificate for the Woodfibre LNG Project, permitting it to proceed. [107] The Federal government approved the Project on 16 May 2016. [108] Both provincial and federal decision-makers concluded that Aboriginal consultation had taken place through the government process despite the fact Squamish Nation did not formally participate.

The BC EAO published its Assessment Report for the Pipeline Project in July 2016 finding:

- The EA process has adequately identified and assessed the potential adverse environmental, economic, social, heritage and health effects of the Eagle Mountain Project;
- Consultation with Aboriginal groups, federal, provincial and local government agencies, and the public have been adequately carried out and that efforts to consult with Aboriginal groups will continue on an ongoing basis;
- Issues identified by Aboriginal groups, federal, provincial and local government agencies, and the public, which were within the scope of the EA, were adequately and reasonably addressed during the review of the Application;
- Practical means have been identified to prevent or reduce any potential adverse environmental, social, economic, heritage or health effects of the Eagle Mountain Project such that no direct or indirect significant adverse effect is predicted or expected;

[102] SN-EA Agreements, *supra* notes 19 and 20.

[103] On 24 July 2015, Woodfibre accepted the 13 Conditions and on 14 October 2015, Squamish Nation and Woodfibre executed the SN-EA Agreement. On 14 September 2015, FortisBC agreed to some of the Conditions. Negotiations continued and on 22 June 2016, Squamish Nation and FortisBC executed their SN EA Agreement with FortisBC agreeing to all 9 Conditions.

[104] See SN Squamish Nation, "Summary/ PGL's Environmental Report on Woodfibre LNG Proposal," *Squamish Nation Update Issue 3* (2015).

[105] The Squamish Conditions placed on the province were negotiated through the *Squamish Liquefied Natural Gas (LNG) Benefits Agreement Between Her Majesty in the Right of Province of British Columbia, British Columbia Hydro and Power Authority, and Squamish Nation*, (7 March 2019), online: <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/squamish-nation>.

[106] Woodfibre Summary Assessment Report, *supra* note 39.

[107] In the matter of the Environmental Assessment Act SBC 2002, c. 43 and In the matter of an Application for an Environmental Assessment Certificate by Woodfibre LNG Ltd. for the Woodfibre LNG Project (Project), "Reasons for Ministers' Decision", (26 October 2015).

[108] Decision Statement Reissued under Section 54 of the Canadian Environmental Assessment Act, 2012 to Woodfibre LNG Limited c/o Byng Giraud, Vice President, Corporate Affairs, (7 March 2018), online: <https://iaac-aeic.gc.ca/050/evaluations/document/109540?culture=en-CA>.

- The potential for adverse effects on the Aboriginal rights and title of Aboriginal groups has been avoided, minimized or otherwise accommodated to an acceptable level; and
- The provincial Government has fulfilled its obligations for consultation and accommodation to Aboriginal groups relating to the issuance of an EA Certificate for the Eagle Mountain Project. [109]

Considering these findings, the BC EAO Executive Director recommended that the BC Minister issue an EA Certificate for the Pipeline Project, and the Minister did so on 9 August 2016. [110] Figure 2 below provides a timeline for the conclusion of the Crown EAs in relation to the Squamish Process.

Figure 2

DATE	SQUAMISH PROCESS FOR WOODFIBRE FACILITY AND PIPELINE	CROWN EA PROCESS FOR EAGLE MOUNTAIN PIPELINE	CROWN EA PROCESS FOR WOODFIBRE LNG FACILITY
Nov 2014		FortisBC submits Final AIR to EAO	
Dec 2014		EAO accepts AIR and moves to review stage	Woodfibre submits Final AIR to EAO EAO accepts AIR and moves to review stage
June 2015	SN Environmental Assessment Report finalized by PGL Environmental Consultants and presented to SN Council SN Council votes on Project and sets out 25 Squamish Conditions needed to be met by proponents and BC in order for SN to grant consent to Woodfibre Project		
July 2015	Woodfibre LNG accepts all Squamish Conditions		

[109] Fortis BC Assessment Report, *supra* note 54 at 20.

[110] In the Matter of The Environmental Assessment Act S.B.C. 2002, c.43 (Act) and in the matter of an Application for an Environmental Assessment Certificate (Application) by FortisBC Energy Inc. (Proponent) for the Eagle Mountain – Woodfibre Gas Pipeline Project (Project), Reasons for Ministers' Decision, (9 August 2016).

DATE	SQUAMISH PROCESS FOR WOODFIBRE FACILITY AND PIPELINE	CROWN EA PROCESS FOR EAGLE MOUNTAIN PIPELINE	CROWN EA PROCESS FOR WOODFIBRE LNG FACILITY
Aug 2015			EAO publishes its Project Assessment Report and recommendations to be sent to Ministers for final decision
Sept 2015	FortisBC responds to some of Squamish Conditions and offers alternatives for its proposed pipeline route and compressor station location		
Oct 2015	SN Council **approves** Woodfibre LNG EA Agreeent ccontaining 13 Squamish Conditions and Certificate of Approval		BC Ministers Polak and Coleman approve project and grant EA Certificate
March 2016			Federal Minister McKenna issues Decision Statement approving Project
June 22 2016	SN Council **approves** FortisBC EA Agreement containing 9 Squamish Conditions and Certificate of Approval		
July 2016		EAO publishes its Project Assessment Report to be sent to Ministers for final decision	
August 2016		BC Ministers Polak and Coleman grant EA Certificate for Project to proceed	

Reflections on the Conditions of the Squamish Process

Because Squamish Nation jurisdiction was not adequately recognized under Crown EA law in relation to the Woodfibre Projects, the Squamish Nation turned to private contracts to compel the proponents to adhere to Squamish Nation legal principles. The Squamish Conditions are central to the Squamish Process because it is through the Conditions that Squamish Nation sought to create an avenue to assert ongoing authority over the proponents in their future construction and implementation of the Projects. Squamish used the SN-EA Agreements to assert itself as a *de facto* third regulator over the proponents by attaching legal and equitable remedies such as injunctions, specific performance, and damages, to the Conditions, should they be breached. [111] This means that going forward, Squamish Nation has a way of holding the proponents accountable to their law outside the Crown EA processes. However, because the

[111] SN-CEAA Review Panel Submission, *supra* note 21 at 8.

Squamish Conditions are entrenched within the realm of private law, they lack the level of authority enjoyed by provincial and federal regulators. In other words, in the event Squamish Nation were to revoke its consent due to breach of the Conditions, it is uncertain what would happen. Most likely, to halt the Projects, Squamish Nation would have to seek judicial review of the Projects in Canadian courts, arguing that the governments did not meet their constitutional duty to consult Squamish Nation when carrying out the Crown EA processes.

While there are clear limitations to using private law in this context, it is nonetheless important to consider what Squamish Nation achieved through the Squamish Process. Indeed, Squamish Nation was able to make various changes to the Projects through its Conditions including changing the LNG cooling technology, altering the design of the Projects, committing the proponents to actions aimed at promoting sustainability, and redressing cumulative adverse impacts sustained by Howe Sound, and securing promises from the proponents intended to address the community's historical mistrust of the industry.

Two Squamish Conditions are particularly noteworthy. The first relates to how the LNG is cooled during production. In the initial project design, Woodfibre LNG proposed using a seawater cooling technology, where warm, chlorinated water would be discharged into Howe Sound. This method presented serious concerns for Squamish Nation because the community felt that there should be limited or no impact on the Sound. The community's concern regarding seawater cooling was translated into a Condition that Woodfibre LNG would conduct further studies to validate its position that there would not be any impacts on marine life caused by the introduction of warm water to Howe Sound. Alternatively, Woodfibre LNG could select a different cooling technology that guaranteed less impact and met Squamish Nation approval. The SN-EA Agreement with Woodfibre LNG provided Squamish Nation with the power to make the final decision regarding cooling technology.

In 2016, the seawater cooling study began, with discussions going back and forth between Woodfibre LNG and Squamish Nation. The Squamish Council ultimately rejected Woodfibre's preferred technology of seawater cooling in favour of an air-cooling method because it had the least potential to impact marine life and was most consistent with Squamish Nation values. [112] In a statement to the media regarding the shift in cooling technology, Byng Giraud, former VP of Corporate Relations for Woodfibre LNG, stated: "[t]his was a Squamish Nation decision and a Squamish Nation process . . . The reason we do this is because we respect our relationship with the Squamish Nation and it was a contractual obligation we made to them." [113] Giraud acknowledged that "the air-cooling system will cost the company more" and "there's production loss that results from the decision . . . But we accept that . . . It is something we think we can overcome." [114]

The other notable Condition placed on both proponents by Squamish Nation relates to the environmental management and monitoring plans (EMPs) for the Projects. Due to the history of settler pollution in Howe Sound, the Squamish Nation community strongly believed that it needed a way to hold industry accountable to the promises made regarding the level of impact the Projects would have, and mitigation measures that would be adopted to prevent such impacts. Often in Crown EAs, certain details of Projects get pushed forward to be dealt with in future project management plans because it is difficult to address them at

[112] Letter from Squamish Nation to Woodfibre LNG Ltd. (19 October 2016), "Re: Squamish Nation Decision on Cooling Technology." See also Jennifer Thuncher, "Sea-cooling system out, air-cooling in – Squamish Nation a catalyst for change at Woodfibre LNG", *The Squamish Chief* (21 October 2016), online: <https://www.squamishchief.com/local-news/sea-cooling-system-out-air-cooling-system-in-3345935>.

[113] Jennifer Thuncher, "Squamish Nation wins change in Woodfibre LNG cooling system", *North Shore News* (25 October 2016), online: <https://www.nsnews.com/local-news/squamish-nation-wins-change-in-woodfibre-lng-cooling-system-3041102>.

[114] *Ibid.*

the EA approval stage when the level of detail is quite general. This results in the deferral of issues to later stages of the projects, when there is typically less consultation with Indigenous nations and less government oversight of the details. To prevent Squamish Nation from losing its voice and oversight over these details, it created a Condition to address the problem. In both SN-EA Agreements, Woodfibre LNG and FortisBC agree to submit EMPs to Squamish Nation for approval and a framework is set out regarding timing for responses, possible amendments, and dispute resolution. In other words, as a result of the SN-EA Agreements, the proponents are bound to obtain approval of management plans from three levels of government (provincial, federal and Squamish) as the Projects are constructed and become operable. These Conditions are important because they provide a strong expression of Squamish Nation governance and control over the future development of the Projects. In typical Crown EAs, if Squamish Nation disagreed with the proponent's management plan, it would need to appeal to the BC EAO, requesting that the EAO not approve the plan.

Reflections on the Impact of the Squamish Process on the Crown EAs

Having briefly addressed how Squamish exercises authority through the Squamish Conditions, it is also important to reflect on how the Squamish Process (as a whole) impacted the operation of the Crown EAs for the Woodfibre Projects. In other words, it is important to consider if mechanisms were developed to facilitate communication between these two legal orders, and what tensions arose. While Squamish Nation had anticipated some form of collaboration and harmonization would occur between the Crown processes and the Squamish Process once the assessments were complete, this did not occur. Indeed, in its submission to the CEAA Review Panel, Squamish noted that "reconciliation or harmonization of the Squamish Nation and government decisions did not fully materialize on the Woodfibre project." [115] The BC EAO remained reluctant to acknowledge Squamish Nation's jurisdiction to conduct an independent process if it would disrupt the government's established EA process. Thus, one can conclude that the greatest impact of the Squamish Process occurred at the Squamish Nation community level (where Squamish Nation was able to develop and refine its own EA law), and at the proponent level where Squamish Nation engaged with Woodfibre LNG and FortisBC in a pseudo-regulator capacity.

Because both Woodfibre LNG and FortisBC acknowledged Squamish Nation's authority to conduct an EA process through private contractual relationships, tensions arose in the simultaneous operation of the Crown and Squamish processes. Firstly, there were no established mechanisms in place to deal with the inconsistencies caused when overlapping authorities address the same matters but come to different conclusions. While the federal and provincial governments entered a memorandum of understanding to allow the provincial process to substitute for the federal process, Squamish Nation carried out its process without an agreement with the other governments about what would occur if the Crown EA and the Squamish Process rendered different results. Further, there were certain aspects of the Squamish Process that put the proponents in the position of being unable to comply with the Crown EA if it complied with the Squamish Process. For example, the requirement that proponents keep all information acquired from the Squamish Process confidential, prevented the proponents from complying with consultation requirements set out in the initial BC EAO Section 11 Orders. [116] The BC EAO eventually amended its Section 11 Orders to reflect that

[115] SN-CEAA Review Panel Submission, *supra* note 21 at 9.
[116] Woodfibre LNG Section 11 Order, *supra* note 50 and Fortis BC Section 11 Order, *supra* note 57.

the proponents had chosen to engage in the Squamish Process. However, the BC EAO still required the proponents to provide consultation updates that conflicted with the Squamish Process. While the BC EAO did acknowledge the Squamish Process, it did not formally recognize the competing jurisdiction of the Squamish Nation, or the ability of the Nation to excuse itself, or the proponents, from participating in the Crown's consultation process under its Section 11 Order. Furthermore, it continued to place consultation requirements on both the proponents and Squamish Nation, and it operated as though the Crown's process for fulfilling the duty to consult was not impeded by the Squamish Process.

Tensions also arose due to the timeline requirements specified under Crown EA legislation and its alignment with the results of the Squamish Process. Squamish Nation and the proponents intended to complete the Squamish Process, meaning SN-EA Agreements in place, before the BC EAO made recommendations to the Ministers regarding project approval. To this end, in June 2015, Woodfibre LNG and FortisBC requested a suspension of the 180-day Review Period under the Crown EAs to allow them time to determine whether they could meet the Squamish Conditions announced on 26 June 2015. The BC EAO suspended its EA review and agreed to resume it "once EAO was satisfied with the information provided and with the adequacy of the consultation with Squamish Nation." [117] A conflict occurred because Squamish Nation envisioned that upon completion of both the Crown and Squamish EA processes, the governments and Squamish Nation would engage in collaborative negotiation regarding the results of the three EAs. Instead, the BC EAO concluded that completion of the Squamish Process indicated that consultation requirements had been met. Squamish Nation did not officially consent to the Projects until the proponents entered into legally binding EA agreements accepting the Squamish Conditions, which, for Woodfibre LNG, came after the BC EAO had submitted its recommendation to approve the Project to the Ministers. This was a significant point of tension between Squamish Nation and the BC EAO, and a function of its refusal to adequately acknowledge Squamish Nation's jurisdiction.

While the Squamish Process appears to have been most impactful at the community and proponent levels, post-assessment developments suggest that the Squamish Process and Squamish Nation's subsequent regulation of the Projects through the SN-EA agreements with the proponents are being formally acknowledged by provincial and federal regulators. Indeed, while the Crown EA process and the Squamish Process were initially separate, there is some evidence that they are beginning to align. In May 2020, Squamish Nation, the BC EAO, and the new federal Impact Agency of Canada (IA Agency) entered a Memorandum of Understanding (MOU) to address proposed amendments to the Woodfibre Project. Woodfibre has applied to modify the Project to include a floatel (a floating boat that will be used to house workers at the Woodfibre site.) [118] In the MOU, the Parties "acknowledge that each party has its own respective regulatory and decision-making process for such an amendment request." [119] The Parties "agree to cooperate during the planning and during the assessment of proposed changes to enable coordinated engagement, to facilitate common

[117] Letter from Michael Shepard, Project Assistant Manager, BC Environment Assessment Office to Byng Giraud, Woodfibre LNG Vice President of Corporate Affairs, Reference: 285146, (30 June 2015).
[118] The floatel is a solution put forth by the proponent following local criticism of a work camp being created at Britannia Beach. The Squamish Nation has engaged in community consultation to assess the proponent's proposal to create a floating work camp in Howe Sound, as opposed to the original proposal to house workers in the District of Squamish. The National Inquiry into Missing and Murdered Indigenous Women and Girls found that work camps pose significant risk for Indigenous women and girls; see National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), online: <https://www.mmiwg-ffada.ca/final-report/>.
[119] *Memorandum of Understanding Between Squamish Nation And BC Environmental Assessment Office And Impact Agency of Canada*, (22 May 2020).

requirements for information, and to encourage joint issuance of documents and coordinated timing of decisions." [120] The Parties also agree to coordinate potential conditions arising from amendment requests and to co-ordinate the timing of decisions made. The MOU contains commitments that better align with Squamish Nation's initial vision of how the Squamish and Crown regulatory processes would communicate with one another. Thus, it appears that the MOU sets the foundation for a more collaborative approach to assessing the amendment request, one that acknowledges Squamish Nation decision-making authority. In one media report, Squamish Nation Councillor, Khelsilem, stated that "Squamish Nation welcomes the collaborative approach to examining the barge proposal." [121] He also stated: "We'd participate as equal reviewers" and "[w]e have an equal seat at the table, basically . . . whatever conditions are to be agreed to, have to be agreed to by all parties." [122] The MOU suggests that going forward the BC EAO and IA Agency will relate to Squamish Nation at a government-to-government level in its negotiations regarding the Projects. Changes in both federal and provincial EA legislation since the commencement of the Woodfibre LNG Projects recognize a stronger role for Indigenous decision-making in EA processes and thus the MOU may be reflective of that shift.

Conclusion

Squamish Nation's assessment of the Woodfibre LNG Projects provides an example of how an Indigenous nation sought to undermine the imposed authority of Crown EA law by refusing to participate. Instead, it developed and implemented a process that better aligned with its values, laws, and interests. Through the Squamish Process, the Squamish Nation was able to exercise authority over significant phases of the assessment process including the method of assessment, community engagement, decision-making, and the relationship with the proponent. The case study shows that while an Indigenous nation can develop an assessment process separate from the Crown's, a tremendous amount of uncertainty occurs if there is not a mechanism in place to determine how the Indigenous assessment and Crown assessment will relate to one another. A critical issue that remains unanswered is how Indigenous authority is recognized by and within Crown EA processes. In this example, because Squamish Nation provided its consent to the Projects, it is unclear what would have occurred had the Squamish Process resulted in a vote of no consent. What this example further illustrates is that Indigenous-led assessments can become important processes for rebuilding and strengthening Indigenous law and jurisdiction on the ground. That said, much more research needs to be done in terms of developing suitable mechanisms, and creating space, for Crown IAs to respectfully work alongside Indigenous IAs. This is particularly the case when an Indigenous nation chooses not to integrate its process with the Crown EA process.

[120] *Ibid.*

[121] Brett Jang, "Squamish Nation plans joint review with B.C. and federal regulators for Woodfibre LNG's work camp", *Globe and Mail* (13 April 2020) online: <https://www.theglobeandmail.com/business/article-squamish-nation-plans-joint-review-with-bc-and-federal-regulators/>.

[122] *Ibid.*

Appendix "A": Woodfibre LNG Project Squamish Nation 25 Conditions

NO.	CONDITIONS PLACED ON WOODFIBRE LNG LIMITED:	CONTRACTUAL OBLIGATIONS*
1	Conduct further studies on the proposed sea-water cooling method that will prove to the satisfaction of the Squamish Nation that the biological impacts on marine life are acceptable to it and also that the method has lower overall environmental impact than alternative technologies. If WLNG cannot provide conclusive evidence to demonstrate this, then WLNG will pursue an alternate method of cooling the natural gas that is acceptable to the Squamish Nation.	Seawater Cooling Condition (section 4.1)
2	Restore Mill Creek and the adjacent area to a "green zone" designation. Formal recognition that the project is located on the former village of Swiy'a'at will also be located in the green zone.	Green Zone Condition (section 4.2)
3	Locate other water sources during critical stream flow periods if the necessary water flow amount is not met on Mill Creek.	Mill Creek Condition (section 4.3)
4	Fully fund a Squamish Nation marine use plan to help address cumulative impacts of industrial projects on the marine environment in Howe Sound.	Marine Use Plan Condition (section 4.4)
5	Provide access to Squamish Nation members through the Controlled Access Zone to allow Squamish Nation to practice Aboriginal rights.	Access Through Control Zone Condition (section 4.5)
6	Partner with the Squamish Nation to co-manage the environmental management programs and the monitoring of the programs (including the funding of Squamish Nation participation)	Environmental Management Condition (section 4.6)
7	Provide insurance coverage or form of bond to address personal loss and injury costs of members who may be impacted by an explosion caused by an accident or malfunction of project.	Insurance Coverage Condition (section 4.7)
8	No future expansion of the project without Squamish Nation approval.	Project Expansion Condition (section 4.8)
9	No fueling of LNG tankers in Squamish territory.	Bunker Fueling in Howe Sound Condition (section 4.9)
10	Conduct further study on noise impacts of the Project on marine animals.	Marine Mammal Condition (section 4.10)
11	Only operate the facility for the liquefaction and export of natural gas.	Use of LNG Facility Condition (section 4.11)
12	Make certain mitigation measures proposed in Government EA application (that are considered voluntary) legally binding under Squamish Nation Environmental Certificate.	Binding Mitigation Measures Condition (section 4.12)

* CORRESPONDING CONTRACTUAL PROVISIONS IN SQUAMISH NATION ENVIRONMENTAL AGREEMENT BETWEEN SQUAMISH NATION AND WOODFIBRE LNG LIMITED.

NO.	CONDITIONS PLACED ON FORTISBC:	CONTRACTUAL OBLIGATIONS*
13	Avoid any industrial impacts in the Skwelwil'em Wildlife Management Area ("WMA") boundaries by constructing the new pipeline completely underneath or around the WMA so that the pipeline surfaces outside of the WMA boundaries.	No Pipeline Construction Impacts within the WMA Condition (section 4.1)
14	No barges in the WMA.	No Barges in WMA Condition (section 4.2)
15	Relocate the compressor station from the location proposed in its EA Application to a location that poses no risk to Squamish members residing on any Indian Reserve in Squamish territory.	Relocation of Compressor Station Condition (section 4.3)
16	Route the pipeline to avoid impacts within, and adjacent to, the following cultural sites that have been legally designated under the Land Use Agreement with BC: Monmouth Creek, Stawamus Creek and Indian River. For certainty, in order to minimize disturbance to the cultural sites FortisBC will come to agreement with Squamish Nation on a reasonable buffer area around each of these cultural sites.	Avoid Impacts to Cultural Sites Condition (section 4.4)
17	Partner with Squamish Nation to co-manage the environmental management programs and the monitoring of the programs (including funding of SN participation).	Environmental Management Programs Condition (section 4.5)
18	Provide insurance coverage or form of bond to address personal loss and injury costs of members that may be impacted by an explosion caused by an accident or malfunction of a project.	Insurance Coverage Condition (section 4.6)
19	No future expansion of the pipeline without Squamish Nation approval.	Project Expansion Condition (section 4.7)
20	Make certain mitigation measures proposed in Government EA application (that are considered voluntary) legally binding under Squamish Nation Environmental Certificate.	Binding Mitigation Measures Condition (section 4.8)

* CORRESPONDING CONTRACTUAL PROVISIONS IN SQUAMISH NATION ENVIRONMENTAL ASSESSMENT AGREEMENT BETWEEN SQUAMISH NATION AND FORTISBC ENERGY INC.

NO.	CONDITIONS PLACED ON THE PROVINCE OF BC:	CONTRACTUAL OBLIGATIONS*
21	No authorizing the transportation of oil through the pipeline.	Squamish Assurances and Other Covenants (section 13.7b)
22	Government-to-government discussions regarding a marine use planning agreement to address cumulative impacts of industry in the Howe Sound area.	Marine Use Planning (Part 9)
23	Work with Squamish Nation to develop an Emergency Response Plan for the Squamish Valley area.	Emergency Response (Part 10)
24	No future expansion of the project without Squamish Nation approval.	Squamish Assurances and Covenants (section 13.7a)

* CORRESPONDING CONTRACTUAL PROVISIONS IN SQUAMISH LIQUEFIED NATURAL GAS (LNG) BENEFITS AGREEMENT BETWEEN THE PROVINCE OF BC, BC HYDRO AND SQUAMISH NATION.

NO.	CONDITIONS PLACED ON WOODFIBRE LNG, FORTISBC AND THE PROVINCE OF BC:	CONDITION IN ALL 3 AGREEMENTS
25	Enter into an economic benefits agreement with the Squamish Nation that will be reflective of the Squamish Nation's Aboriginal rights and title interests.	Economic Benefits Agreement Condition (section 4.13 [Woodfibre EA Agreement], section 4.9 [FortisBC EA Agreement], Parts 4 - 8 [BC/Hydro LNG Agreement])

Table 1: 25 Squamish Conditions and corresponding contractual obligations found in the SN-EA Agreements between Squamish Nation, Woodfibre LNG, and FortisBC, and in the Liquefied Natural Gas Benefits Agreement between Squamish Nation, BC, and BC Hydro

Inuit Leadership and Authority in Impact Assessment: Experiences with the Mary River iron mine in the Qikiqtani region of Nunavut

Warren Bernauer,[1] Laura Tanguay,[2] and Jerry Natanine[3]

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Abstract

In 2012, Baffinland's proposal for the Mary River iron ore mine was approved by the Nunavut Impact Review Board (NIRB). Our review of the regulatory history of the Mary River mine through its several changes in scope suggests that "Indigenous-led" is a poor descriptor of Nunavut's Impact Assessment (IA) process, despite that many of NIRB's unique and innovative procedures provide substantial opportunities for Inuit *participation*. However, Inuit *authority* over the IA process is clearly limited. This case study illustrates that by including co-management arrangements where the Crown holds unilateral decision-making power in the category of Indigenous-led IA, we risk weakening the concept of Indigenous leadership, especially when Indigenous communities do not assert that the process is Indigenous-led. Moreover, it makes it difficult for Indigenous communities that currently have Crown-controlled co-management processes in place to use the concept of Indigenous-led IA to increase their authority over lands and resources. We argue for the need to extend Indigenous participation and authority beyond the initial assessment and decision to include the entire lifecycle of IA. Conceptions of Indigenous-led IA need to be expanded to account for Indigenous participation in, and authority over, pre-assessment land use planning and post-assessment implementation and follow-up.

[1] Postdoctoral Research Associate, York University, Osgoode Hall Law School.
[2] Doctoral Candidate, Faculty of Environmental and Urban Change, York University.
[3] Senior Administrative Officer, Hamlet of Clyde River.

Introduction

On February 4, 2021, a group called the Nuluujaat Land Guardians, consisting of Inuit hunters from Arctic Bay and Pond Inlet, travelled over 150 km by snowmobile, to blockade Baffinland's Mary River Mine. The blockade focused on disrupting the mine's airstrip and tote road. The reasons for this action were complex and included frustrations with the negative effects of the existing Mary River mine, as well as opposition to a controversial expansion to the project called Phase 2.

The six-day blockade occurred simultaneously to the Nunavut Impact Review Board's (NIRB) public hearings for Baffinland's Phase 2 application. Representatives for the Land Guardians explained to the media that their actions were partially motivated by concerns with the process being used to decide whether the expansion should be approved. They argued that communities were unable to meaningfully participate in the NIRB's review, and that Baffinland was threatening to shut down the project and lay off workers to strong-arm Nunavut's government and Inuit organizations into supporting the controversial expansion. [4] Guardian Naymen Inuarak emphasized, "we would like to see actual negotiations with the most impacted communities." [5]

The blockade of the Mary River mine shows significant conflict and contention over Nunavut's IA process. It therefore suggests a need for a thorough analysis of Inuit participation and leadership in resource management in their territory. Several academic commentators argue that Nunavut's resource management processes are examples of best practices regarding Indigenous participation in IA. [6] Others have gone further, characterizing Nunavut's IA process and similar co-management arrangements in the territorial north as "Indigenous led." [7] And yet, significant dissatisfaction remains.

This report considers experiences with Indigenous leadership in IA from the Qikiqtani region of Nunavut. Nunavut is part of *Inuit Nunangat*, the Inuit homeland in Canada. The Qikiqtani region comprises Baffin Island, the Melville Peninsula, and the eastern High Arctic Islands. Lands and resources in Nunavut are governed according to the terms of the Nunavut Agreement, a modern treaty signed between Inuit and the Crown in 1993. We focus on the regulatory processes and decisions related to the Mary River iron mine, located on North Baffin Island, near the communities of Pond Inlet, Arctic Bay, Igloolik, Sanirajak, and Clyde River. Because the project has undergone several controversial expansions and modifications since it was originally approved, the Mary River mine makes a useful case study to examine Inuit leadership and authority in IA in Nunavut.

Our goal is to draw lessons from Inuit experiences with IA, both positive and negative, that can help guide Indigenous-led IA processes in Nunavut and beyond. For each step in the evolution of the Mary River project, we tracked the positions and perspectives of Inuit communities and organizations participating in regulatory processes, as well as the recommendations issued by co-management boards and final decisions rendered by the Crown. Our primary concerns include the degree to which Inuit have authority over key stages of the regulatory process. We consider the ability of Inuit organizations and communities to provide or withhold their consent, as well as barriers to their informed participation in

[4] Dandietzel, "Interview with Nunavut Land Guardian - English subtitles" (March 2021), online (video): *Uvagut TV* <http://www.isuma.tv/nitv-live/land-guardian-translated>.
[5] Randi Beers, "Mary River mine protesters announce end to blockade" (11 February 2021), online: *Nunatsiaq News* <https://nunatsiaq.com/stories/article/mary-river-mine-protesters-announce-end-to-blockade/>.
[6] Darek Gondor, "Inuit knowledge and environmental assessment in Nunavut Canada" (2015) 11:1 Sustainability Science 153.
[7] Hannah Peletz & Kevin Hanna, "The central role of Inuit Qaujimaningit in Nunavut's impact assessment process. Impact Assessment and Project Appraisal" (2020) 38:5 IAPA 412; Ginger Gibson et al, "Impact Assessment in the Arctic: Emerging Practices of Indigenous- Led Review" (April 2018), online (pdf): *Gwich'in Council International (GCI)* <https://gwichincouncil.com/sites/default/files/Firelight%20Gwich%27in%20Indigenous%20led%20review_FINAL_web_0.pdf>.

decision-making processes. Unique and otherwise noteworthy approaches to participation are highlighted throughout. We mostly relied on regulatory documents available on the public registries of the Nunavut Impact Review Board and Nunavut Planning Commission. Our analysis of regulatory documents was supplemented with a review of relevant media coverage, with a focus on regional news sources like *CBC News North* and *Nunatsiaq News*.

Our analysis suggests that while northern co-management processes will typically involve significant levels of Indigenous participation, they may not always produce robust opportunities for Indigenous control over decision-making. On the one hand, we document ample opportunities for Inuit participation in Nunavut's IA process, and Inuit have succeeded in using IA to stop several proposals for unwanted extraction. On the other hand, Inuit authority over IA remains limited, and there are examples of proposed extraction that were approved without Inuit consent. Because Indigenous participation and control are both fundamental components of Indigenous-led IA, the degree of Indigenous authority over IA processes and final decisions should be a fundamental consideration in determining whether a co-managed assessment process is Indigenous-led. [8] That said, there are many positive attributes to the NIRB process that can help inform the development of more robust forms of Indigenous-led IA. There are also important lessons to be drawn from interventions by Inuit organizations and communities.

The Nunavut Agreement and Resource Governance

Nunavut's IA process is established in the 1993 Nunavut Agreement and relevant enabling legislation, the 2013 Nunavut Planning and Project Assessment Act (NuPPAA). Signed in 1993, the Nunavut Agreement was one of the last modern treaties to explicitly extinguish Aboriginal title and to exclude discussion of Aboriginal self-government. [9] In exchange for surrendering their inherent Aboriginal rights to land, Inuit received $1.14 Billion, ownership of roughly 20% of the territory's land, subsurface/mineral rights to roughly 2% of the territory, and a variety of specified rights. [10]

The Nunavut Agreement also included provisions for political development. It committed Canada to divide the Northwest Territories and create the new territory of Nunavut. The Government of Nunavut (GN) was established as a public, rather than Indigenous, government. All residents of Nunavut can run and vote in elections for the territory's legislative assembly. Because Inuit form a demographic majority in the new territory, they expected the GN would provide them with a degree of political self-determination. [11] However, because Nunavut is a territory rather than a province, in settler law the GN lacks constitutional jurisdiction over Crown lands and mineral resources. As a result, most decisions about extraction in Nunavut remain in the hands of the Government of Canada. [12] While the GN aspires to obtain some jurisdiction over Crown lands and mineral resources through a devolution agreement with the federal government, discussions related to devolution have been ongoing for decades and there is little indication they will conclude anytime soon. [13]

Inuit Organizations and Jurisdiction Over Lands and Resources

The Nunavut Agreement led to the further development of Inuit organizations. All Inuit from Nunavut are politically and legally represented by the corporate Inuit organization, Nunavut Tunngavik Incorporated (NTI). Its responsibilities include managing Inuit Owned Lands (i.e.

[8] *Ibid*.
[9] Peter Kulchyski, "Trail to Tears: Concerning Modern Treaties in Northern Canada" (2015) 35:1 Can J Native Stud 69.
[10] Graham White & Jack Hicks, *Made in Nunavut* (Vancouver: UBC Press, 2015).
[11] *Ibid*.
[12] *Ibid*.
[13] Alisa Henderson, *Nunavut: Rethinking Political Culture*, (Vancouver: UBC Press, 2007).

the lands over which Inuit retained ownership after signing the Nunavut Agreement). NTI shares this responsibility with three regional Inuit associations. The Qikiqtani Inuit Association (QIA) is the association representing Inuit of the Qikiqtani (Baffin Island) region. While NTI manages lands where Inuit own mineral rights, the regional associations manage Inuit surface rights. Hunters and Trappers Organizations (HTOs) manage Inuit wildlife harvesting at the community level. [14] These community organizations also have legal responsibilities to implement and protect Inuit harvesting rights. [15] In 2017, the Supreme Court of Canada confirmed that HTOs have the legal authority to initiate Aboriginal rights litigation related to extractive industries in Nunavut. [16]

The Nunavut Agreement provides Inuit with some jurisdiction over extraction on Inuit Owned Land. However, the relatively small amount of land and resources Inuit retained ownership of, together with restrictions on the ability of Inuit to withhold consent to extraction on some Inuit Owned Land, means that Inuit authority over extraction is limited. Where Inuit own subsurface rights (roughly 2% of the Nunavut territory), mining proponents must negotiate exploration and production agreements with NTI. Further, Article 26 of the Nunavut Agreement requires proponents to negotiate an Inuit Impact and Benefit Agreement (IIBA) before a "major development project" proceeds on lands where Inuit own surface rights (roughly 18% of the territory). Like Impact and Benefit Agreements in other contexts these agreements purport to provide Inuit consent to the proposed activity, in exchange for money and other specified benefits. [17] Responsibility for negotiating IIBAs lies with regional Inuit associations (QIA in the case of the Mary River project).

While provisions for IIBAs give Inuit some ability to influence how extraction proceeds on their land, the parameters for negotiation outlined in the Nunavut Agreement restrict the ability of Inuit to withhold their consent to extraction in some circumstances. For example, if an agreement is not reached after 60 days of negotiation, either party may request the federal Minister of Northern Affairs refer the matter to compulsory arbitration. The Minister is required to appointment an arbitrator within 15 days of receiving an application, based on a list of arbitrators approved by both parties. [18] Inuit may well use compulsory arbitration as leverage in negotiations in some circumstances. However, these provisions also allow proponents to refer disagreements to third parties, effectively undermining Inuit authority to make independent decisions about their land and resources. Moreover, the Nunavut Agreement enshrines numerous public easements on Inuit owned lands, including for transportation routes related to potential future mining projects. [19] These limitations suggest that in many cases it may be difficult for Inuit to use IIBAs as a legal mechanism to withhold their consent to unwanted extraction.

Inuit jurisdiction over extraction is clearer on the 2% of lands where Inuit own subsurface rights and mining companies must negotiate exploration and production agreements with Inuit. However, even when Inuit own mineral rights, their authority is often circumscribed. While Inuit subsurface lands include some of the most promising ore bodies in the territory, in many cases the rights to these parcels were grandparented because they were subject to existing mineral leases when the Nunavut Agreement was negotiated. In these cases, the federal government administers the mineral rights, with all royalties paid to Inuit. As such, for many resource extraction projects in Nunavut, Inuit must rely on their participation in Nunavut's co-management regime to assert their influence and safeguard their harvesting rights.

[14] *Nunavut Land Claims Agreement Act* S.C. 1993, c. 29, ss 5.7.3.
[15] Ibid at s 5.7.3/5.7.15.
[16] *Clyde River (Hamlet) v Petroleum Geoservices Inc,* 2017 SCC 40 at para 24.
[17] See Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World* (London: Routledge, 2016); DN Scott, "Extraction Contracting: The struggle for control of Indigenous lands" (2020) 119:2 South Atlantic Quarterly 269.
[18] Nunavut Agreement, *supra* note 1 ss 26.6.1/26.6.3.
[19] *Ibid* s. 19-11.

Co-Management of Land and Resources

The Nunavut Agreement established a series of advisory boards which provide Inuit with opportunities to participate in decision-making about resource extraction in Nunavut. The Nunavut Wildlife Management Board was established to make decisions about wildlife harvesting in the territory. The Nunavut Planning Commission oversees land use planning for the territory, while the Nunavut Impact Review Board has responsibility for IA. Water licencing and disputes over access to Inuit-owned lands are addressed by the Nunavut Water Board and Nunavut Surface Rights Tribunal, respectively. It must be stressed that these are primarily advisory bodies, as the Nunavut Agreement allows the federal government to reject their advice and/or constrain their processes. [20]

The Nunavut Planning Commission (NPC) and Nunavut Impact Review Board (NIRB) are the co-management boards most relevant to this report. The NPC develops land use plans and issues conformity determinations for proposed extraction. The Nunavut Agreement and NuPPAA both contain provisions for Inuit participation in the NPC's processes. Its board members are appointed by the Federal Minister of Indigenous Affairs, with half of the appointments based on nominations from Inuit organizations. [21] The NPC is required to conduct its business in Inuktitut when requested and must "give weighty consideration to the tradition of Inuit oral communication and decision-making." [22] The Nunavut Agreement gives the GN and Government of Canada shared jurisdiction to approve/reject draft land use plans. [23] NuPPAA extends this jurisdiction sharing, by including NTI (or another "Designated Inuit Organization") as a party that may approve or reject draft land use plans. [24]

In Nunavut, land use planning is directly connected to the IA process. Proposals for mineral exploration and mining in Nunavut can only proceed to IA if they conform with land use plans. [25] All proposals are referred to NPC for conformity determination prior to environmental screening or review by NIRB.

However, if NPC determines that a proposal does not conform with a land use plan, the responsible minister (i.e. the Minister with jurisdiction over the proposed land use) has the sole authority to issue exemptions, allowing a project to proceed to IA. Because the federal Minister of Northern Affairs is responsible for mining and hydrocarbon extraction in Nunavut, provisions for exemptions provide the Government of Canada with significant control over the implementation of land use plans. There are few restrictions on the ability of the minister to issue exemptions, aside from requirements to consult the NPC and provide publicly available written reasons. [26]

Another issue is that the NPC has been unable to develop new land use plans for Nunavut. The only two plans in place – the *Keewatin Regional Land Use Plan and the North Baffin Regional Land Use Plan* – were originally developed in the 1980s by planning boards established through an agreement between the Government of Canada and the Government of the Northwest Territories. [27] The NPC initially sought to continue this regional approach to planning, with extensive work conducted on a draft land use plan in the Kitikmeot region in western Nunavut. However, this process stalled in 2005, amidst conflicts between the NPC

[20] Hicks and White, *supra* note 2.
[21] Nunavut Agreement, *supra Note* 1 ss 11.4.5.
[22] *Ibid* ss. 11.4.15; 11.4.7.
[23] *Ibid* ss. 11.5.6.
[24] Nunavut Planning and Project Assessment Act S.C. 2013, c. 14, s. 2) ss 54.3.
[25] Nunavut Agreement, *supra Note* 1 12.3.4.
[26] NLCA *ibid* ss 11.5; NuPPAA, *supra note* 3 ss 82.3.
[27] Banks, *The Place of Land Use Planning in the TFN Claim* (1987); Nigel Richardson, "Land Use Planning and Sustainable Development in Canada" (1989), online (pdf): *Canadian Environmental Advisory Council* <https://atrium.lib.uoguelph.ca/xmlui/bitstream/handle/10214/15224/LUPSD_land_use_planning_sust_dev1989.pdf?sequence=1&isAllowed=y>.

and the federal government over funding and board appointments. [28]

After a period of internal reorganization, the NPC announced that it would abandon regional planning, and instead focus its efforts on developing a territorial land use plan that would cover all of Nunavut, replacing existing regional plans. Draft Nunavut Land Use Plans were issued in 2012, 2014, and 2016. However, the development of the Nunavut Land Use Plan has been controversial and subject to ongoing delays, mostly due to disagreements over caribou habitat protection. [29]

The NIRB screens and reviews proposals for mineral exploration and extraction in Nunavut. It is also responsible for overseeing the follow-up and monitoring phase of IA. In addition to project-specific IA, NIRB has also conducted a Strategic Environmental Assessment (SEA) into offshore oil and gas extraction in the Qikiqtani region. Like the NPC, the NIRB was designed to provide Inuit with opportunities to participate in resource management. Half of NIRB's board members are appointed based on nominations from Inuit organizations, NIRB is required to operate in Inuktitut when requested, and it must give consideration to Inuit traditions of oral communication and decision-making. [30]

However, the federal government has significant leeway to reject NIRB advice. If, after a screening or review, NIRB recommends a project not proceed, the Minister can reject the recommendation, provided that the project is in the "regional or national interest". [31] Moreover, if NIRB recommends a project proceed under specified terms and conditions, the federal government may reject terms and conditions if they are "more onerous than necessary". [32]

It is also important to note that the NIRB review process is proponent-driven, like most other EA processes in Canada. It is the proponent's responsibility to commission research and prepare an Environmental Impact Statement (EIS), which is the focus of discussion and debate through most of the review. Notably, the proponent is responsible for 'collecting' and 'integrating' Inuit knowledge (usually called *Inuit Qauajimajtauqangit*) into the assessment process.

At the same time, Nunavut's IA processes have many positive attributes. On several occasions, Inuit have used the NIRB process to stop proposals for unwanted extraction, including a controversial expansion to the Mary River mine. As we explain below, the 'community roundtable' component of public hearings make significant space for Inuit participation. Moreover, while it is the proponent's responsibility to collect and integrate Inuit knowledge, Inuit have successfully drawn on Indigenous knowledge to influence process outcomes.

The Mary River Iron Mine

The Mary River mine is owned and operated by Baffinland Iron Mines Ltd. ("Baffinland"), a company based in Oakville Ontario but jointly owned by The Energy and Minerals Group (a private equity firm based in the United States) and AcelorMittal (a multi-national steel company based in Luxembourg). The scope of the Mary River project has changed several times since it was first approved in 2012 through a series of project modifications and expansions (see: Table 1).

[28] Samuel Dyck, *Community politics, governance, and land-use planning in Nunavut: Two decades of controversy over the Nunavut Land Use Plan* (Master of Arts, University of Alberta, 2019)[Unpublished].; *supra* note 2.
[29] Thierry Rodon, Land Use Co-Management in Canada, in *Finnmark Act 15 Years After* (Oslo: Gyldendal, 2021) 289.
[30] Nunavut Agreement, *supra Note* 12.2.6, 12.2.17, 12.2.24.
[31] NLCA *ibid* 12.59/12.5.7.; NuPPAA, *supra* Note 3 95-b.
[32] NuPPAA *ibid* 105-a.

Table 1: Regulatory History of the Mary River iron mine.

	PROPOSED	SHIPPING VOLUME	SHIPPING ROUTE	GOVERNMENT DECISION	PRODUCTION COMMENCED
Original Proposal	2008	18 mt/a	Rail to Steensby Inlet	Approved in 2012	N/A
Early Revenue Phase	2013	4.2 mt/a	Road to Milne Inlet	Approved in 2014	2015
Production Increase Proposal	2017	6 mt/a	Road to Milne Inlet	Approved in 2018	2018
Phase 2 Expansion	2015	12 mt/a	Rail to Milne Inlet	Rejected in 2022	N/A
Production Increase Proposal Renewal	2022	6 mt/a	Road to Milne Inlet	Approved in 2022	2022

The Original Mary River Proposal

The original proposal, submitted in 2008 and approved in 2012, included a port at Steensby Inlet, south of the Mary River mine, near the communities of Igloolik and Sanirajak (formerly Hall Beach). The Steensby port was to be connected to the Mary River mine by railway, which would transport up to 18 mt/a (million tonnes per year) of iron ore. While the municipal governments representing Igloolik and Sanirajak initially opposed the construction of a port at Steensby Inlet, they later changed their positions in exchange for commitments from Baffinland to provide direct benefits to municipalities, including housing and infrastructure. [33]

The NPC issued a positive conformity determination for the Mary River project in 2008, apparently without any Indigenous, stakeholder, or public consultation. [34] A NIRB review of Baffinland's proposal commenced the following year. No intervenor or participant funding was provided to the most affected communities. While QIA participated in all stages of the NIRB process – and engaged with communities through a series of *ad hoc* committees – no written submissions were provided by the municipal governments and HTOs in the most affected communities. [35] In the later stages of the review, the QIA board passed a resolution supporting the Mary River mine. [36]

NIRB conducted public hearings in the summer of 2012, with sessions in Iqaluit, Igloolik, and Pond Inlet. The hearings began with a technical session, where Baffinland and registered intervenors made oral submissions before the board and questioned one-another. This was followed by a 'community roundtable' component, where the conversation focused on questions and statements from representatives of the most affected communities. The roundtable

[33] "Baffin Communities Fight Steensby Inlet Port Plan", *CBC News* (19 August 2011), online: <https://www.cbc.ca/news/canada/north/baffin-communities-fight-steensby-inlet-port-plan-1.1037633>. & Baffin "Mayors Soften Stance on Iron Mine Import" *CBC News* (9 November 2011), online: <https://www.cbc.ca/news/canada/north/baffin-mayors-soften-stance-on-iron-mine-port-1.1049887>.

[34] Nunavut Planning Commission, "Conformity Determination for Baffinland's Mary River Project" (2008), online (pdf): <www.nirb.ca>.

[35] Willow Scobie & Kathleen Rodgers, "Contestation of Resource Extraction Projects via Digital Media in Two Nunavut Communities" (2013) 37:2 Inuit Studies.; Sheena Kennedy Dalseg & Frances Abele, "Language, Distance, Democracy: Development Decision Making and Northern Communications" (2015) 41 The Northern Review.

[36] Nunavut Impact Review Board, "Final Hearing Transcript for Baffinland's Mary River Project" (2012), online (pdf): <www.nirb.ca>.

followed an agenda like the technical sessions, with presentations from the proponent, government regulators, and other intervenors, followed by questions and comments from community representatives.

Aside from their participation in the community round table, there were no formal presentations or other interventions from municipalities or HTOs in the most affected communities. The only formal community-based intervention was organized by Inuk filmmaker and Igloolik resident Zacharias Kunuk. Kunuk's intervention was multifaceted. It included testimony from academics and other professionals with expertise in human rights law, the northern economy, and climate change in Nunavut. Kunuk's team undertook baseline research regarding the local economy, and developed plans for community-driven socio-economic monitoring. [37]

In his presentation to the board, Kunuk advocated for the use of video and digital media to enable Inuit participation in future decisions about the Mary River project. His team also established new digital community-access television stations in affected communities, to provide a forum for Inuit to share information and debate the proposal in their own language. These stations were also used to broadcast NIRB proceedings, in Inuktitut, to affected communities. [38]

NIRB's final report was issued in September 2012, and recommended that the project proceed under specified terms and conditions. [39] The Minister of Aboriginal Affairs responded to NIRB's report in December, accepting the NIRB's recommended terms and conditions without variance. [40] A project certificate for the Mary River mine was issued later that month.

The Early Revenue Phase Proposal

Just two weeks after the project certificate was issued for the original Mary River proposal, Baffinland indicated that it did not have sufficient capital to build a railway to Steensby Inlet and would have to substantially alter its plans for the Mary River mine. [41] It then submitted a new proposal for an Early Revenue Phase of the Mary River project, which included a port at Milne Inlet, north of the Mary River mine. Both Milne Port and the community of Pond Inlet are located within Eclipse Sound, a region notable for its ecological and cultural value, recognized by its inclusion in the Tallurutiup Imanaga National Marine Conservation Area. The Early Revenue Phase proposal called for shipping 4.2 mt/a, using trucks and a tote road to transport the ore from mine to port. Baffinland stated that once it raised enough funds, it would proceed with the Steensby port and rail. [42]

During the NIRB review, the Hamlet of Pond Inlet, the Mittimatalik HTO, and QIA all shared the same basic position. While all three groups had outstanding concerns with the proposal, they indicated that these issues could be addressed through terms and conditions, suggesting support in-principle for the proposed modification. [43] Unlike the NIRB review of the original Mary River proposal, the municipal governments and HTOs representing the most affected community (Pond Inlet) registered as formal intervenors in the NIRB process, with both the Hamlet of Pond Inlet and the Mittimatalik HTO submitting written comments and giving formal presentations at the public hearing. However, both organizations indicated

[37] *Ibid.*
[38] Scobie and Rodgers, *supra* note 4.; Kennedy Dalseg and Abele, *supra* note 5.
[39] Nunavut Impact Review Board, "Final Hearing Report for the Mary River Project" (2012), online (pdf): <www.nirb.ca>.
[40] John Duncan, "Letter to Elizabeth Copeland "(3 December 2012), online: <www.nirb.ca>.
[41] Abele *supra* note 36; Willow Scobie & Kathleen Rodgers, "Diversions, Distractions, and Privileges: Consultation and the Governance of Mining in Nunavut." (2019) 100:3 Political Economy 232.
[42] Nunavut Impact Review Board, "Final Hearing Transcript for Baffinland's Mary River Project" (2014), online: <www.nirb.ca>.
[43] Qikiqtani Inuit Association, "Final Written Submission: Early Revenue Phase: File No. 08MN053" (2022), online: <www.nirb.ca>.; Pond Inlet Hamlet, "Final Written Submission: Early Revenue Phase File No. 08MN053." (2014), online: <www.nirb.ca>.; Mittimatalik Hunters and Trappers Organization, "Final Written Submission: Phase 2 Expansion" (2019), online: <www.nirb.ca>.

that their participation in the assessment was impeded by capacity issues, and expressed concerns that this could affect their participation in the follow-up and monitoring for the Mary River mine.[44]

NIRB issued its final report in March 2014, recommending that the early revenue phase be approved.[45] Bernard Valcourt, then Minister of Aboriginal Affairs, responded to the NIRB report the following month. Valcourt accepted the NIRB recommendation to approve the project, but varied or rejected several terms and conditions recommended by NIRB. For example, the NIRB report recommended a term and condition that would limit the total production levels at the Mary River mine to 18 mt/a, to prevent the Early Revenue Phase from enabling an overall expansion to the project and prematurely exhausting the resource base. However, Valcourt found this term and condition "too onerous" and rejected it.[46] This decision effectively raised the production cap at the mine to 22.5 mt/a. More importantly, it opened the door for Baffinland to further increase the overall scale of the Mary River project through future expansions to its shipping operations through Milne Inlet.

The Phase 2 Expansion: Nunavut Planning Commission & Land Use Plan Conformity

Five months after a project certificate was issued for the Early Revenue Phase, Baffinland stated its intention to further expand shipping through the northern route before constructing the Steensby port and rail.[47] This was apparently because the proponent continued to lack the necessary capital to build a railroad to Steensby Inlet. Baffinland submitted a proposal for an expansion, called Phase 2, that would increase shipping volume through Milne Inlet to 12 mt/a, for a total production level of 30 mt/a. The proposed expansion included an extended shipping season that would include substantial icebreaking.[48]

The Phase 2 proposal did not pass the NPC's land use plan conformity review. The NPC found that the extensive icebreaking proposed by Baffinland contradicted the terms of the *North Baffin Regional Land Use Plan*.[49] Baffinland subsequently wrote to Valcourt, requesting a Ministerial exemption for the Phase 2 proposal.[50] In a series of letters, NTI and QIA urged Valcourt and Baffinland to address the issue through an amendment to the land use plan, to allow for more public involvement and Inuit consultation about icebreaking in the region.[51] The Premier of Nunavut and Mayor of Pond Inlet both wrote to Valcourt requesting he issue an exemption, citing the potential economic benefits of the proposed expansion. While neither of these letters were officially released to the public, the Premier's was eventually leaked to the media.[52] Valcourt issued an exemption later that summer.[53]

[44] Mittimatalik Hunters and Trappers Organization "Final Written Submission: Early Revenue Phase" (2014), online: <www.nirb.ca>.; Hamlet, *supra* note 6.; Rodgers *Supra* note 7.
[45] NIRB 2014, *supra* note 8.
[46] Bernard Valcourt, "Letter to Elizabeth Copeland (NIRB Chairperson)" (2014), online: <www.nirb.ca>.
[47] Baffinland Iron Mines Ltd, "Mary River Project: Phase 2 Development File No. 08MN053" (2014), online: <www.nirb.ca>.
[48] *Ibid*.
[49] Nunavut Planning commission, "Conformity Determination for Baffinland's Mary River Project" (2015), online: <www.nirb.ca>.
[50] Nunatsiaq News, "Inuit organizations join chorus opposing Nunavut mining exemption"(2015), online: *Nunatsiaq News* <https://nunatsiaq.com/stories/article/65674inuit_orgs_join_chorus_against_nunavut_mining_exemption/>
[51] Cathy Towntongie "Letter to Bernard Valcourt (Minister of Aboriginal Affairs). RE: Mary River Project Phase II" (2015), online: <www.nunavut.ca>. ; P.J. Akeeagok "Letter to Bernard Valcourt (Minister of Aboriginal Affairs) and Hunter Tootoo (NPC Chairperson)" (2015), online: < www.nunavut.ca>.
[52] Nunatsiaq News, "Nunavut Premier tries to explain his leaker letter supporting Baffinland" (2015), online: *Nunatsiaq News*, <https://nunatsiaq.com/stories/article/65674premier_tried_to_settle_speculation_over_leaked_letter/>.
[53] N Bernard Valcourt, "Letter to Elizabeth Copeland (NIRB Chairperson), Hunter Tootoo (NPC Chairperson), and E. Madsen (Baffinland)" (2015), online: <www.nirb.ca>; *Nunatsiaq News*, "Valcourt exempts Nunavut iron mine expansion." (2015), online: *Nunatsiaq News* <https://nunatsiaq.com/stories/article/65674breaking_valcourt_exempts_nunavut_iron_mine_expansion_from_npc/?>.

The proposed Phase 2 expansion did not immediately proceed to IA, but instead went through several revisions. Most significantly, in 2016 Baffinland announced that Phase 2 would use a shorter shipping season with significantly less icebreaking. The announcement also stated that Phase 2 would include a railway to Milne Inlet, to replace the existing trucking operation.

This revised proposal for Phase 2 required another amendment to the land use plan, to allow the construction of a railway to Milne Inlet. Hearings were held in 2017. While QIA expressed concerns that Baffinland had not provided sufficient evidence in support of its application, and expressed significant concerns with the potential impacts of the proposed railway on caribou, it did not oppose Baffinland's application. [54] The proposed amendment was, however, opposed by the Hamlet of Pond Inlet and Mittimatalik HTO, both of which were concerned with potential effects of the proposed railway on caribou. [55] The GN argued that the amendment should be approved and that concerns with the railway would be better addressed through an environmental review by NIRB. [56] NPC recommended the amendment be approved, and its recommendation was accepted by the Government of Canada, GN, and NTI. [57]

The Production Increase Proposal

While the Phase 2 proposal worked its way through land use plan conformity, Baffinland submitted another proposal to temporarily increase shipping levels through Milne Inlet to 6 mt/a. After NPC issued a positive conformity determination, the Production Increase Proposal was forwarded to NIRB, which opted to deal with the proposal by reconsidering the terms and conditions of the existing project, rather than conducting a full environmental review. Written comments were solicited, and a community meeting, rather than a formal public hearing, was held in the community of Pond Inlet in July 2018. [58]

While it was "generally supportive" of the proposed production increase, QIA's written comments indicated that it was not satisfied that the proponent had provided sufficient evidence for the project to proceed. However, it also indicated that it had negotiated new mitigations with Baffinland which, if implemented, would address its outstanding concerns. [59] Notably, no written comments were received from the Hamlet of Pond Inlet or the Mittimatalik HTO. Moreover, no transcript of the meeting in Pond Inlet was ever publicly released, with only summary notes included on the NIRB registry. Although the summary notes document numerous concerns Inuit had with the proposed expansion, they did not record the position of either the Hamlet or HTO.

NIRB ultimately recommended that the Production Increase Proposal not proceed, because of concerns with the adequacy of impact predictions and proposed mitigations. [60] QIA responded by writing to Dominic LeBlanc (then Minister of Northern Affairs) and Carolyn Bennett (then Minister of Indigenous Affairs), urging them to approve the proposed expansion to the Mary River project. QIA's letter – which was never released publicly but summarized in subsequent correspondence by LeBlanc and Bennett – indicated strong support for the Production Increase Proposal and expressed serious concern that rejecting it could cause the Mary River mine to cease operations. The Premier of Nunavut apparently

[54] Nunavut Planning Commission, "Public Hearing Transcript: North Baffin Regional Land Use Plan Amendment #3" (2018), online: <www.nunavut.ca>.
[55] Pond Inlet Review Committee, "Submission to the Nunavut Planning Commission for the Public Hearing on North Baffin Regional Land Use Plan Amendment #3" (2017), online: <www.nunavut.ca>.
[56] Nunavut Planning Commission, "Public Hearing Transcript: North Baffin Regional Land Use Plan Amendment #3", (2018), online: <www.nunavut.ca>.
[57] Nunavut Planning Commission, "Notice of Approval of Amendment #3 to the North Baffin Regional Land Use Plan" (2018), online: <www.nunavut.ca>.
[58] Nunavut Impact Review Board, "Reconsideration Report and Recommendations: Production Increase Proposal" (2018), online: <www.nirb.ca>.
[59] Qikiqtani Inuit Association "Final Written Submission: Production Increase Proposal" (2018), online: <www.nirb.ca>.
[60] NIRB 2018 *Supra* note 9.

wrote a similar letter, encouraging the federal government to quickly approve the proposal, to avoid negative economic repercussions for the region. [61]

LeBlanc and Bennet responded to the NIRB report, and the letters from QIA and the GN, by noting that the Government of Canada had to "balance a number of competing issues and interests." [62] They concluded that "maintaining or re-imposing the production and transport caps at 4.2 mt/a is both more onerous than necessary to adequately mitigate impacts, and would undermine the viability of the project and work against the regional interest in that project continuing." [63] The Ministers thus rejected the NIRB recommendation and authorized Baffinland to increase its shipping volume to 6 mt/a of ore through the Northern shipping route.

Phase 2 Expansion: Nunavut Impact Review Board Reconsideration

After the process of land use conformity was completed for the Phase 2 proposal in 2018, NIRB initiated a process to reconsider the terms and conditions of the Mary River project. By the time NIRB began its reconsideration process, Inuit organizations and communities were becoming frustrated with Baffinland's operation of the Mary River mine:

- The Mittimatalik HTO was becoming increasingly concerned with environmental changes that correlated with Baffinland's shipping operations. Key issues included changes to the distribution of marine mammals, as well as the deposition of large amounts of iron ore dust on the land and sea ice. [64] The proponent's monitoring program appears to corroborate some of these observations, most notably changes to narwhal migrations and distribution. [65] Scientific research has also identified a correlation between the commencement of Baffinland's shipping operations and an increase in cortisol levels (a stress hormone) in narwhal. [66] While Baffinland has attempted to dismiss concerns with iron ore dust, arguing that it is not causing "significant" environmental changes, Inuit hunters remain concerned about the consequences of eating animals such as ptarmigan, char, fox, and caribou who have red dust on their bodies or in their organs. [67] James Eetoolook – NTI vice president who is well known in Nunavut for his support for responsible mining – told a reporter from *The Globe and Mail*: "It's a disaster. I've seen mines in the past. This is one of the worst." [68]
- At the same time, QIA and government regulators were raising serious concerns about Baffinland's approach to project monitoring and mitigation. Of particular concern was the fact that the proponent had failed to follow-through with commitments to develop adaptive management plans for the Mary River project. Moreover, a term of Baffinland's project certificate requires it to regularly update its environmental management plans in consultation with two stakeholder advisory groups: a Marine Environment Working Group (MEWG) and Terrestrial Environment Working Group (TEWG). QIA and the Mittimatalik HTO are members of both groups. Members of the MEWG also include Fisheries and Oceans Canada and Parks Canada, while the TEWG includes the GN.

[61] Dominic LeBlanc & Carolyn Bennett, "Letter to Elizabeth Copeland, NIRB Chairperson" (2018), online: <www.nirb.ca>.
[62] *Ibid*.
[63] *Ibid*.
[64] L'Herault *et al*, "Compendium of testimonies on the impacts of BaffinLand Iron Mines's Mary River project on ecosystems, wildlife, and residents of Pond Inlet" (2021) online (video): *vimeo* <https://vimeo.com/505376532>.
[65] Baffinfield Iron Mines, "Annual Monitoring Report for the Mary River Project" (2022), online: <www.nirb.ca>.
[66] Courtney Watt et al, "Cortisol levels in narwhal (Monodon monoceros) blubber from 2000 to 2019" (2021) 7:3 Arctic Science 690.
[67] David Venn, "Baffinland exceeded dust impact projections for 3 straight years: QIA" (6 October 22), *Nunatsiaq News*, online: <https://nunatsiaq.com/stories/article/baffinland-exceeded-dust-impact-projections-for-3-straight-years-qia/>.
[68] Niall McGee, "A Nunavut iron ore mine's expansion exposes unique quandary of Arctic development", *Globe and Mail* (2021) online: <https://www.theglobeandmail.com/business/article-a-nunavut-iron-ore-mines-expansion-exposes-unique-quandary-of-arctic/>.

Members of both the MEWG and TEWG were critical of Baffinland's operation of these groups during the Phase 2 review and/or in written comments on the proponent's annual report. Prominent criticisms included that meetings were poorly organized and that Baffinland routinely ignored the advice of the working groups. [69]

- North Baffin communities and QIA also began to express concern that the Mary River mine was not benefitting community economies as much as anticipated. For example, many Inuit were disappointed with the proponent's record of Inuit employment, as most other mines in Nunavut have workforces with much higher proportions of Inuit employees, and Baffinland has repeatedly failed to meet employment targets set out in the IIBA for the Mary River mine. [70]

Baffinland submitted an addendum to its Environmental Impact Statement in 2018. After a series of technical meetings and written submissions, final hearings were scheduled for the fall of 2019. Written comments submitted in the months leading up to the hearings identified numerous deficiencies in the proponent's environmental impact statement. Scientists working for the GN and Fisheries and Oceans Canada had low confidence in the proponent's impact predictions for caribou and marine mammals, respectively. [71] These concerns were echoed by the QIA, which also argued that Baffinland had failed to meaningfully integrate Inuit knowledge into its impact statement for the Phase 2 expansion, as well as its operations at the existing Mary River project. [72] The Hamlet of Pond Inlet took issue with Baffinland's analysis of socio-economic impacts and approach to community consultations, while a submission from the Mittimatalik HTO indicated opposition to the proposed railway to Milne Inlet and icebreaking associated with the Phase 2 proposal. [73]

Hearings, Regulatory Delays, and the Inuit Certainty Agreement

Public hearings commenced in November 2019. In response to criticism from government and Indigenous intervenors, Baffinland suggested that the significant uncertainty in its impact predictions could be addressed through adaptive management. [74] However, rather than produce adaptive management plans as a part of the NIRB process, Baffinland instead committed to developing these plans following approval of the Phase 2 expansion. Company representatives indicated that it would establish a new "Inuit committee" to act alongside the environmental working groups in providing advice for adaptive management. Because Baffinland had failed to develop adaptive management plans for the existing Mary River mine, it is not surprising that such commitments did little to quell concerns with its proposed expansion.

On the fifth day of the proceedings, NTI brought an oral motion to suspend the hearing for 9-12 months. The motion noted that the large number of questions for Baffinland had caused significant delays in the hearing agenda, which led to incomplete discussion of some technical issues. NTI also argued that, because of the large number of outstanding issues going into the hearing, more time was needed for consultations between Inuit, the proponent, and government regulators. NTI's motion received unanimous support from registered intervenors, and after a brief deliberation, NIRB resolved to suspend the hearing. [75]

[69] Warren Bernauer *et al*, "Undermining Assessment: EIA follow-up, stakeholder advisory groups, and extractive industries in Nunavut, Canada" (2022) 41: 2 Impact Assessment and Project Appraisal.
[70] Thierry Rodon, "Institutional development and resource development: the case of Canada's Indigenous peoples" (2018) 39:1 Can. J. Dev. Stud 119.
[71] Government of Nunavut, "Final Written Submission: Phase 2 Expansion" (2019) online: <www.nirb.ca>.; Department of Fisheries, "Final Written Submissions: Phase 2 Expansion" (2019), online: <www.nirb.ca>.
[72] Qikiqtani Inuit Association, "Final Written Submission: Phase 2 Expansion" (2019), online: <www.nirb.ca>.
[73] Pond Inlet, "Final Written Submission for the Phase 2 Development Proposal" online: <www.nirb.ca>.; Mittimatalik Hunters and Trappers Organization, "Final Written Submission: Early Revenue Phase" online: <www.nirb.ca>.
[74] Nunavut Impact Review Board "Public Hearing Transcript: Phase 2 Proposal. Vol 1-5, November 2-6" (2019), online: <www.nirb.ca>.
[75] *Ibid*.

While the hearings were suspended, the federal government provided intervenor funding to the Hamlets and HTOs from North Baffin. In March 2020 NIRB attempted to organize technical meetings to help intervenors resolve outstanding issues prior to the resumption of hearings. However, the onset of the COVID pandemic resulted in an indefinite delay in the process. By this point, Baffinland was becoming increasingly desperate to have the Phase 2 expansion approved and suggested that regulatory delays and uncertainty threatened the viability of the Mary River mine. It indicated that the economics of the project were in question, and that it required some certainty that the expansion would be approved to secure financing for its operations. In his intervention, Enookie Inuarak expressed frustration with the pressure from Baffinland to increase production, citing building tensions between communities and community members, "Once they got approved, then they wanted to expand some more. They said the iron ore – selling the iron ore was too cheap... they got approval for 6 million, now they're requesting 12 million because they can't do it. It's been 12 years. They keep being threatened that we can't continue this mine because they don't have enough money. It's a threatening manner that we get each time, and this is what's separating the Inuit. How long are they going to continue to use that tactic is a big question. And I wanted to say this in English: Baffinland doesn't understand the impacts their current project is having on Inuit hunting rights and culture. Why should we enter approval of Phase 2 before Baffinland starts addressing impacts to Inuit harvesting rights?... We don't want to sacrifice our culture and traditions for the sake of money and few benefits, and we ask other communities not to sacrifice us".[76]

Baffinland's financial problems were likely due, at least in part, to the large amount of money it owes to contractors that had been hired to construct the Phase 2 expansion, even though the regulatory process had not come to completion. Four companies have filed liens against Baffinland, related to contracts for the construction of the Phase 2 expansion, totalling over one hundred million dollars.[77] According to documents filed with the Nunavut Court of Justice, companies mobilized workers, materials, and equipment to the mine site in the summers of 2017 and 2019, under the direction of Baffinland.[78] This was despite the fact that, in both cases, it seemed clear that the regulatory process would not be complete in time for work to occur.

In any case, Baffinland's financial troubles and ongoing regulatory delays led to the negotiation of an Inuit Certainty Agreement (ICA) with QIA in the spring of 2020. The agreement, which was intended to resolve the QIA's outstanding concerns with the Phase 2 proposal, included provisions for Inuit participation in adaptive management, direct benefits for North Baffin communities, and compensation for negative effects on Inuit harvesting practices. In return, QIA provided support in-principle for the Phase 2 expansion, although the agreement stipulated that QIA's support would be withdrawn if North Baffin communities did not endorse the ICA. It is important to note that this conditional support was given in the context of public threats of project closure and mass layoffs.

The ICA's emphasis on Inuit participation in adaptive management appears to have been an attempt to assert Inuit authority over IA follow-up. As we have seen, there were serious concerns by Inuit organizations and government regulators with Baffinland's approach to monitoring and mitigation at the existing Mary River mine, including its failure to develop adequate adaptive management plans. The ICA included mechanisms for Inuit involvement

[76] Nunavut Impact Review Board, "Public Hearing Transcript: Phase 2 Proposal Volume 21" (2021), online: <www.nirb.ca>.

[77] Beth Brown, "Baffinland faces millions in liens over stalled expansion." (27 January 2020), online: *CBC News North* < https://www.cbc.ca/news/canada/north/baffinland-contractors-file-liens-mary-river-expansion-1.5439042>; Jane George, "Baffinland signed contracts for its railway and mine expansion before project approved, documents show" (5 November 2021), online: *CBC News North* < https://www.cbc.ca/news/canada/north/baffinland-nirb-hearings-1.6238258>.

[78] Aecon Mining Construction Services. Notice to Defendant (Baffinland Iron Mines Ltd.). January 7, 2020. Nunavut Court of Justice; Tower-EBC. Notice to Defendant (Baffinland Iron Mines Ltd.). March 2019. Nunavut Court of Justice.

in project monitoring and adaptive management moving forward. An "Inuit Committee" was to be established, with representatives from North Baffin communities, to guide the selection of adaptive management indicators, thresholds, and actions/responses. Final adaptive management plans would require approval by both QIA and the proponent. Inuit-led monitoring, funded by Baffinland, would supplement the proponent's monitoring programs. QIA would have the ability to order a temporary (five-day) shut down of the Mary River mine if Baffinland failed to implement the actions/responses established in the adaptive management plan.

Through its provisions for Inuit involvement in adaptive management, the ICA provides Inuit with some authority over follow-up and monitoring for the Mary River mine. Later in the NIRB process, Baffinland representatives frequently overstated the degree of control Inuit would have over the project. For example, they repeatedly stated that the agreement contained a "red button" that would allow Inuit to shut down operations if "they think that... their animals are being impacted."[79]

In fact, Inuit authority under the ICA is limited. The agreement is clear that "high-level actions" (i.e. actions that affect the scope, scale, or viability of the project) require higher levels of scientific certainty with regards to the cause of observed environmental changes.[80] Because there are multiple drivers of environmental change in the Arctic, and because of gaps in baseline data, the level of "certainty" required to trigger high level actions may be unattainable. Moreover, if Baffinland and QIA cannot reach an agreement on the development of adaptive management plans or the implementation of actions/responses, either party can refer the matter to expedited arbitration. QIA's[81] ability to order temporary project shut-downs as part of the arbitration process may provide it with significant leverage in negotiations with the proponent. However, insofar as these shutdowns are temporary and connected to an arbitration process, they do not give Inuit control over the long-term trajectory of the Mary River mine. While the ICA's provisions provide new opportunities for Inuit to influence follow-up and monitoring for the Mary River project, they do not provide Inuit with clear authority to compel the proponent to implement specific mitigations, let alone a "red button" to halt operations until issues are resolved to their satisfaction.

The NIRB process resumed in the fall of 2021 with written submissions and a virtual technical meeting, intended to resolve outstanding issues prior to the recommencement of formal hearings. QIA indicated that most of its concerns with the Phase 2 project had been satisfied by the Inuit Certainty Agreement.[82] In a series of joint letters, the Mayors and HTO chairpersons from North Baffin communities expressed frustration that they were not meaningfully consulted prior to QIA signing the ICA, as well as concern that public health restrictions would impede their participation in the NIRB process moving forward.[83] During the public hearings in November, 2021, Enookie Inuarak, a member of the Mittimatalik Hunters and Trappers' Organization presented an intervention on behalf of Pond Inlet. Inuarak stated that Baffinland's dismissal of Inuit concerns regarding the current impacts from the mine, in favour of promising future benefits, was being perceived as a bribery attempt, "...I want to tell Baffinland: Once this hearing is over, when you talk about benefits, it sounds like you're trying to buy us, the way you're talking about it. You keep saying "we're going to do this, we're going to do

[79] Nunavut Planning Commission, "Public Hearing Transcript: Phase 2 Proposal Volume 17" (2021), online: <www.nirb.ca>.
[80] Inuit Certainty Agreement, "Section 2.1.3" online (pdf): <https://www.qia.ca/wp-content/uploads/2020/12/inuit-certainty-agreement-1.pdf>.
[81] *Ibid* at 2.1.16; 2.1.6.
[82] Qikiqtani Inuit Association, "QIA Update Regarding Ongoing Resolution of Technical Issues (2020), online: <www.nirb.ca>.
[83] North Baffin Communities, "Letter to P.J. Akeeagok (President, QIA) RE: North Baffin Community Concerns with the Inuit Certainty Agreement" (2021), online: <www.nirb.ca>.; North Baffin Communities Letter to Kaviq Kallurak (Chairperson, NIRB) RE: Process Update" (2021), online: <www.nirb.ca>.

that" ...I want to tell you–our culture and our traditions are not for sale". [84] This highlights that opposition to the phase 2 expansion was exacerbated by Baffinland's refusal to act on current Inuit concerns regarding impacts to animals and the land, instead using mitigation commitments as leverage to seek community support.

Phase 2 Hearings Resume

Hearings recommenced in late January 2021. By this point opposition to the Phase 2 expansion had spread beyond the Mittimatalik HTO. The HTOs and Hamlets from the five most affected communities (Pond Inlet, Clyde River, Sanirajak, Igloolik, and Arctic Bay) released a joint-statement opposing the expansion at the outset of hearings: "The existing Mary River mine and proposed expansion have caused serious concern among North Baffin communities. While there are some benefits, we are not convinced the benefits outweigh the adverse impacts. We support the positions of the Mittimatalik Hunters and Trappers Organization and Hamlet of Pond Inlet. There is too much uncertainty to make an informed decision about this project. Baffinland has not provided enough evidence that it can do the expansion safely." [85]

The Mittimatalik HTO's presentation at the hearings was notable for its use of video media to draw on Inuit knowledge to assess the impacts of Baffinland's operations. In a compendium of video testimony, hunters and Elders from Pond Inlet discussed several environmental changes that correlate with the operation of the Mary River mine, including changes to sea mammal distribution and the presence of iron ore dust on the land and sea ice. Participants also expressed concern that Baffinland's proposal to double shipping could exacerbate these negative trends. [86]

Due to the large number of questions put to the proponent by community intervenors, the hearings again fell behind schedule. [87] As a result, additional in-person meetings were scheduled for April 2021. However, an outbreak of COVID-19 in Iqaluit forced NIRB to adjourn the hearings before the agenda was completed. [88] Hearings resumed in November 2021 with a Community Round Table session. At the end of the round table, representatives from five of the 6 communities recommended the proposal not be approved at the time. However, most communities expressed a desire to maintain present operations at the Mary River mine. [89] Intervenors and the proponent were given an opportunity to submit written closing statements after the in-person hearings concluded. Most relevant Inuit organizations, as well as several municipalities, recommended the Phase 2 expansion not proceed. [90] Statements expansion

[84] Nunavut Planning Commission, "Public Hearing Transcript: Phase 2 Proposal Volume 21" (2021), online (pdf): <www.nirb.ca>.

[85] Beth Brown, "Mary River expansion hearings open to opposition from Nunavut communities" (2021), online: *CBC News North* <https://www.cbc.ca/news/canada/north/baffinland-hearings-nunavut-1.5888883>.

[86] L'Herault, *supra* note 11.

[87] Nunavut Impact Review Board, "Public Hearing Transcript: Phase 2 Proposal Volume 1-12" (2021), online (pdf): <www.nirb.ca>.

[88] Nunavut Impact Review Board, "Public Hearing Transcript: Phase 2 Proposal Volume 13-15" (2021), online (pdf): <www.nirb.ca>.

[89] NIRB 2021, *supra* note 12.

[90] See: Qikiqtani Inuit Association, "Closing Statement: Mary River Phase 2 Expansion" (10 January 2022), NIRB File No. 08MN053, online: <www.nirb.ca>; Nunavut Tunngavik Incorporated, "Closing Statement: Mary River Phase 2 Expansion" (10 January 2022), NIRB File No. 08MN053, online: <www.nirb.ca>; Mittimatalik Hunters and Trappers Organization, "Closing Statement: Mary River Phase 2 Expansion" (10 January 2022), NIRB File No. 08MN053, online: <www.nirb.ca>; Hamlet of Clyde River and Nangmautaq Hunters and Trappers Organization, "Closing Statement for the NIRB Review of Baffinland's 'Phase 2' Proposal" (6 January 2022), NIRB File No. 220108-08MN053, online: <www.nirb.ca>; Igloolik Working Groups, "Closing Statement: Mary River Phase 2 Expansion" (10 January 2022), NIRB File No. 08MN053, online: <www.nirb.ca>; Ikajutit Hunters and Trappers Organization, "Closing Statement: Mary River Phase 2 Expansion," (10 January 2022), NIRB File No. 08MN053, online: <www.nirb.ca>; Hamlet of Sanirajak, "Closing Statement: Mary River Phase 2 Expansion," (10 January 2022), NIRB File No. 08MN053, online: <www.nirb.ca>.

were received from the GN,[91] as well as the Hamlets of Pond Inlet,[92] Arctic Bay,[93] Sanirajak,[94] and Grise Fiord.[95]

Nunavut Impact Review Board Recommendation and Minister Decision for Phase 2

The NIRB released its report in May 2022, recommending the Phase 2 proposal not be approved. The recommendation was based on the board's conclusion that the proposed monitoring and adaptive management programs for the Phase 2 project were insufficient to avoid or adequately mitigate the expansion's adverse effects. The report concluded that there was significant uncertainty in the proponent's impact predictions, exacerbated by the incomplete nature of the proponent's adaptive management plans. It also noted widespread dissatisfaction with the proponent's approach to monitoring and mitigation at the existing project, as well as its efforts to integrate Inuit knowledge into its impact assessment and operations.[96] The Minister of Northern Affairs responded in November 2022, accepting the NIRB recommendation that the Phase 2 expansion should not proceed as currently proposed. The Minister's letter indicated that, during post-IA consultations, there was a consensus among Inuit organizations (NTI, QIA, and HTOs) that the proposed project should not proceed at this time.[97]

Production Increase Proposal Renewal

When Baffinland was approved to increase production from 4.2 mt/a to 6 mt/a, this variance was intended to be temporary, and was set to expire at the end of 2020. It was assumed that the NIRB review of the Phase 2 proposal would be completed by this time. However, as we have seen, the review of Phase 2 was repeatedly delayed. A one-year extension to the production increase was issued in 2020.

Shortly after NIRB issued its recommendation that Phase 2 be rejected, Baffinland wrote to the Minister of Northern Affairs, requesting an "emergency order" allowing it to continue operating at 6 MT/a. The letter claimed that Baffinland would be forced to layoff its workforce and place the Mary River project into care and maintenance if its demands were not met.[98] The minister responded one week later, denying Baffinland's request for an emergency order, citing a lack of Inuit support and a need to respect Nunavut's co-management processes.[99]

On July 19, NIRB formally initiated its assessment of Baffinland's proposed "renewal" of its production increase. It announced that the assessment would be expedited and would not include a public hearing component. Written technical comments were solicited, with less than 14 working days for intervenors and the public to submit comments. A community roundtable meeting, rather than a technical hearing with presentations by intervenors, was held in Pond Inlet.[100]

[91] Government of Nunavut, "Closing Statement: Mary River Phase 2 Expansion," (10 January 2022), NIRB File No. 08MN053, online: <www.nirb.ca>.
[92] Hamlet of Pond Inlet, "Closing Statement: Mary River Phase 2 Expansion," (10 January 2022), NIRB File No. 08MN053, online: <www.nirb.ca>.
[93] Hamlet of Arctic Bay, "Closing Statement: Mary River Phase 2 Expansion," (10 January 10 2022), NIRB File No. 08MN053, online: <www.nirb.ca>.
[94] Hamlet of Sanirajak, "Letter of Support for Baffinland's Production Increase Renewal Proposal," (28 October 2021) NIRB File No. 08MN053, online: <www.nirb.ca>
[95] Hamlet of Grise Fiord, "Closing Statement: Mary River Phase 2 Expansion," (10 January 2022), NIRB File No. 08MN053, online: <www.nirb.ca>.
[96] Nunavut Planning Commission, "Reconsideration Report and Recommendations for Baffinland's Phase 2 Development Proposal" (2022), online (pdf): <www.nirb.ca>.
[97] Dan Vandal, "Letter to Kaviq Kallurak (NIRB Chairperson)" (2022), online (pdf): <www.nirb.ca>.
[98] Nunatsiaq News, "Baffinland Warns of Layoffs in Emergency request over Shipping Limits" (2022), online: *Nunatsiaq News* <https://nunatsiaq.com/stories/article/baffinland-warns-of-layoffs-in-emergency-request-over-shipping-limits/>.
[99] Nunatsiaq News, "No Emergency Order for Baffinland" (2022), online: *Nunatsiaq News* <https://nunatsiaq.com/stories/article/no-emergency-order-for-baffinland/>.
[100] Nunavut Planning Commission, "Reconsideration Report and Recommendations for Baffinland's Phase 2 Development Proposal" (2022), online: <www.nirb.ca>.

Written comments indicate a desire by most communities to maintain operations at Mary River, but also growing frustration with Baffinland's approach to project operations. The Pond Inlet HTO indicated its opposition to the proposed renewal of the production increase, based on a motion passed at a general members' meeting.[101] The Hamlet of Clyde River wrote that it was unable to provide technical comments, because it was unable to find a technical advisor to review regulatory documents on such short notice.[102] Submissions supporting the proposal were received by the Hamlet of Sanirajak and the Igloolik and Arctic Bay HTOs Ikajutit HTO.[103] The GN stated that it had outstanding concerns with Baffinland's assessment of ecosystem and socioeconomic effects but did not state a position regarding whether the project should proceed.[104]

QIA's technical comments gave conditional support for the renewed production increase. The submission indicated that QIA would only support the renewal if it was limited to one year, after which time a full reconsideration of Baffinland's project must be conducted to address outstanding concerns with the current operations. Other conditions included immediate changes to the structure of the environmental working groups, the establishment of a compliance monitoring board, and the establishment of an Inuit-led monitoring program. QIA echoed Clyde River's concern that the expedited review process impeded meaningful participation of community-level organizations: "The timelines for this review limits the ability of Inuit to fully engage and meaningfully participate in the NIRB review process in order to identify what terms and conditions should be in place for a renewal of the 6 mtpa expanded production and shipping rate…[T]he very short time windows and the time of year mean that many of the Inuit harvesters and land users whose views are key in this process are unavailable."[105]

Further, because of the large number of changes to the Mary River project, according to QIA, Inuit organizations and communities "have struggled to resource and actively participate in ten years of non-stop hearings and reviews of seven different proposals for Project changes or expansions."[106]

In the lead-up to the meeting in Pond Inlet, Baffinland announced that it would proceed with layoffs if it did not receive approval by the end of August.[107] At the same time, comments on Baffinland's annual monitoring report showed ongoing concern with narwhal numbers in the project area. For example, in response to concerns raised by QIA, DFO stated: "the decline or displacement of narwhal of the Eclipse Sound summer stock are significant and appear to be persistent."[108]

The community round table in Pond Inlet was held on August 11. No transcript of the meeting was publicly released. However, subsequent submissions from the Pond Inlet HTO argued the meeting was biased in favour of the proponent, in part because intervenors were not given an opportunity to present: "Allowing only [Baffinland] to make a presentation to community

[101] Mittimatalik Hunters and Trappers Organization, "Technical Review Comments for Baffinland's Production Increase Renewal Proposal" (2022), online: <www.nirb.ca>.
[102] Hamlet, *supra* note 6.
[103] Sanirajak, "Letter of Support for Baffinland's Production Increase Renewal Proposal" (2022), online: <www.nirb.ca>.; Igloolik HTO (Hunters and Trappers Organization), "Conditional Support for Baffinland's Production Increase Renewal Proposal" (2022), online: <www.nirb.ca>.; Ikajutit HTO Hunters and Trappers Organization. "Closing Statement: Mary River Phase 2 Expansion" (2022), online: <www.nirb.ca>.
[104] Government of Nunavut, "Technical Comments: Mary River Production Increase Renewal" (2022), online: <www.nirb.ca>
[105] Qikiqtani Inuit Association, "Technical Review Comments for Baffinland's Production Increase Renewal Proposal" (2022), online: <www.nirb.ca>.
[106] *Ibid*.
[107] Nunatsiaq News, "Baffinland issues layoff notices to more than 1,100 employees" (2022), online: *Nunatsiaq News* <https://nunatsiaq.com/stories/article/baffinland-issues-layoff-notices-to-more-than-1100-employees/>.
[108] Department of Fisheries, "Fisheries and Oceans Response to QIA Comment on Baffinland Annual Monitoring Report" (2022), online: <www.nirb.ca>.

representatives has meant that these attendees really have no idea what the positions or issues other agencies have with respect to the [proposal]. Hearing only from [Baffinland] leads to a very one-sided understanding of a project proposal and potential impacts."[109]

The NIRB report was released on September 22, recommending the production increase be renewed for one year.[110] The Minister of Northern Affairs responded on October 4, accepting NIRB's recommendation and authorizing Baffinland to continue operating at 6 MT/a in 2022.[111]

In December 2022, Baffinland announced that it would work with communities and Inuit organizations to develop a proposal to maintain operations at 6 mt/a into the foreseeable future, avoiding layoffs despite the rejection of Phase 2.[112] This approach seems to satisfy many North Baffin community organizations that opposed the phase 2 expansion but supported the production increase renewal. However, the Mittimatalik HTO – whose members have the most to lose if negative environmental trends continue – clearly opposed Baffinland production increase renewal. It remains unclear whether Baffinland's future efforts at engagement will succeed in persuading hunters in Pond Inlet to consent to the operation of the Mary River mine at present production levels.

Discussion and Conclusions

The Nunavut Agreement and the co-management regime it established are sometimes cited as examples of best practices in resource management, especially with regards to the integration of Indigenous knowledge and the facilitation of Indigenous participation. Peletz *et al*. (2020) suggest that the NIRB process can serve as a model for Indigenous-led IA in Canada.[113] They argue that Indigenous leadership over Nunavut's IA process unfolds through Inuit representation on co-management boards, the integration of Inuit knowledge and culture into NIRB processes and decisions, and NIRB oversight of follow-up and monitoring.

However, our review of the regulatory history of the Mary River mine suggests that "Indigenous-led" is a poor descriptor of Nunavut's IA process. This is not to say that NIRB does not have positive attributes that can inform best practices. Many of NIRB's unique and innovative procedures, like its community roundtables, provide substantial opportunities for Inuit *participation*. In some cases, Inuit have successfully *influenced* the NIRB process to stop risky and controversial proposals for extraction. In addition to Pond Inlet's successful opposition to the Phase 2 expansion of the Mary River mine, Inuit communities have used their participation in NIRB processes to stop proposals for uranium mining and mineral exploration in sensitive caribou habitat.[114]

However, Inuit *authority* over the IA process is clearly limited. Like most other project-specific review processes in Canada, the NIRB process is largely proponent-driven. Federal ministers of the Crown retain authority over decisions and jurisdiction over the NIRB process, and on several occasions have rejected recommendations from co-management boards. We also found evidence of Inuit community participation being curtailed at key moments in the development of the Mary River project. For example, the production increase proposal and subsequent renewal were approved based on narrow and expedited reviews, with the renewal vocally opposed by the Pond Inlet HTO. Moreover, throughout the many screenings, reviews, and land use conformity processes associated with the Mary River mine, municipal governments and community HTOs indicated that they lacked the capacity to meaningfully participate.

[109] Mittimatalik Hunters and Trappers Organization, Post Community Roundtable Comments for Baffinland's Production Increase Proposal Renewal (2022), online: <www.nirb.ca>.
[110] NIRB 2022, *supra* note 13.
[111] Dan Vandal, "Letter to Kavviq Kallurak (NIRB Chairperson)" (2022), online: <www.nirb.ca>.
[112] Nunatsiaq News, "Baffinland Working on Proposal to keep River Mine Open" (2022), online: *Nunatsiaq News* <https://nunatsiaq.com/stories/article/baffinland-working-on-proposal-to-keep-mary-river-mine-open/>.
[113] Peletz, *supra* note 14.
[114] Joan Scottie et al, "*Will Live for Both of Us: A History of Colonialism, Uranium Mining, and Inuit Resistance*" (Winnipeg University of Manitoba Press 2022).; Dyck *Supra* note 15.

Some of the reasons Peletz *et al*. give for characterizing NIRB as an Indigenous-led process were sources of serious concern with the Mary River project, including integration of Inuit knowledge and culture, as well as the lack of Inuit control over follow-up and monitoring. The authors' suggestion that Inuit representation on the NIRB board is indicative of Inuit leadership also appears inaccurate. While half of the board is appointed based on nominations by Inuit, and the majority of board members are Inuit, NIRB was explicitly established as an "Institution of Public Governance" that makes decisions based on the public interest, rather than Inuit interests.

While Peletz *et al*. acknowledge some shortcomings regarding Inuit authority over NIRB, they suggest these issues could partially be resolved if the GN obtained jurisdiction over Crown lands and mineral resources through a devolution agreement with the federal government. However, even if the GN had decision-making authority over extraction in Nunavut, it is not clear that this would translate into stronger Indigenous leadership over IA. Like NIRB, the GN is a public government, with a mandate to act in the public interest. Moreover, in our review of regulatory documents, we found that the GN repeatedly sided with the proponent in disputes between Inuit communities and Baffinland. When federal ministers rejected recommendations from co-management boards, they often did so with the support of the GN and against the wishes of Inuit organizations representing the most affected communities, like the Pond Inlet HTO. It is also important to note that many Inuit, including Inuit organizations like NTI, have grown frustrated and lost confidence in the ability of the GN to serve as a mechanism of self-determination and decolonization, with NTI currently developing a proposal for Inuit organizations to take over the administration of some of the GN's responsibilities. [115] As such, it seems unlikely that greater GN authority would necessarily create more space for Inuit perspectives, or provide communities with greater control over their land and resources.

The results of our analysis suggest that co-management arrangements will not always produce IA processes that can be easily characterized as 'Indigenous-led'. There is a variety of co-management arrangements for IA in Canada. While some processes include provisions for joint decision-making, in other cases the Crown retains ultimate authority over both the IA process and decisions to approve or reject proposals. [116] By including co-management arrangements where the Crown holds unilateral decision-making power in the category of Indigenous-led IA, we risk weakening the concept of Indigenous leadership, especially when Indigenous communities do not assert that the process is Indigenous-led. Moreover, it makes it difficult for Indigenous communities that currently have Crown-controlled co-management processes in place to use the concept of Indigenous-led IA to increase their authority over lands and resources.

An important lesson from our research is the need to extend Indigenous participation and authority beyond the initial assessment and decision, to include the entire lifecycle of IA. With regard to land use planning in Nunavut, there is an opportunity to increase Inuit jurisdiction over the implementation of land use plans in Nunavut. Presently, federal Ministers can unilaterally issue exemptions to projects that do not conform with land use plans. We also found considerable frustration with the inability of Inuit to significantly influence follow-up and monitoring at the Mary River mine. This suggests that conceptions of Indigenous-led IA need to be expanded to account for Indigenous participation in, and authority over, pre-assessment land use planning and post-assessment implementation and follow-up.

[115] Nunatsiaq News, "Nunavut Tunngavik Inc. board considers self-government options" (2021), online: *Nunatsiaq News* <https://nunatsiaq.com/stories/article/nunavut-tunngavik-inc-board-considers-self-government-options/>.
[116] Gibson et al, *supra* note 15; Graham White, "Issues of Independence in Northern Aboriginal-State Co-Management Boards." (2018) 61:4 JLME 550.

Both the NIRB process and Inuit interventions into NIRB reviews have many valuable lessons for Indigenous-led IA. The community round tables provide an interesting mechanism to include community perspectives in board decisions. Zacharias Kunuk's use of digital and video media to engage the public in Inuktitut, as well as the Pond Inlet HTO's use of video to analyze environmental changes associated with Baffinland's operations, are important examples of the potential for film to enable more meaningful Indigenous participation in IA processes. This work built on a long history of Inuit using film as a tool to advocate for their rights and interests, including to participate in decisions about resources. [117] In the context of IA, film may better accommodate Indigenous nations with oral traditions than the conventional requirement for written submissions. Further, while the NIRB process itself may not be accurately characterized as 'Indigenous-led', some of the interventions from Inuit organizations and communities were examples of Indigenous assessments, especially the Mittimatalik HTO's video submissions during the assessment of the Phase 2 expansion.

[117] Michael Evans, "Inuit Video Art" (Montreal/Kingston: McGill Queens University Press, 2008).; Martin Keavy, "On the Hunting and Harvesting of Inuit Literature" in Reder, D(ed), *Earn, Teach, Challenge: Approaches to Indigenous Literature* (Waterloo: Wilfred Laurier University Press) 445.; Tartak, C. Green, E. and Bernauer, W, "Inuit Perspectives on Caribou Management Workshop. Report prepared for the Kangiqliniq Hunters and Trappers Organization."(2019), Online: <https://www.nwmb.com/en/conservation-education/list-all-documents/funding-guides/iqrf-final-project-reports/8329-iqrf-2019-001-k-hto-inuit-perspectives-on-caribou-management-final-report/file>.;Natalie Baird, "Visualizing changing oceans: Inuit Qaujimajatuqangit and participatory arts- based methods in Pangnirtung, Nunavut" (Master of Arts, University of Manitoba 2020) [Unpublished]; Mark Turner, : "*Inuit TakugatsaliuKatiget / On Inuit Cinema*" (Newfoundland: Memorial University Press, 2022).

Impact Assessment in the Ring of Fire: Contested Authorities, Competing Visions and a Clash of Legal Orders

Dayna Nadine Scott*

Table of Contents

Abstract

In 2007, a significant mineral deposit dubbed the "Ring of Fire" was discovered in the boreal peatlands in Treaty No.9 territory in the far north of Ontario. The original project proposal submitted to the Canadian Environmental Assessment Agency was for a chromite mine and an associated infrastructure corridor to connect the remote location to the provincial highway system. As years went by without progress on the regulatory approvals, the proponent sold its claims at a loss. In the period that followed, Ontario negotiated with the Matawa First Nations (the nine most proximate First Nations) who were, as a united block, claiming to hold inherent jurisdiction and governing authority over their homelands in the Ring of Fire region, an area exclusively occupied by Indigenous peoples. Those negotiations soon broke down and Ontario pivoted to bilateral negotiations with individual "mining-ready" First Nations. Deal-making from that approach has produced two First Nations willing to act as proponents for all-season roads along the same corridor as the mining road originally proposed. Three road segments became subject to both provincial and federal environmental/impact assessments. The Impact Assessment Agency of Canada also initiated a Regional Assessment for the Ring of Fire region, which was intended to examine the cumulative impacts of all the expected changes in the region brought about by opening up the far north. Each of these assessments is now mired in controversy about who holds jurisdiction, who can provide or withhold their consent to major projects in the region, and whose law applies when environmental/impact assessments are conducted. This case study illustrates how difficult it can be to apply a term such as "Indigenous-led impact assessment" in a context of overlapping territories, competing authorities, and multiple legal orders.

* The author wishes to acknowledge the skilled research assistance and insights of Osgoode JD student Isabel McMurray.

Introduction

The "Ring of Fire" is the name given to a significant deposit of minerals discovered in the boreal far north of the province of Ontario in 2007. The deposit was once hyped for the presence of chromite, although it is now nickel—a crucial component of electric vehicle batteries, said to be necessary for the transition to a green economy—that is attracting the most attention. The "critical minerals" strategies of both Ontario and Canada lay out a rationale for mining in the Ring of Fire as a part of a strategic effort to secure supply chains for electric vehicle batteries. [1] But development of the mineral resources of the Ring of Fire has been on the table for over a decade, long before these rationales for the mining emerged. Despite the enthusiasm of multiple successive governments, the remote location and lack of infrastructure, as well as the inability of governments to obtain the buy-in of all the First Nations communities in the region, has meant that the imminent and dramatic change to the region that has been repeatedly predicted is still uncertain, and at least several years off.

The Hudson Bay Lowlands remains one of the world's largest, most intact ecological systems. They form part of the world's second-largest peatland complex and are globally significant for both climate change and biodiversity protection. [2] These peatlands sequester an estimated 35 billion tons of carbon. [3] The boreal forest and peatlands thus play key roles in regulating the climate. In fact, one reason that proposed mining in this region generates so much controversy is that both proponents and opponents of development are now mobilizing climate justice rationales. There are concerns about the long-term release of carbon resulting from disturbance of the peatlands, weighed against arguments that Canada will need to expedite critical minerals projects to meet our ambitious objective to transition to a net-zero economy by 2050. [4]

Any potential for wealth generation in developing the Ring of Fire is also accompanied by the potential for significant negative impacts on the remote Anishinaabe and Anishini communities that are the region's sole occupants. These communities are already experiencing an ongoing state of social emergency: youth suicide, addiction, and housing crises are recurring, COVID-19 exposed major health vulnerabilities, and persistent deficits of essential community infrastructure, including safe drinking water. [5] Any credible assessment of the potential risks

[1] The rationales are either explicit or implied. See, for example: Ontario, Ministry of Mines, *Ontario's Critical Minerals Strategy: Unlocking potential to drive economic recovery and prosperity 2022-2027* (March 2022) at 13–14, 24–26, online (pdf): *Ontario.ca* <https://www.ontario.ca/files/2022-03/ndmnrf-ontario-critical-minerals-strategy-2022-2027-en-2022-03-22.pdf>; Canada, Natural Resources Canada, *From Mines to Mobility: Seizing opportunities for Canada in the global battery value chain—What we heard report* (2020), online (pdf): *Canada.ca* <https://publications.gc.ca/collections/collection_2021/rncan-nrcan/M4-203-2020-eng.pdf>; Canada, Natural Resources Canada, *The Canadian Critical Minerals Strategy— From Exploration to Recycling: Powering the Green and Digital Economy for Canada and the World* (9 December 2022) at 12, 22–24, online (pdf): *Canada.ca* <https://www.canada.ca/content/dam/nrcan-rncan/site/critical-minerals/Critical-minerals-strategyDec09.pdf> [NRCan, The Canadian Critical Minerals Strategy].

[2] Mushkegowuk Council, Press Release, "MC announces new Indigenous-led Project to protect Globally significant Marine Area" (1 October 2020) online: *Mining Life* <https://mininglifeonline.net/company-news/mc-announces-new-indigenous-led-project-to-protect-globally-significant-marine-area/14569>. The Lowlands are "also an important global stopover for billions of migratory birds": Parks Canada, News Release, "Government of Canada and Mushkegowuk Council working together to protect western James Bay" (9 August 2021) online: *Government of Canada* <https://www.canada.ca/en/parks-canada/news/2021/08/government-of-canada-and-mushkegowuk-council-working-together-to-protect-western-james-bay.html>.

[3] James Wilt, "The battle for the 'breathing lands': Ontario's Ring of Fire and the fate of its carbon-rich peatlands" *The Narwhal* (11 July 2020), online: <https://thenarwhal.ca/ring-of-fire-ontario-peatlands-carbon-climate/>.

[4] NRCan, The Canadian Critical Minerals Strategy, *supra* note 1 at 26.

[5] See, for example, Olivia Stefanovich, "COVID-19 tents, shacks turned into homes amid housing crisis in Eabametoong First Nation" *CBC* (25 February 2021), online: <https://www.cbc.ca/news/politics/eabametoong-housing-crisis-covid-isolation-tents-1.5924625>; Jamie Pashagumskum, "Neskantaga First Nation issues state of emergency for members off reserve" *APTN National News* (24 February 2021), online: <https://www.aptnnews.ca/national-news/neskantaga-first-nation-issues-state-of-emergency-for-members-off-reserve/>; Curve Lake First Nation and Whetung, Neskantaga First Nation and Moonias v Attorney General of Canada, "Fresh as Further Amended Statement of Claim" (29 May 2020), Court file no. T-1673-19 at para 47.

associated with such development would have to take account of significant cumulative effects, as the all-season roads and other infrastructure would literally 'pave the way' for multiple mines and multiple generations of extraction. [6]

At the time of writing, there are no less than seven separate environmental/impact assessment processes underway in the region ("EA" and "IA," respectively). Each of the three separate all-season road segments are subject to both provincial and federal individual project-based assessments and a Regional Assessment under the federal Impact Assessment Act is (theoretically) ongoing. [7] The all-season roads are being put forward for environmental assessment by First Nation proponents, adding another layer of complications as neighboring First Nation communities vigorously oppose those same roads. Many analysts have noted the complexity of the contemplated infrastructure decisions, the potential for lasting negative socio-ecological impacts, and the likelihood of legal challenges grounded in Indigenous and Treaty rights. [8] Despite the obvious and urgent need for a deep and wide assessment of likely future scenarios, the critical minerals rationale has various actors pushing for quicker regulatory approvals. [9]

[6] Dayna Nadine Scott et al, "Synthesis Report: Implementing a Regional, Indigenous-Led and Sustainability-Informed Impact Assessment in Ontario's Ring of Fire" (14 April 2020) at 1, online (pdf): *YorkU* <https://www.osgoode.yorku.ca/wp-content/uploads/2014/08/SCOTT.Final-Synthesis-report.pdf>.

[7] Canada, Impact Assessment Agency of Canada, "Marten Falls Community Access Road Project" (last updated 13 January 2023), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/80184?culture=en-CA>; Ontario, Ministry of Environment, Conservation, and Parks "Marten Falls community access road project" (last updated 14 October 2021), online: *Ontario.ca* <https://www.ontario.ca/page/marten-falls-community-access-road-project>; Canada, Impact Assessment Agency of Canada, "Webequie Supply Road Project" (last updated 5 January 2023), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/80183>; Ontario, Ministry of Environment, Conservation, and Parks "Webequie supply road project" (last updated 14 October 2021), online: *Ontario.ca* <https://www.ontario.ca/page/webequie-supply-road-project>; Ontario, Ministry of Environment, Conservation, and Parks "Northern road link project" (last updated 2 May 2022), online: *Ontario.ca* <https://www.ontario.ca/page/northern-road-link-project>; Canada, Impact Assessment Agency of Canada, "Regional Assessment in the Ring of Fire Area" (last updated 22 April 2022), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/80468>. Canada, Impact Assessment Agency of Canada, "Northern Road Link Project" (last updated 23 February 2023), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/84331>.

[8] See Cheryl Chetkiewicz & Anastasia Lintner, "Getting it Right in Ontario's Far North: The Need for a Regional Strategic Environmental Assessment in the Ring of Fire (Wawangajing)" (2014), online (pdf): *Wildlife Conservation Society* <https://global.wcs.org/Resources/Publications/Publications-Search-II/ctl/view/mid/13340/pubid/DMX2453300000.aspx>; Dayna Nadine Scott, "Canada's environment minister is headed for trouble if Ottawa doesn't correct course on the Ring of Fire" (26 January 2022), online: *The Conversation* <https://theconversation.com/canadas-environment-minister-is-headed-for-trouble-if-ottawa-doesnt-correct-course-on-the-ring-of-fire-175616>; Cole Atlin, *Pushing for Better: Confronting Conflict, Unsustainability & Colonialism Through Sustainability Assessment and Regional Assessment in the Ring of Fire* (PhD Dissertation, Social and Ecological Sustainability, Waterloo University, 2019), online: *UWSpace* <https://uwspace.uwaterloo.ca/handle/10012/14509>; Environmental Justice and Sustainability Clinic, "EJSC Submissions on the Draft Agreement for Regional Assessment in the ROF" (1 February 2022), online (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/56898>.

[9] In 2021, the federal government reported that, "the pace of development should be accelerated if Canada and the United States are to effectively reduce their reliance on critical mineral imports from non-market economies, boost domestic production to meet future demand, and adhere to high ESG standards. This is especially true due to the specific demands of the mining sector—steep upfront costs, regulatory hurdles, delayed revenue streams, opaque markets, and fluctuating prices, all within a typical 5-to-25-year timeline for mines to become operational." Canada, Global Affairs Canada, "U.S.-Canada/Canada-U.S. Supply Chains Progress Report" (18 November 2021), online: *Canada.ca* <https://www.international.gc.ca/transparency-transparence/supply_chains_progress_report-rapport_etape_chaine_approvisionnement.aspx?lang=eng>. Colin Hardie, "Critical minerals: a panel discussion from PDAC 2022" *Canadian Mining Journal* (12 October 2022), online <https://www.canadianminingjournal.com/featured-article/critical-minerals-a-panel-discussion-from-pdac-2022/>. Natural Resources Minister Jonathan Wilkinson echoed some of the same pro-development talking points when he launched the Canadian Critical Minerals Strategy on December 9, 2022. See David Thurton, "Ottawa's critical mineral strategy calls for faster project approvals" *CBC* (9 December 2022), online: <https://www.cbc.ca/news/politics/critical-minerals-strategy-1.6679728>.

For those interested in environmental and resource governance and the practice of impact assessment, there is also a pressing need for conceptual clarity around what a term like "Indigenous-led assessment" could possibly mean in a context such as this. The purpose of this case study is to unpack this question—exploring what the term could mean in relation to assessments conducted by First Nation proponents of major projects, and in the context of divisions within and between various neighboring Indigenous communities.

In terms of a methodology for this case study, I draw on publicly available regulatory documents and correspondence filed with IAAC and the Ontario Ministry of Environment, Conservation and Parks. Knowledge of the dynamics between various First Nations in the region, Ontario, Canada, and the IAAC derives from multiple years of participatory action research in collaboration with the leadership of Neskantaga First Nation. [10] Further insights have been obtained through the review of litigation documents, documents released through freedom of information and privacy legislation, and many conversations and meetings over several years with participants in the various processes described here.

This case study consists of three parts. In Part I, *Introduction to the Territory*, I outline how Indigenous Peoples of the James Bay Lowlands regard the territory as their homelands, how outsiders have characterized the urgency of accessing the mineral deposits known as the Ring of Fire, the resistance to extractivism in the region, and Ontario's vision for the way forward. In Part II, *The Road to the Ring of Fire is Paved with Environmental Assessments*, I outline the various environmental and impact assessments ongoing in the region, their multiple mandates, competing authorities and the clash of legal orders at the heart of the dispute over who should be conducting them. In Part III: *What is Indigenous-led IA in this context?* I examine the difficulties of overlapping territories and competing visions, and I confront persistent tensions around divisions within and between communities generated when Indigenous peoples are the proponents of contested projects.

Introduction to the Territory

This part of Ontario is inhabited almost exclusively by remote Indigenous communities, who continue to maintain and renew their connection to their homelands by exercising their rights to hunt, fish, harvest food and medicines, practice ceremony, and continue to care for the lands and waters as they have since time immemorial. The major watersheds of the region are shown in Figure 1 below. First Nations in the region state that they "depend on the [James Bay Lowlands'] biodiversity and the richness of its fish, wildlife, and plants for food, medicine, cultural and spiritual values, and economic livelihoods." [11] Moreover, the archaeological and cultural evidence in the area shows that First Nations have been using these lands and waters since time immemorial. [12] Maggie Sakanee, of Neskantaga First Nation, says that the community's health is intimately connected to the lands and waters of the Lowlands. [13] Mike Koostachin, of Attawapistak First Nation, goes further to state that contaminating the James Bay Lowlands would be akin to destroying the life of First Nations peoples. [14] The Elders of

[10] The author has been working alongside the leadership of Neskantaga First Nation on issues related to the proposed Ring of Fire developments for many years. Her research has been funded by a SSHRC Insight Grant (*Consent & Contract: Authorizing Extraction in Ontario's Ring of Fire*, 2015–2017), a SSHRC Partnership Development Grant (*New Techniques for Authorizing Extraction*, 2016–2019) and a Partnership Grant (*Infrastructure After Extractivism*, 2021–2027). She is also a co-Director of Osgoode Hall Law School's Environmental Justice & Sustainability Clinic: the Clinic provides research and strategic advice to Neskantaga First Nation on environmental/impact assessment.
[11] Aroland First Nation, "Appendix A – Request for a Regional Assessment" (29 October 2019) at 4, online: (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/documents/p80468/133833E.pdf>.
[12] *Ibid* at 5.
[13] Logan Turner, "Life on the line" *CBC* (12 September 2022), online: *CBC* <https://www.cbc.ca/newsinteractives/features/a-divisive-road-to-ring-of-fire-ontario>.
[14] Mining Injustice, "Minister Guilbeault: Listen to the grassroots in Treaty 9! (ft. Mike Koostachin)" (24 February 2022) at 00:03:58, online (video): *YouTube* <https://www.youtube.com/watch?v=TsEyM6_XHZI>.

Kitchenuhmaykoosib Inninuwug First Nation refer to the James Bay Lowlands as "'the breathing lands' because they are the lungs of the Earth." [15]

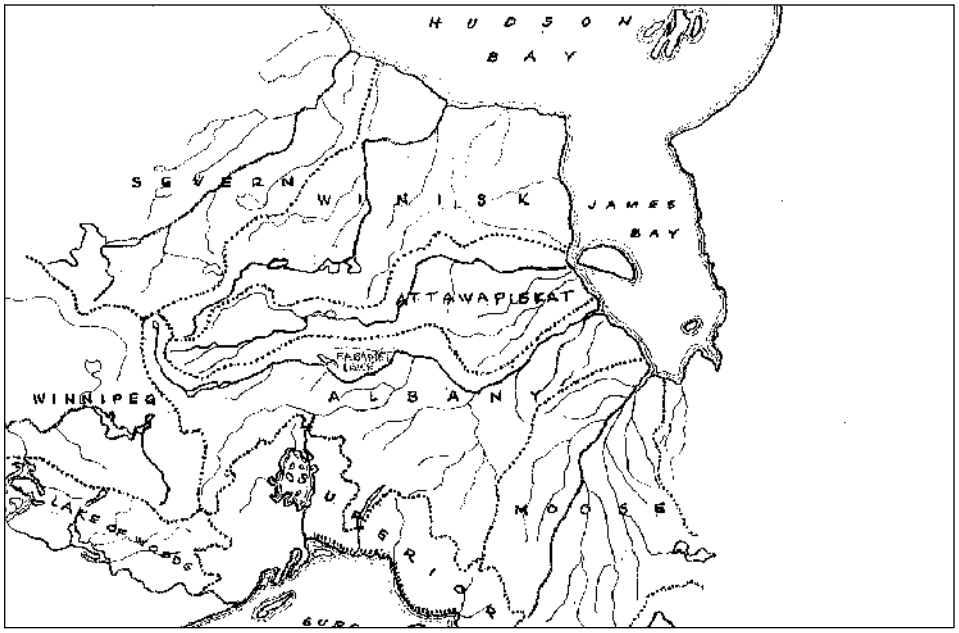

Figure 1: Northern Ontario's Major Watersheds[16]

The "Breathing Lands" are Homelands

The First Nations of the region are signatories to Treaty No. 9, which covers most of the James Bay Lowlands in Ontario. Treaty No. 9 was signed in 1905 and 1906, though additional communities adhered to the treaty later in 1908 and 1929–1930. [17] At the time Treaty No. 9 was signed, Indigenous communities understood that it was an agreement to share the land in exchange for specific treaty benefits, and the protection of the Crown. [18] From the Crown's perspective, Treaty No. 9 was a land surrender treaty intended to open northern Ontario up for resource development. [19] According to the text of the Treaty, the Indigenous signatories agreed to "hereby cede, release, surrender and yield up to the Government of the Dominion of Canada ... all their rights, titles and privileges whatsoever," to their traditional territory. [20] This is the so-called "surrender" clause. The Treaty goes on to state that, while Indigenous communities have the right to hunt, trap, and fish in their traditional territory, the Crown has the right to take up land from time to time for "settlement, mining, lumbering, trading or other purposes." [21] This is the "taking up" clause. The operation of these two clauses have to date provided the rationale for Crown control over development approvals in Treaty No. 9 territory. [22]

[15] Allan Lissner, "The Breathing Lands" *Alternatives Journal* (28 February 2013), online: *Alternatives Journal* <https://www.alternativesjournal.ca/community/web-exclusive-the-breathing-lands/>.
[16] Ontario, Department of Lands and Forests, *Ontario Resources Atlas* (Toronto: Government of Ontario, 1982) at 9.
[17] John S. Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal: MQUP, 2010) at 84–88.
[18] Sheldon Krasowski, *No Surrender: The Land Remains Indigenous* (Regina: University of Regina Press, 2019) at 2; Long, *Treaty No. 9, supra* note 17 at 353; Andrew Costa, "Across the Great Divide: Anishinaabek Legal Traditions, Treaty 9, and Honourable Consent" (2020) 4:1 Lakehead LJ 1 at 8.
[19] Long, *Treaty No. 9, supra* note 17 at 32.
[20] *The James Bay Treaty - Treaty No. 9 (Made in 1905 and 1906) and Adhesions Made in 1929 and 1930 online: Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100028863/1581293189896> *[Treaty No. 9].*
[21] *Ibid.*
[22] Costa, "Across the Great Divide," *supra* note 18 at 7.

Indigenous communities throughout Treaty No. 9, however, firmly dispute that they ever ceded, sold, or surrendered their homelands or their inherent jurisdiction over their territories and people. [23] Indigenous communities repeatedly assert their inherent jurisdiction over the territory and continue to practice their own Anishinaabe and Anishini laws and customs, and implement their own protocols. As an example, then-Chief Wayne Moonias of Neskantaga First Nation stated recently:

> We believe that our lands are held collectively by our community, and our Anishinaabe laws require us to collectively manage and protect our homelands. We have our own forms of governance, protocols, law, authority, and jurisdiction, which are informed by the foundational principles of: *Mno-bimaadiziwin*, good life; *Onda-tisiwin*, the source of life; and *Bima-chiwin*, the sustaining of life. ... These *aadizookaanag*, or "sacred teachings," are passed on orally from generation to generation so that we will always know who we are, where we come from, how we fit into the world, and how we need to behave in order to ensure a long life. These sacred elements have sustained Neskantaga since time immemorial. ...
>
> Neskantaga has a vested responsibility over our homelands that is inherent and includes the right and duty of stewardship over the land and the right to self-determination and governance. It is the belief of the Neskantaga people that these rights and responsibilities were given to the Anishininuwug by the Creator. We exercise these rights and responsibilities on the basis of laws that are not written, but rooted in our customary law, our traditional and cultural values, and the ceremonies and beliefs that connect the Neskantaga people to the land. We believe we have the right to be sustained by our homelands, as we always have been, in modern and evolving ways, and that this principle includes the right to the equitable sharing of wealth from our homelands. [24]

Indigenous communities of Treaty No. 9 continue to assert and exercise jurisdiction over their homelands through mechanisms located both inside and outside of settler state law and institutions. Communities have partnered with different branches of the federal government to enact conservation areas and launch collaborative research on cultural keystone species of fish, for example. [25] Communities have also asserted their own jurisdiction by denying would-be miners access to their "assets" (demonstrating their effective control over the territory) [26] and by declaring and enforcing moratoriums on development activity across their territories. [27] Contestation over mining in the Ring of Fire thus emerges out of this complex terrain of jurisdictional contention amid globally significant ecosystems.

[23] Ryan Bowie, "Reconciliation and Indigenous resurgence in the Ontario Far North and Mushkegowuk Cree land use planning processes" (2021) 39:4 Politics and Space 722 at 737; Lenny Carpenter, "Mushkegowuk launches lawsuit on Treaty promises" *Wawatay News* (1 December 2015) online: <https://wawataynews.ca/home/mushkegowuk-launches-lawsuit-treaty-promises>.

[24] *Moonias and Neskantaga First Nation v Ministry of Northern Development, Mines, Natural Resources, and Forestry*, Court file no. CV-21-00672552-0000 (Affidavit of Chief Wayne Moonias at paras 9–11) [*Neskantaga First Nation v MNDMNR*].

[25] See, for example: Canada, Parks Canada, "Government of Canada and Mushkegowuk Council working together to protect western James Bay" (9 August 2021), online: *Canada.ca* <https://www.canada.ca/en/parks-canada/news/2021/08/government-of-canada-and-mushkegowuk-council-working-together-to-protect-western-james-bay.html>; Neskantaga is currently in the process of developing a collaborative youth sturgeon stewardship program funded by Fisheries and Oceans Canada, similar to the Moose Cree First Nation study of Lake Sturgeon further south: Moose Cree First Nation & WCS Canada, "About" (no date), online: Learning from Lake Sturgeon <https://learningfromlakes-turgeon.ca/about?fbclid=IwAR1-hfQXfBrYaYTXW_DLt93>.

[26] See, for example, *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CanLII 26171 (ON SC).

[27] Attawapiskat, Fort Albany, & Neskantaga First Nations, "First Nations Declare Moratorium on Ring of Fire Development" (5 April 2021), online: *Newswire* <https://www.newswire.ca/news-releases/first-nations-declare-moratorium-on-ring-of-fire-development-854352559.html>.

The "Ring of Fire" is a Deposit of Minerals[28]

In September 2007, Canadian junior mining company Noront Resources Ltd. discovered deposits of nickel, copper, platinum, and palladium in the James Bay Lowlands in Northern Ontario on an exploratory mining expedition. Noront nicknamed their exploration camp the "Ring of Fire," and the name later came to be applied to the entire region and its crescent-shaped mineral-rich deposit. [29] The Ring of Fire is about 550 kilometers northeast of Thunder Bay and covers approximately 5,000 square kilometres of the James Bay Lowlands, see map in Figure 2 below. [30] Since its discovery, at least 4,600 mining claims have been staked in the Ring of Fire. [31] In 2010, then Ontario Premier Dalton McGuinty initiated plans for major mining developments in the Ring of Fire area in the Speech from the Throne. [32] At the time, chromite was considered the most strategically important mineral to pursue; vanadium, zinc, and gold are also present. [33] Many of the deposits contain minerals considered "critical" on both the federal and provincial critical minerals lists. [34]

Figure 2: Location of the Ring of Fire mineral deposits in relation to the surrounding Matawa and Mushkegowuk First Nations in the James Bay lowlands.[35]

[28] As an example of how many Indigenous peoples in the region feel about the term "Ring of Fire," Chief Sol Atlookan stated in 2022 that "our homelands stretch across the northern river systems, including and beyond what industry calls the 'Ring of Fire.'" Matawa First Nations, "Matawa Chiefs' Council Acknowledge the Support of the Chiefs of Ontario in Asserting Their Sovereignty, Rights, Interests, and Jurisdiction in the Ring of Fire Region" (17 November 2022), online: *Matawa First Nations* <http://www.matawa.on.ca/matawa-cc-acknowledge-support-of-coo-in-asserting-sovereignty-rights-interests-and-jurisdiction-in-the-rof-region/>.

[29] Peter Gorrie, "The Ring of Fire" (31 August 2010), at 23, online (pdf): *ON Nature Magazine* <onnaturemagazine.com/the-ring-of-fire.html>.

[30] *Neskantaga First Nation v MNDMNR, supra* note 24 (Notice of Application at para 14).

[31] Gorrie, "The Ring of Fire," *supra* note 29.

[32] "Text of throne speech" *Toronto Star* (8 March 2010), online: <https://www.thestar.com/news/ontario/2010/03/08/text_of_throne_speech.html>.

[33] *Neskantaga First Nation v MNDMNR, supra* note 24 (Notice of Application at para 23).

[34] Canada, Natural Resources Canada, "Critical Minerals Centre of Excellence" (last updated 2 November 2022), online: *Canada.ca* <https://www.nrcan.gc.ca/our-natural-resources/minerals-mining/critical-minerals/23414>; Ontario, Ministry of Mines, "Critical minerals" (last updated 12 December 2022), online: *Ontario* <https://www.ontario.ca/page/critical-minerals>.

[35] Heather Kitching, "Australian owner of major Ring of Fire deposits brings big promises, controversial reputation" CBC (25 May 2022), online: <https://www.cbc.ca/news/canada/thunder-bay/wyloo-metals-ontario-ring-of-fire-andrew-forrest-stake-1.6443170>.

Currently, the Ring of Fire is a cornerstone of Ontario's economic plan to integrate the province into global supply chains as a reliable supplier of critical minerals, especially for battery production in the electric vehicle manufacturing sector. [36] Over the years, government officials have projected that the Ring of Fire contains up to $120-billion worth of minerals and represents a "multi-generational" mining opportunity. An Ontario cabinet Minister once enthusiastically billed it as "Ontario's oil sands." [37] These estimates are now widely acknowledged to have been wildly optimistic and many experts are beginning to question whether this potential can realistically be achieved, given the infrastructure deficits, the division amongst the interested and affected First Nation communities, and the likely environmental costs. [38]

Indigenous Resistance to Extraction

In the early days, proposals for development in the Ring of Fire met with resistance from an allied group of Indigenous communities in the region. The Matawa Tribal Council, composed of nine 'autonomous' First Nations in the region that includes both road-connected and remote communities, reaffirmed their commitment to work together on land, resource, and water issues in the 2011 *Unity Declaration* (see Figure 3 below). With this, they presented a united negotiating front to a province eager for extraction. [39] The communities expressed concern that Ring of Fire mining and infrastructure development would alter the regional landscape and ecosystems significantly. They feared that changes would cause habitat fragmentation affecting rare species, such as the culturally important Lake Sturgeon or Caribou, potentially release pollutants and effluents into sacred rivers, such as the Attawapiskat or the Albany, possibly impair carbon sequestration functions of the peatlands, increase non-native hunting and fishing pressures facilitated by easier access, and introduce of non-native species, among other concerns. [40] In the years since, serious risks of sexual violence and trafficking of Indigenous women and girls have been added to that list, as the incidence of those risks associated with opening up previously remote areas to roads and the presence of industrial man-camps has become better understood through the work of the National Inquiry on Murdered and Missing Indigenous Women and Girls. [41]

[36] Ministry of Mines, *Ontario's Critical Minerals Strategy, supra* note 1 at 13–14, 25.
[37] Daniel Tencer, "Clement: Ontario 'Ring Of Fire' Will Be Canada's Next Oil Sands" *Huffington Post* (26 April 2013), online: *The Huffington Post Canada* <www.huffingtonpost.ca/2013/04/26/ring-of-fire-ontario-tony-clement_n_3159644.html>.
[38] See, for example, Joseph Quesnel & Kenneth P. Green, "First Nations can't veto Ring of Fire development in northern Ontario" (17 June 2017), online: *Fraser Institute* <https://www.fraserinstitute.org/article/first-nations-cant-veto-ring-of-fire-development-in-northern-ontario>; Emma McIntosh, "Four years in, Doug Ford still can't pay for a mining road to Ontario's Ring of Fire: internal documents" *The Narwhal* (11 May 2022), online: <https://thenarwhal.ca/ring-of-fire-ontario-election/>; Noront Resources Ltd., "BHP makes recommended all-cash offer of C$0.55 per share for Noront" (27 July 2021), online: *GlobeNewswire* <https://www.globenewswire.com/en/news-release/2021/07/27/2269305/0/en/BHP-makes-recommended-all-cash-offer-of-C-0-55-per-share-for-Noront.html>; As an example of the continuing division, a report from the Fall Assembly of the Chiefs of Ontario in November 2022 stated as a summary that "[Progressive Conservative's] First Nation partner in Ring of Fire defends project as other Chiefs condemn it." Alan S. Hale, "Queen's Park Today—Daily Report" (16 November 2022) at 3–5, online: *Queen's Park Today* <https://mcusercontent.com/88c2969b1996ffe8d5dce8a56/files/93533b26-010e-0e3f-4eaf-b7a8a-ca23e91/November_16_2022_Daily_Report.pdf>.
[39] Matawa First Nations, "Unity Declaration" (13 July 2011), online (pdf): *Matawa First Nations* <http://www.matawa.on.ca/wp-content/uploads/2019/05/Mamow-Wecheekapawetahteewiin-Unity-Declaration-Signed-July-13-2011.pdf>.
[40] Dayna Nadine Scott et al, "Synthesis Report," *supra* note 6 at 4. [citations omitted]
[41] See "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls – vol 1a" (June 2019), online: *National Inquiry into Missing and Murdered Indigenous Women and Girls* <www.mmiwg- ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf>.

Figure 3: Watersheds Within the Matawa Homelands and Traditional Territory. The shading indicates the extent of the Matawa homelands and Traditional Territory.[42]

As mentioned, negotiations between Ontario and the Matawa Tribal Council proceeded from 2013 to 2018, attempting to reach a consensus on major challenges such as inherent jurisdiction, revenue sharing, and environmental assessment. [43] These talks broke down after Ontario ended the Regional Framework Agreement and refocused its attention on confidential bilateral negotiations between the province and individual "mining-ready" First Nations in the area. [44] Since discussions fell apart, various First Nations have continued to oppose development in the Ring of Fire. For example, in January 2021, the Mushkegowuk Council Chiefs called for a moratorium on development in the Ring of Fire until a proper protection plan could be implemented for the James Bay Lowlands. [45] In April 2021, Neskantaga First Nation, Attawapiskat First Nation, and Fort Albany First Nation took the next step and jointly declared a moratorium on any development in or to facilitate access to the Ring of Fire. [46] In November of the same year, Neskantaga First Nation launched litigation against Ontario's flawed consultation process on proposed road development in the Ring of Fire. [47] Neskantaga continues to assert that they have not granted their free, prior, and informed consent to permit development to proceed. [48]

[42] Matawa First Nations Management and Four Rivers Inc, "Watersheds Within the Matawa Homelands and Traditional Territory," (2014, revised 2020). [Copy with author.]
[43] Dayna Nadine Scott et al, "Synthesis Report," *supra* note 6 at 5. [citations omitted]
[44] Matt Pokopchuk, "Ontario government ends Ring of Fire regional agreement with Matawa First Nations" *CBC* (27 August 2019), online: <https://www.cbc.ca/news/canada/thunder-bay/regional-framework-ends-1.5261377>.
[45] Mushkegowuk Council, "Mushkegowuk Chiefs Call for Moratorium on Development Activities in the Ring of Fire to Ensure Sensitive Wetlands and Waters are Protected First" (12 January 2021), online (pdf): *WWF* <https://wwf.ca/wp-content/uploads/2021/01/Moratorium .pdf>.
[46] Attawapiskat, Fort Albany, & Neskantaga First Nations, "First Nations Declare Moratorium on Ring of Fire Development," *supra* note 27.
[47] Falconers, "Neskantaga First Nation Goes to Court Over Ontario's Flawed Consultation on the Ring of Fire" (26 November 2021), online: *Falconers* <https://falconers.ca/neskantaga-first-nation-goes-to-court-over-ontarios-flawed-consultations-on-ring-of-fire-road/>.
[48] Neskantaga First Nation, online: *Twitter* <https://twitter.com/NeskantagaFN/status/1554620047296970752?s=20&t=MUDvW-pwLU3qxa7g9BjM9A>.

In an affidavit for separate litigation about exploration in their traditional territory, Chief David Nakogee of Attawapiskat First Nation stated that the Ring of Fire "will cause severe and permanent adverse effects to the environment and our Indigenous land-based culture." [49] Other Indigenous communities in the area continue to express concern about proposed development in the Ring of Fire, though they face major capacity and resource challenges in terms of engaging in ongoing resistance. Former Chief Elizabeth Atlookan of Eabametoong First Nation has expressed that the province's approach to consultation on the Ring of Fire "is not tailored to the realities on the ground for Ontario's fly-in First Nations that lurch from crisis to crisis while patching creaking infrastructure." [50] Atlookan went on to explain that communities are not equipped to deal with the disruption that development will bring to their ways of life. [51]

Former Chief Wayne Moonias of Neskantaga in litigation with Ontario over its failure to meaningfully consult in relation to the Ring of Fire roads states:

> We remain seriously concerned about the Ring of Fire's threats to Aboriginal, Treaty, and Inherent Rights, including irreversible damage to our homelands and those of other First Nations. ...We also remain deeply concerned that road construction, mines, refineries, and other aspects of the Ring of Fire infrastructure will be located in areas of cultural significance across the watershed. We are especially concerned about the likelihood that construction of access roads will rely on eskers as the source for the necessary gravel/sand, which is likely to disturb sites of cultural and ecological significance. Eskers are naturally occurring formations of elevated gravel, which are quite noticeable in the Ring of Fire region. Eskers are where we traditionally practiced and continue to practice our harvesting rights, and where there are documented sites of cultural significance, such as burial grounds, sacred sites, trails, and villages of our ancestors. They form a central component of our past, present, and future. [52]

A summary of discussions at the Fall Assembly of the Chiefs of Ontario in November 2022 stated that "sentiments expressed ...were overwhelmingly against the project, as Chief Moonias declared his community will do everything in its power to prevent the project unless it gets a "big say" in how the Ring of Fire will be operated." [53] Moonias continued, "If the industry and the government wants to proceed without our free, prior, and informed consent, we will defend our right. We will defend our lands...We're going to fight." [54] "I will tell you this", he continued, "Neskantaga First Nation will be there to stop Premier [Doug] Ford if he gets on that dozer," referencing Ford's 2018 promise to "hop on a bulldozer" himself if that was what was necessary to build a road to the Ring of Fire. [55]

[49] *Attawapiskat First Nation v Ontario*, 2022 ONSC 1196 at para 58.
[50] Jorge Barrera, "'Overwhelmed'" *CBC* (27 November 2018), online: <https://newsinteractives.cbc.ca/longform/eabametoong-ring-of-fire>.
[51] *Ibid.*
[52] *Neskantaga First Nation v MNDMNR*, *supra* note 24 (Affidavit of Chief Wayne Moonias at paras 43–44).
[53] Alan S. Hale, "Queen's Park Today—Daily Report," *supra* note 38 at 3.
[54] *Ibid.*
[55] *Ibid.* See also "Progressive Conservatives outline plan for northern Ontario" *CBC* (16 March 2018), online: <https://www.cbc.ca/news/canada/sudbury/doug-ford-northern-ontario-1.4579311>. Four years later, First Nations still felt the sting of that remark: in November 2022, Chief Wayne Moonias stated in a Chiefs of Ontario meeting that "I will tell you this: Neskantaga First Nation will be there to stop Premier Ford if he gets on that dozer." Alan S. Hale, "Queen's Park Today—Daily Report," *supra* note 38 at 1.

Ontario's Vision for the Ring of Fire

In large part, delays to development in the Ring of Fire derive from the need for significant infrastructure investment to access the remote mining region. [56] The Ring of Fire requires a large-scale government-funded infrastructure program, which, among other things, includes bringing electricity, high-speed Internet, and transportation access to the region. The biggest hurdle is the construction of a North-South transportation corridor which will connect the mine site with the highway and the transcontinental railway network. [57] Building an all-season road that can handle heavy-truck traffic across a 300km stretch of muskeg is not an easy or inexpensive endeavour. [58]

Over the last decade, much of the debate has focused on who will pay for the required roads. The 2014 Ontario Budget committed up to 1$ billion dollars to supporting road infrastructure in the Ring of Fire, conditional on matching contributions from the federal government. [59] Later in 2014, as part of their election platform, Kathleen Wynne's Ontario Liberals committed to funding the road infrastructure even without the support of the federal government. [60]

But in 2019, Ontario requested a federal commitment to share costs for developing road infrastructure into the Ring of Fire. In reply, the federal government advised the province to "work through Infrastructure Canada to develop a complete application for road infrastructure that could be taken to the federal Treasury Board per the terms of the Integrated Bilateral Agreement between the federal and Provincial Governments." [61] The federal government has indicated that it will consider cost-sharing the construction of the road infrastructure. [62] No firm commitments have been made to date, however, though there is some indication that Natural Resources Canada may be warming to the idea. [63] The projected cost for the road infrastructure necessary to connect the Ring of Fire to the provincial highway network has crept to over $2 billion, according to a provincial briefing note from September 2021. [64] As a result, it is not clear where the necessary funds will emerge from.

Nor is it clear who will *build* the roads. Initially, the roads were going to be built by one of the mining proponents in the region. Noront Resources Ltd. ("Noront"), now named Ring of Fire Metals, remains the single largest holder of mining claims in the Ring of Fire. [65] Their signature project in the region is the proposed Eagle's Nest Project, an underground nickel-copper-platinum multi-metal mine. [66] As initially proposed in August 2011, Eagle's Nest included a processing facility, a concentrate pipeline, ancillary mine infrastructure, and an

[56] *Neskantaga First Nation v MNDMNR, supra* note 24 (Notice of Application at para 19).
[57] *Ibid* at para 20.
[58] See Emma McIntosh, "Four years in, Doug Ford still can't pay for a mining road to Ontario's Ring of Fire: internal documents," *supra* note 38.
[59] Ontario, Ministry of Finance, "Building Opportunity Securing Our Future: Ontario Budget 2014" (1 May 2014), at 35, online (pdf): *Ontario* <https://collections.ola.org/mon/28007/327633.pdf>.
[60] Kaleigh Rogers, "Ontario Liberals promise $1-billion for Ring of Fire" The Globe and Mail (24 May 2014), online: <https://www.theglobeandmail.com/news/politics/ontario-liberals-promise-1-billion-for-ring-of-fire/article18835742/>.
[61] Canada, Natural Resources Canada, *Meeting between Minister of Natural Resources and Greg Rickford, Minister of Energy, Northern Development and Mines and Minister of Indigenous Affairs, Government of Ontario Ref# 187537, with the Lands and Minerals Sector (LMS)* (Obtained through Access to Information Request A-2021-00214/TR) at 6.
[62] *Ibid* at 8.
[63] Emma McIntosh, "Federal government moving closer to funding Ring of Fire mining roads: document" *The Narwhal* (25 October 2022), online: <https://thenarwhal.ca/ring-of-fire-federal-briefing/>.
[64] Emma McIntosh, "Four years in, Doug Ford still can't pay for a mining road to Ontario's Ring of Fire: internal documents," *supra* note 38.
[65] Jessa Gamble, "What's at stake in Ontario's Ring of Fire" (24 August 2017), online: *Canadian Geographic* <https://canadiangeographic.ca/articles/whats-at-stake-in-ontarios-ring-of-fire/>.
[66] Ring of Fire Metals, "Eagle's Nest" (2023), online: *Ring of Fire Metals* <https://www.rofmetals.com/projects/eagles-nest/>.

all-season access road that would connect the mine to the provincial highway network. [67]

Noront received provincial approval for the Terms of Reference for an environmental assessment for the Eagle's Nest Project, including the proposed transportation corridor, on June 18, 2015. [68] As recently as January 2022, Ring of Fire Metals indicated that the environmental assessment of the project was on hold pending the completion of other environmental assessment research in the area, presumably referring to the road projects. [69]

The federal comprehensive study of the Eagle's Nest Project, which included the transportation corridor, was terminated on August 28, 2019, when the new Impact Assessment Act came into force. [70] It is unlikely that Eagle's Nest will be subject to an impact assessment under the new legislation, as the projected daily ore production of the project is below the applicable threshold necessary to trigger a federal impact assessment. [71]

However, in the time since the initial project description in 2011, the road project has dropped out of all the mining company's project planning discussions. For example, the road is not mentioned in the latest description of the project on the Canadian Impact Assessment Registry home page. [72] Nor is it mentioned on Ring of Fire Metals' website. [73] Ring of Fire Metals appears to have recused themselves as proponents for the road infrastructure.

The Road to the Ring of Fire is Paved with Environmental Assessments

In 2019, two of the "mining-ready" Indigenous communities in the region put themselves forward as proponents for specific segments of the road infrastructure. Marten Falls First Nation ("MFFN") and Webequie First Nation ("WFN") have collectively proposed three road projects to connect the Ring of Fire mining district to the provincial highway network. [74] First, there is the Marten Falls Community Access Road (the "MFCAR"), which is a North-South road that would connect the provincial highway to the Marten Falls community. The MFCAR is proposed by MFFN. [75] Second is the Webequie Supply Road (the "WSR"), which is the East-West supply road leading directly from the Webequie community into the Ring of Fire mining

[67] Impact Assessment Agency of Canada, "Public Notice—Eagle's Nest Project – Public Comments Invited and Federal Funding Available" (15 November 2011), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/document/91690>; Ontario, Ministry of Environment, Conservation, and Parks, "Noront Eagle's Nest Multi-metal Mine" (last updated 8 July 2021), online: *Ontario* <https://www.ontario.ca/page/noront-eagles-nest-multi-metal-mine>. Of interest, Noront initially planned on operating side by side with a chromite mine proposed by Cliffs Natural Resources Inc. At the time, the proponents seemed to have envisioned collaborating on some local infrastructure and operating both mines simultaneously. In 2015, Cliffs Natural Resources Inc terminated their project and withdrew from the Ring of Fire. See Impact Assessment Agency of Canada, "Cliffs Chromite Project" (last updated 5 February 2015), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/63927?culture=en-CA>.

[68] MECP, "Noront Eagle's Nest Multi-metal Mine," *supra* note 68.

[69] Noront Resources Ltd., "Project Status" (2021), online : *Wayback Machine* <https://web.archive.org/web/20211129000838/https://norontresources.com/projects/eagles-nest-mine/project-status/>.

[70] Impact Assessment Agency of Canada, "Eagle's Nest Project" (last updated 28 August 2019), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/63925>.

[71] *Physical Activities Regulations*, SOR/2019-285, s18(c) *[Physical Activities Regulations*]. Eagle's Nest projected a production capacity of just under 3000 tonnes of ore per day. Assessments are required for mines producing 5000 tonnes of ore per day, or more. As such, smaller projects are not likely to undergo a federal impact assessment unless the Minister of Environment and Climate Change grants a designation request.

[72] IAAC, "Eagle's Nest Project," *supra* note 68.

[73] Ring of Fire Metals, "Eagle's Nest," *supra* note 67. Of interest, the road projects were also not mentioned on Noront Resources Ltd.'s website prior to the Wyloo Metals takeover. Noront Resources Ltd., "Project Details" (2021), online: *Wayback Machine* <https://web.archive.org/web/20220118072618/https://norontresources.com/projects/eagles-nest-mine/project-details/>.

[74] "Marten Falls Community Access Road" (no date), online: *Marten Falls Community Access Road* <https://www.martenfallsaccessroad.ca> ["MFCAR"]; "Webequie Supply Road" (no date), online: *Webequie Supply Road* <https://www.supplyroad.ca> ["WSR"]; "Northern Road Link" (no date), online: *Northern Road Link* <https://northernroadlink.ca> ["NRL"].

[75] "MFCAR," *supra* note 75.

district. This is proposed by WFN. [76] Third, and most crucially is the Northern Road Link (the "NRL"), which would complete the North-South route by joining the MFCAR all the way to the proposed mine site, thereby directly connecting the Ring of Fire to the provincial highway network. The NRL is jointly proposed by MFFN and WFN. [77]

These roads effectively replicate the 300-kilometre all-season access road initially proposed by Noront to serve the Eagle's Nest Project. In response to Webequie First Nation and Marten Falls First Nation's proposed projects, Ring of Fire Metals has signaled that it intends to modify the scope of its project proposal to reflect this change once the road work is sufficiently underway. [78] In the following excerpt, Al Coutts, former President/CEO of Noront Resources Ltd, and now Advisory Committee member at Ring of Fire Metals describes what happened. In remarks at an event as part of the Prospectors & Developers Association of Canada (PDAC) called "Unlocking the Ring of Fire" in 2022 he stated:

> ... Finally, on obtaining the infrastructure commitments from government. This was, it's really interesting because the Province of Ontario, when they issued Noront the terms of reference for the project, they wanted us to be the proponent of the 300 kilometre, all-season gravel road into the region. And we started along those lines, but it quickly became apparent that the local communities wanted to have a lot of involvement with the development of the road and the infrastructure. It was going to cross their traditional lands. They wanted to be party to it, they wanted to understand it fully, they wanted to have say, they wanted to provide Aboriginal traditional knowledge.
>
> Eventually what happened—and it was neat, it was iterative too—a model emerged, between the Government of Ontario and Noront and the local First Nations, that saw the First Nations take over the proponency of the roads themselves. Webequie First Nation and Marten Falls First Nation, the communities with the traditional land use in the area, are permitting the road over their traditional lands and the Government of Ontario is bankrolling that assessment, allowing the communities to engage the appropriate engineering and other skills to put together the environmental assessment. But it's a great model, it's a fantastic model that emerged. The communities have that involvement, they know exactly what's going on, they are the proponents....And that's what really unlocked everything. Once we got the two First Nations on board, and they took over the proponency of the road, everything started to move. [79]

Chief Bruce Achneepineskum of Marten Falls First Nation, a road proponent, vigorously defends the decision to lead the environmental assessment of the MFCAR. He wrote in September 2021:

> We reserve the right to make decisions in our traditional territory. We have watched others enjoy the fruit of development, while our community has languished in poverty and a perpetual lack of opportunity. It is impossible to change our circumstances without the proposed projects in the Ring of Fire. Without these projects, our community will continue to wither away. However, with these projects, we can inject hope into our

[76] "WSR," *supra* note 75.
[77] "NRL," supra note 75.
[78] Noront Resources Ltd., "Eagle's Nest Mine: Environmental Assessment" (2021), online: *Wayback Machine* <https://web.archive.org/web/20211023172613/https://norontresources.com/projects/eagles-nest-mine/environmental-assessment/>.
[79] Al Coutts, "Unlocking the Ring of Fire" (remarks delivered to the Prospectors and Developers Association of Canada, online, 29 June 2022) [notes on file with the author].

community and plant the seeds for a brighter future. [80]

Still, Chief Achneepineskum has also acknowledged publicly that unless the Province finds ways to "bring other First Nations on board" the Ring of Fire will continue to stall. [81] During a panel discussion hosted by the Empire Club in December 2022 that included Ontario Minister of Mines George Pirie, Chief Achneepineskum stated: "My question to the government is: why not start a process [to get them to come to the table]? Because, as I see it, if we don't have the willing participation from other communities in the nearby area, things will be delayed and even halted." [82]

The upshot of this is that these three road projects are being assessed in a complex regulatory framework under settler law, put forward by First Nation proponents. Provincial and federal legislation applies concurrently to make an environmental assessment (by Ontario) and an impact assessment (by Canada) necessary for each project. Additionally, the federal Impact Assessment Agency of Canada (IAAC) is conducting a Regional Assessment in the Ring of Fire area, which should have implications for future development in the region. In other words, a total of seven separate environmental assessment processes are ongoing for just the road projects alone. [83]

Provincial Environmental Assessment: "Stuck in the 1970s" or at least the 1990s[84]

The road proponents have each agreed to voluntarily subject the projects to environmental assessment under Ontario's *Environmental Assessment Act*. [85] The voluntary agreement for the MFCAR was signed in May 2018. As proposed, the road's purpose is to connect MFFN to the provincial highway network and improve community wellbeing. The project description acknowledges that other parties, including industry, may also use the road infrastructure. [86] On October 8, 2021, the government of Ontario approved the Terms of Reference for the MFCAR. [87] MFFN is currently developing the environmental assessment report for the project and estimates that the report will be finalized in the spring of 2025. [88] The voluntary agreement for the WSR was signed on the same day in May 2018. [89] The stated purpose of the WSR is to connect Webequie community members to opportunities for employment and economic development, as well as to connect mining development in the Ring of Fire region to the Webequie Airport. [90] The Terms of Reference for the WSR were also approved on October 8, 2021. [91] WFN is currently gathering information and assessing the potential

[80] Marten Falls First Nation, "Re: Terms of Reference for the Regional Assessment in the Ring of Fire Region" (21 September 2021) at 3–4, online (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/57596>.

[81] Alan S. Hale, "PCs must find way to bring other First Nations on board, or Ring of Fire will stall: Chief" (15 December 2022), online: *Queens Park Today* <https://www.politicstoday.news/queens-park-today/pcs-must-find-way-to-bring-other-first-nations-on-board-or-ring-of-fire-will-stall-chief/>.

[82] Chief Bruce Achneepineskum, "Ring of Fire Progress Update" (remarks delivered at the Empire Club of Canada, Toronto, 14 December 2022), online: *Empire Club of Canada* <https://empireclubofcanada.com/event/ring-of-fire-2022/> [notes on file with the author].

[83] IAAC, "Marten Falls Community Access Road Project," *supra* note 7; MECP, "Marten Falls community access road project," *supra* note 7; IAAC, "Webequie Supply Road Project," *supra* note 7; MECP, "Webequie supply road project," supra note 7; MECP, "Northern road link project," *supra* note 7; IAAC, "Regional Assessment in the Ring of Fire Area," *supra* note 7; IAAC, "Northern Road Link Project," *supra* note 7.

[84] Cheryl Chetkiewicz, "Critical Minerals and the Climate" (remarks made at a seminar of the Osgoode Environmental Justice & Sustainability Clinic, Toronto, 24 November 2022), notes on file with author.

[85] *Environmental Assessment Act*, RSO 1990, c E.18, s 3.0.1 [EAA]; MECP, "Marten Falls community access road project" *supra* note 7; MECP, "Webequie supply road project," *supra* note 7; MECP, "Northern road link project," *supra* note 7.

[86] *Ibid.*

[87] *Ibid.*

[88] "Schedule" (no date), online: Marten Falls Community Access Road <https://www.martenfallsaccessroad.ca/schedule/>.

[89] MECP, "Webequie supply road project," *supra* note 7.

[90] *Ibid.*

[91] *Ibid.*

impacts of the project as they develop the environmental assessment report. [92] Finally, the voluntary agreement for the NRL was signed more recently, on October 28, 2020. [93] MFFN and WFN are the joint proponents for the NRL, that stated purpose of which is to connect the MFCAR to the Ring of Fire mining development area, and thus provide a route for mined ore to reach the provincial highway and rail networks. [94] The project is currently waiting for Ontario to approve the Terms of Reference. [95]

Ontario's Environmental Assessment Act (EAA) was passed in 1975, updated in 1996 with Bill 76. [96] It contains no mention of the duty to consult and accommodate (DTCA). In fact, Neskantaga First Nation became so frustrated during the COVID-19 crisis that the community launched litigation against Ontario to complain about the process of 'consultation' that was undertaken under the EAA in relation to the MFCAR. [97] As Former Chief Wayne Moonias states in his affidavit filed as part of the application:

> This application arises out of our community's recent negative experience with Ontario, specifically with the process for developing Terms of Reference ("ToR") for an Environmental Assessment ("EA") of a proposed road through our homelands. Throughout this process, our community's insistence on meaningful consultations was ignored, as was the fact of our ongoing state of social emergency, which meant that we were not in a position to undertake or engage in meaningful consultations. In this affidavit, I share information on our Anishinaabe decision-making protocols, the failure to respect those protocols during the recent ToR process, and a snapshot of our ongoing state of social emergency. [98]

The Notice of Application states that court challenge "is about the extent of the Duty to Consult and Accommodate *Indigenous communities in crisis*, as it relates to Environmental Assessments in Ontario." [99]

The EAA does not explicitly require any specific consultations with affected First Nations. [100] The consultation tool enabled by the Act is a generic feedback mechanism that envisions opportunities for public input. [101] It allows any interested party to submit feedback, which is then sorted through by the project proponents or, external consultants retained by the proponents. In other words, the Act completely fails to implement the unique duties imposed by the settler state legal regime -- the DTCA, the Honour of the Crown, and the principles of reconciliation. Additionally, and more importantly, the regime fails to account for the conditions on the ground in affected First Nations. As Former Chief Wayne Moonias references above, Neskantaga respects well-defined, centuries-old legal protocols around consultations, which the community argues the proponents repeatedly failed to respect. [102]

[92] "The Process—EA Process Milestone" (no date), online: *Webequie Supply Road* <https://www.supplyroad.ca/our-process/#assessment-milestones>.
[93] MECP, "Northern road link project," *supra* note 7.
[94] *Ibid.*
[95] *Ibid.*
[96] Richard D. Lindgren & Burgandy Dunn, "Environmental Assessment in Ontario: Rhetoric vs Reality" (2010) 21 JELP 279 at 279–80, 285 n 38.
[97] See *Neskantaga First Nation v MNDMNR, supra* note 24.
[98] *Neskantaga First Nation v MNDMNR, supra* note 24 (Affidavit of Chief Wayne Moonias at para 4).
[99] *Neskantaga First Nation v MNDMNR, supra* note 24 (Notice of Application). [Emphasis added]
[100] Apart from empowering the Minister of the Environment, Conservation, and Parks to make a regulation that could require a proponent to carry out consultation with "aboriginal communities," the EAA is notoriously silent on the duty to consult and accommodate. As of yet, these regulations have not been passed. See EAA, *supra* note 86 at s 40(2)(c).
[101] See *EAA, supra* note 86 at ss. 5.1, 6.
[102] See *Neskantaga First Nation v MNDMNR, supra* note 24 (Affidavit of Chief Wayne Moonias at para 4); *Neskantaga First Nation v MNDMNR, supra* note 24 (Notice of Application at para 32).

The EAA's provisions also do not contemplate any situation where a First Nation faces additional, extraordinary barriers to participating in consultation activities, as was the case during the COVID-19 pandemic. In fact, in most EA and IA regimes under settler state law in Canada today, the relevant Minister lacks the discretionary power to pause any step in the process due to social emergencies, public health emergencies, or any other reason. [103] In other words, the emphasis in these regimes on 'legislated timelines' allows for the situations, as happened in respect of the MFCAR EA during the COVID-19 pandemic, where a project proponent is free to ignore the needs of a First Nation with s.35 rights at stake. This arguably violates the DTCA, the Honour of the Crown, s. 35 of the Constitution, and the principles of Reconciliation. It remains to be seen whether settler jurisprudence will develop in such a direction to recognize this. Further, and again – more profoundly – it is also an open question as to whether settler jurisprudence will genuinely grapple with the idea that meaningful consultation requires specific consultations with each affected First Nation, on that Nation's own terms, and in line with its own laws, customs, and protocols tied to the territory.

Federal Impact Assessment: "Next Generation"?

Each road segment is likewise undergoing, or is anticipated to undergo, a federal impact assessment under the *Impact Assessment Act (IAA)*. [104] The impact assessment process for the MFCAR began on August 9, 2019. [105] On February 24, 2020, the IAAC issued a Notice of Commencement of an Impact Assessment along with a suite of documents to help MFFN prepare an Impact Statement for the project. [106] MFFN anticipates submitting the final Impact Statement to the Agency in spring 2025. [107] The impact assessment process for the WSR began on July 23, 2019. [108] IAAC issued the Notice of Commencement of an Impact Assessment for the WSR on February 24, 2020. [109] WFN is currently preparing the Impact Statement for the project but has not made any public estimates of when they will submit the document to the Agency. [110] Finally, the impact assessment for the NRL has not yet begun, but the project will more than likely trigger a federal impact assessment. It is unclear when MFFN and WFN intend to begin the federal assessment process.

The federal *Impact Assessment Act* evolved from the highly contested Bill C-69 (the so-called "No Pipelines Bill") and promised a "next generation" approach, incorporating a climate test, sustainability assessment, and provisions to allow for assessments to be

[103] For example, under the *IAA*, a time limit may be suspended for any activity related to a designated project only if the proponent requests the Minister of the Environment and Climate Change to do so. IAAC may not, of their own volition, suspend a time limit during an impact assessment. See *Information and Management of Time Regulations*, SOR/2019-283, s 2(a).

[104] IAAC, "Marten Falls Community Access Road Project," *supra* note 7; IAAC "Webequie Supply Road Project," *supra* note 7, IAAC, "Northern Road Link Project," *supra* note 7.

[105] Canada, Impact Assessment Agency of Canada, "Public Notice—Marten Falls Community Access Road – Public Comments Invite" (9 August 2019), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/document/132263>.

[106] Canada, Impact Assessment Agency of Canada, "Notice of Commencement of an Impact Assessment" (24 February 2020), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/document/133939?culture=en-CA>.

[107] "Schedule," *supra* note 89.

[108] Canada, Impact Assessment Agency of Canada, "Public Notice—Webequie Supply Road – Public Comments Invited" (23 July 2019), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/document/131054>.

[109] Canada, Impact Assessment Agency of Canada, "Notice of Commencement of an Impact Assessment" (24 February 2020), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/document/133940>.

[110] "The Process—EA Process Milestone," *supra* note 93.

conducted in partnership with "Indigenous Governing Bodies." [111] At the same time, or perhaps in exchange for these 'wins' for the governing Liberals, the IAA also included fairly high thresholds to trigger a federal impact assessment of a mining project. As such, it is still uncertain as to whether the mines envisioned for the Ring of Fire will trigger an impact assessment under the federal Act. [112]

The Regional Assessment

In the dominant, settler legal tradition in Canada, environmental assessment is the central regulatory tool for anticipating and planning for the effects of industrial development. However, it is widely recognized that project-level, proponent-driven assessment methods—whether conducted under the federal or the provincial regime—are woefully inadequate for considering the potential cumulative and regional impacts of developments on ecosystems and communities. [113] These assessments cannot provide an adequate base for determining whether proposed developments are likely to contribute to lasting well-being and sustainability for the people of the region. This is in large part because the roles and responsibilities that Indigenous peoples take on as ecological stewards, in tandem with their spiritual and cultural connection to the land, are poorly understood and generally have not been integrated into project-level assessment mechanisms. [114]

As mentioned, the Anishinaabe and Anishinii communities that stand to be most impacted by development in the Ring of Fire are remote communities accessible only by air and winter roads. Indigenous peoples are the region's sole occupants. They are the long-term stewards of the lands, and therefore they have the most at stake in both the short and long-term changes in the region. They stand to be the most affected by development and infrastructure as they interact with the land regularly on multiple levels, including culturally, spiritually, socially, and economically. They depend on the ongoing ecological integrity of the region to meet livelihood needs through activities such as hunting, trapping, fishing, and gathering. [115] But as stewards, the Indigenous Peoples of the area also bring crucial knowledge otherwise unavailable to EA and IA proceedings. In fact, the provisions for partnering with Indigenous jurisdictions included in the new Act could be interpreted as emerging in recognition of this. The Expert Panel for the Review of Environmental Assessment Processes stressed

[111] See Josh K. Elliot, "Why critics fear Bill C-69 will be a 'pipeline killer'" *Global News* (21 June 2019), online: <https://globalnews.ca/news/5416659/what-is-bill-c69-pipelines/>; *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA]. See, for example, ss 22(1)(a), 22(1)(h), 63(a), 63(e), 114(1)(e), 114(1)(f). Whether the IAA lived up to this promise is another matter altogether. See for example, Meinhard Doelle, "Bill C-69: the Proposed New Federal Impact Assessment Act" *Environmental Law Blog*, February 9, 2018; Sara Mainville, "The ghost of the Harper Omnibus legislation continues on with Bill C-69" OKT blog, February 9, 2018; Chris Tollefson, "Environmental Assessment Bill is a Lost Opportunity", Policy Options, February 14, 2018. For excellent scholarship on "next generation" approaches, see A. John Sinclair, Meinhard Doelle & Robert B. Gibson, "Next generation impact assessment: Exploring the key components" (2021) Impact Assessment and Project Appraisal 1-17; and Meinhard Doelle and A. John Sinclair, *The Next Generation of Impact Assessment: A Critical Review of the Canadian Impact Assessment Act*, Irwin Law, 2021.

[112] *Physical Activities Regulations, supra* note 72 at ss 18–25. In their submissions on the "Discussion Paper Regarding the Proposed Project List," the Canadian Environmental Law Association highlighted that the proposed increases in the thresholds for many designated project types (including mining) lacked credibility or scientific justification. These thresholds were not determined "in an open, traceable, and evidence-based decision-making process," which leads to some suspicion as to how these thresholds were decided upon at all. See Richard D. Lindgren, "Submissions by the Canadian Environmental Law Association to the Government of Canada Regarding Discussion Paper on the Proposed Project List and Discussion Paper on Information requirements and Time Management Regulatory Proposal" (30 May 2019) at 1–2, 11–13, online (pdf): *Let's Talk EA* <https://letstalkimpactassessment.ca/8869/widgets/34212/documents/16566>.

[113] See, for example, Cole Atlin & Robert Gibson, "Lasting regional gains from non-renewable resource extraction: The role of sustainability-based cumulative effects assessment and regional planning for mining development in Canada" 4(1) Extractive Industries and Society 41-62.

[114] Dayna Nadine Scott et al, "Synthesis Report," *supra* note 6.

[115] *Marten Falls First Nation et al v Attorney General of Canada and Cliffs Natural Resources Inc*, Court file no. T-1820-11 (Affidavit of Chief Peter Moonias at para 10).

in their final report that, "Federal IA governance structures and processes should support Indigenous jurisdiction." [116] Further, given commitments to reconciliation and the adoption of UNDRIP implementing legislation, the IAA provisions for partnering with Indigenous Governing Bodies seemed to provide a nod to the fact that more than mere 'consultation' or 'engagement' is required where significant Indigenous rights and interests are at stake. [117]

As such, it was hoped that the new IAA would open space for a ground-breaking Regional Assessment in the Ring of Fire. On February 10, 2020, then federal Minister of Environment and Climate Change Jonathan Wilkinson agreed to initiate a Regional Assessment in the Ring of Fire Area. [118] He stated that the purpose of conducting a regional assessment would be to "assess the effects of existing or future physical activities carried out in a region." [119] While the exact goals, objectives, and planned outcomes of the Regional Assessment are still being developed, many hoped that the assessment would not only provide baseline data to inform cumulative effects analysis for future impact assessments, as is envisioned by the IAA, but would be genuinely oriented towards finding pathways to durable, positive contributions to sustainability for the region and viable, prosperous futures for its inhabitants in line with their own visions and priorities.

In this vein, a group of collaborators and I released a *Synthesis Report* completed in partnership with the leadership of Neskantaga First Nation in April 2020 entitled, 'Implementing a Regional, Indigenous-Led and Sustainability-Informed Impact Assessment in Ontario's Ring of Fire'. [120] The report recommends that, following a comprehensive regional assessment process that develops a cumulative effects framework, with applicable social and ecological thresholds and essentially lays out the terms and conditions of opening up the north to development, all subsequent project-level assessments in the Ring of Fire would be conducted by joint review panels, jointly appointed by the Crown and the applicable "Indigenous governing authority". [121] The suggested joint review panel process would allow the affected Indigenous communities to grant or withhold their consent to projects on their lands. [122] There has not been any formal government response to the *Synthesis Report*, though Attawapiskat First Nation raised it in a public comment to IAAC as a potential model for the Regional Assessment. [123]

In December 2021, only few months into the new Minister of Environment and Climate Change Steven Guilbeault's term, the IAAC launched a public comment period on a "Draft

[116] Canada, Expert Panel on the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (31 March 2017) at 25, online (pdf): *Canada.ca* <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>. See also the section on "Indigenous Knowledge" at 33–34.
[117] See IAA, *supra* note 112 at 114(1)(e), 114(1)(f).
[118] Letter from Minister Jonathan Wilkinson to Aroland First Nation (10 February 2020), online (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/documents/p80468/133829E.pdf>; Letter from Minister Jonathan Wilkinson to Wildlife Conservation Society Canada (10 February 2020), online (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/documents/p80468/133830E.pdf>; Letter from Minister Jonathan Wilkinson to Osgoode Environmental Justice and Sustainability Clinic (10 February 2020), online (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/documents/p80468/133831E.pdf>.
[119] Canada, Impact Assessment Agency of Canada, "Regional and Strategic Assessments" (last modified 7 April 2022), online: *Canada.ca* <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/regional-strategic-assessments.html>.
[120] See Dayna Nadine Scott et al, "Synthesis Report," *supra* note 6.
[121] *Ibid* at 2, 25–26.
[122] *Ibid* at 2–3, 24.
[123] See, Attawapiskat First Nation, "Establishing a new 2022 Ring of Fire Commission/(namely) A NEW COOPERATIVE Regional Assessment MODEL overseen by CANADIAN MINISTRIES AND INDIGENOUS GOVERNING AUTHORITIES" (28 April 2022), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/58425>.

Agreement to Conduct the Regional Assessment in the Ring of Fire Area." [124] The Draft Agreement outlined the "the goal, objectives and planned outcomes of the regional assessment, as well as key aspects of its governance and administration" and included the proposed "Terms of Reference" for the Regional Assessment. [125] This initial TOR and Draft Agreement was roundly criticized and rejected. [126] Much criticism centered on the failure to recognize any form of Indigenous jurisdiction and governing authority in the proposed Regional Assessment process. Initial hopes that the Agency would decide to partner with an Indigenous governing authority in the region, so that a meaningful assessment of cumulative impacts, considering the ongoing social emergency, could be informed by the applicable Indigenous legal orders, had clearly been misplaced.

The Draft Agreement undermined Indigenous jurisdiction in the Regional Assessment in several ways. One of the most significant was by relegating First Nations to a "participation" role, and emphasizing engagement through an "Indigenous Talking/Sharing Circle." [127] As described, the function of the Talking Circle was deeply unclear and verged on tokenism. Several communities argued that the framework of the Draft Agreement expected Indigenous peoples to contribute their knowledge and expertise but did not allow space for Indigenous decision-making. [128] Others pointed out that the proposed narrow geographic scope for the Regional Assessment was inappropriate give the ecological connectivity across various watersheds and peatlands that will be impacted not only by the mining, but the planned infrastructure developments needed to reach the proposed mines. These, among other flaws, informed widespread opposition to the Draft Agreement by Indigenous communities in the Ring of Fire region. [129]

Other organizations also called on the IAAC to rewrite the "Draft Agreement" to explicitly incorporate Indigenous jurisdiction and decision-making. For example, the Mining Injustice Solidarity Network (MISN) partnered with Friends of the Attawapiskat River to produce *A Treaty Peoples' Briefing*. [130] This series of eight videos hosted on social media intended to

[124] Canada, Impact Assessment Agency of Canada, "Public Notice: Regional Assessment in the Ring of Fire Area—Public Comment Period & Virtual Information Sessions on the draft Agreement to conduct the Regional Assessment" (3 December 2021), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/document/142278>.

[125] *Ibid.*

[126] See, for example, Nibinamik First Nation, "Nibinamik First Nation's Preliminary Comments on the draft Agreement and Terms of Reference for the Ring of Fire Area" (7 March 2022), online (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/58371>; Mushkegowuk Council, "Comments on behalf of the Mushkegowuk Council on the Draft Agreement to Conduct a Regional Assessment in the Ring of Fire Area" (2 March 2022), online (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/57740>; Weenusk First Nation, "Weenusk First Nation Review of the draft Agreement and Terms of Reference" (17 February 2022), online (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/58351>.

[127] Impact Assessment Agency of Canada, "Draft Agreement to Conduct the Regional Assessment" (3 December 2021) at 8, s 6.0; at 20, Appendix D, online (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/documents/p80468/142280E.pdf> ["Draft Agreement"].

[128] Logan Turner "First Nations leaders demand equal partnership in Ottawa's 'broken' regional assessment for Ring of Fire" *CBC* (28 January 2022), online: <https://www.cbc.ca/news/canada/thunder-bay/ring-of-fire-regional-assessment-broken-fn-leaders-1.6330328>.

[129] See, for example: Nibinamik First Nation, "Nibinamik First Nation's Preliminary Comments on the draft Agreement and Terms of Reference for the Ring of Fire Area" (7 March 2022), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/58371>; Mushkegowuk Council, "Comments on behalf of the Mushkegowuk Council on the Draft Agreement to Conduct a Regional Assessment in the Ring of Fire Area" (2 March 2022), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/57740>; Weenusk First Nation, "Weenusk First Nation Review of the draft Agreement and Terms of Reference" (17 February 2022), online: *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/58351>.

[130] "Ring of Fire: Protecting the Attawapiskat River—A Treaty Peoples' Briefing" (2021), online: *Mining Injustice Solidarity Network* <https://mininginjustice.org/ring-of-fire/>.

provide an alternative briefing for the new "activist" Minister Guilbeault, describing the background context of the Ring of Fire. [131] The campaign called upon the Minister to dissolve the Draft Agreement and to establish an Indigenous-led Regional Assessment process. [132]

As a result of the significant opposition, the Minister released a statement in April 2022 that he would be "carefully considering" comments received during the public comment period. [133] Many Indigenous communities in the region were willing to work with the IAAC and the Minister to develop a better model, hoping for one that would be radically different than the first, and would meaningfully incorporate their jurisdiction. The road-proponent First Nations initially defended the original TOR, with MFFN also arguing for a very narrowly scoped Regional Assessment that "should be focused on the ROF area, and it should not include our Community Access Road." [134] However, in June 2022, the Chiefs of the Matawa First Nations announced that they were collaborating to develop a mutually agreeable process to establish an Indigenous Governing Body/Authority to co-lead the Regional Assessment in the Ring of Fire in joint partnership with the IAAC, and presumably Ontario. [135] Mushkegowuk Council came out in support of this proposal shortly thereafter. [136] Discussions continued over the fall and in to the winter, with the Chiefs of Ontario announcing their support for the Chiefs of Matawa First Nations' ongoing efforts to assert their sovereignty, rights, interests, and jurisdiction in the Ring of Fire area in November 2022. [137] Minister Guilbeault finally met in person with the Chiefs of both tribal councils early in 2023 in Thunder Bay. As of the time of writing, it seems that Minister Guilbeault will work with First Nations in the region to co-develop a TOR for the Regional Assessment. [138] He stated, "Its clear to me that there is no access to critical minerals in Canada without Indigenous Peoples being at the table in a decision-making position." [139]

What is Indigenous-led IA in this context?

Indigenous communities across the boreal peatlands of Treaty No.9 are clearly asserting and exercising inherent jurisdiction over their homelands. The protocols and processes for decision-making that they employ often – but not always – exist in tension with the settler state processes. As an example, the road proponent communities have entered into a variety of agreements with Ontario and mining companies. The agreements to voluntarily subject their projects to Ontario's environmental assessment process probably stand in greatest contrast to the positions of the communities rejecting Ontario's jurisdiction in their territories. Most recently, Ring of Fire Metals and MFFN have entered into a memorandum of understanding for future collaboration on the Ring of Fire in December 2022. [140]

[131] The Canadian Press, "An activist in office: Steven Guilbeault's first year as environment minister", *CBC news* online: <https://www.cbc.ca/news/canada/newfoundland-labrador/steven-guilbeault-environment-minister-first-year-1.670214>.
[132] *Ibid.*
[133] IAAC, "Regional Assessment in the Ring of Fire Area," *supra* note 7.
[134] Marten Falls First Nation, "Re: Terms of Reference for the Regional Assessment in the Ring of Fire Region," *supra* note 81 at 4.
[135] Matawa First Nations, "Matawa Chiefs Work Towards Solidifying Approach to Ring of Fire Regional Environmental Assessment" (13 June 2022), online: *Matawa First Nations* <http://www.matawa.on.ca/matawa-chiefs-council-work-towards-solidifying-approach-to-ring-of-fire-regional-environmental-assessment/>.
[136] Mushkegowuk Council, "Mushkegowuk Council Supports Matawa First Nations" (15 June 2022), online: *Mushkegowuk Council* <https://www.mushkegowuk.ca/posts/2022-06-15_mushkegowuk-council-supports-matawa-first-nations>.
[137] Matawa First Nations, "Matawa Chiefs' Council Acknowledge the Support of the Chiefs of Ontario in Asserting Their Sovereignty, Rights, Interests, and Jurisdiction in the Ring of Fire Region," *supra* note 28.
[138] Emma McIntosh, "Scratch that: feds to rethink Ring of Fire environmental assessment after First Nations criticism" *The Narwhal*, March 7, 2023, online:< https://thenarwhal.ca/ontario-ring-of-fire-regional-assessment/>.
[139] *Ibid.*
[140] Ring of Fire Metals, "Ring of Fire Metals and Webequie First Nation Sign Memorandum of Understanding on Ring of Fire Development" (6 December 2022), online: *Newswire* <https://www.newswire.ca/news-releases/ring-of-fire-metals-and-webequie-first-nation-sign-memorandum-of-understanding-on-ring-of-fire-development-837924127.html>.

But both MFFN and WFN assert that they are exercising their jurisdiction in tandem with their participation in the settler state regulatory processes. [141] In so doing, these communities are acting both as Indigenous governments with inherent jurisdiction over the land, and simultaneously as proponents for these road projects, carrying out assessments under settler law and arguably lending legitimacy to a colonial regulatory regime. The Gwichin Council International Report from 2018 considered the question of Indigenous proponents for major projects. The authors state that, in some cases where First Nations are proponents, it may be advisable not to adopt an Indigenous-led impact assessment model, and instead to "run the assessment through the existing legislated process." [142] A benefit of this approach, according to the authors, is that the Indigenous nation:

> can focus its efforts on the proponent side of the equation without taking on the role of process manager. This may include the Indigenous proponent engaging early and often with members of the nation, choosing valued components that are often ignored in legislated systems (e.g., food security, cultural continuity, connection to land), setting up an internal decision-making process that includes members and leadership (not just [economic-development] company management), and the embracing of Indigenous decision-making lenses like inter-generational equity, precaution, and adherence to natural and customary laws. [143]

As stated in the Introduction to this report, Indigenous communities have developed a range of different approaches to impact assessment to consider proposed developments within their homelands. And while these approaches are grounded in each nation's own social, political and legal orders, they can exist in parallel with, subsumed within, or completely independently of legislative processes under settler law. [144] In the following section, I describe the process undertaken by the First Nation road proponents in the Ring of Fire for the purpose of understanding what it means in the context of Indigenous-led IA.

The Road Proponent First Nations' Approach to IA

While we recognize that the MFFN has been seeking a community access road since long before the Ring of Fire became Ontario's excuse to build one, it must be stressed that the First Nation communities that are the all-season road proponents are also generally (and perhaps necessarily) proponents of development in the Ring of Fire. They often say that they consider

[141] See, for example: Webequie First Nation & Marten Falls First Nation, "Environmental Assessment Planning Begins on Proposed Northern Road Link" (3 May 2021), online: *Newswire* <https://www.newswire.ca/news-releases/environmental-assessment-planning-begins-on-proposed-northern-road-link-896385428.html>; Marten Falls First Nation, "Marten Falls First Nation's North-South Road Goes to the Community and Eventually to Ring of Fire" (31 August 2017), online: *PR Newswire* <https://www.prnewswire.com/news-releases/marten-falls-first-nations-north-south-road-goes-to-the-community-and-eventually-to-ring-of-fire-300512245.html>; Gary Rinne, "Two First Nations ask neighbours : 'trust us' with assessment for a Ring of Fire road" *TBnewswatch* (4 May 2021), online: <https://www.tbnewswatch.com/local-news/two-first-nations-ask-neighbours-trust-us-with-assessment-for-a-ring-of-fire-road-3745846>; Webequie First Nation, "Webequie First Nation's Submission to the Regional Assessment." (9 March 2022) at 2, online (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/evaluations/proj/80468/contributions/id/57829>.

[142] Ginger Gibson, Dawn Hoogeveen, & Alistair MacDonald et al, "Impact Assessment in the Arctic: Emerging Practices of Indigenous-Led Review" (April 2018) at 14, online (pdf): *Gwich'in Council International* <https://gwichincouncil.com/sites/default/files/Firelight%20Gwich%27in%20Indigenous%20led%20review_FINAL_web_0.pdf>.

[143] *Ibid.*

[144] See Sarah Morales, "Environmental Challenges on Indigenous Lands: Indigenous-led Assessment Processes as a Way Forward" (4 July 2019), online: *Centre for International Governance Innovation* <https://www.cigionline.org/articles/indigenous-led-assessment-processes-way-forward/>; Amanda Spitzig, *Laying the Groundwork for a Community Risk Assessment of the Ring of Fire and Related Infrastructure* (Master's Research Project, Graduate Program in Environmental Studies, York University, 2017) online: *YorkSpace Institutional Repository* <https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/36373/MESMP03056.pdf?sequence=1&isAllowed=y>.

it a "multi-generational... transformational" opportunity for their members. [145] Chief Bruce Achneepineskum, of Marten Fall First Nation, has stated that the potential developments "will advance our First Nation sovereignty. The agenda must be First Nations-driven and not determined by government, industry, and environmental interests only. ... [T]he impact [must] be maximized to improve the lives of our First Nations people." [146]

Further, MFFN and WFN have both explained that they are incorporating Indigenous legal principles and facets of their inherent jurisdiction over their territories into the assessment process. For example, MFFN is implementing five Guiding Principles (see Figure 4, below). One of the principles states that "Everything on our land and water is living and needs to be respected." These principles were adapted from the MFFN Community Based Land Use Plan for Project Planning and Engagement and are intended to guide MFFN throughout the assessment processes. [147] MFFN does not elaborate upon these in their formal submissions to IAAC. [148]

Figure 4: **MFFN Guiding Principles**[149]

MFFN has also introduced an Indigenous Knowledge Program ("the IK Program"). The IK Program aims to collect Indigenous Knowledge relevant to the MFCAR, including "information on Indigenous land and resource use and important cultural values in and around the project area." [150] Information gathered through the IK Program has been used in tandem with scientific approaches to form "the foundation for baseline conditions, predicting potential

[145] Matawa First Nations, "Matawa Chiefs' Council Acknowledge the Support of the Chiefs of Ontario," *supra* note 28.
[146] *Ibid.*
[147] "Guiding Principles" (no date), online: *Marten Falls First Nation Community Access Road* <https://www.martenfallsaccessroad.ca/guiding-principles/> ["Guiding Principles"].
[148] Note, for example, that the phrase "guiding principles" does not appear in the "Detailed Project Description of a Designated Project" for the MFCAR. Marten Falls First Nation, "Detailed Project Description of a Designated Project" (9 November 2019), online (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/documents/p80184/133143E.pdf>.
[149] "Guiding Principles," *supra* note 143.
[150] "Indigenous Knowledge Program Fact Sheet" (January 2021) at 1, online (pdf): *Marten Falls Community Access Road* <https://www.martenfallsaccessroad.ca/wp-content/uploads/2021/01/MFFN-CAR-Project-IK-Program-Fact-Sheet-English-Version-Final-January-2021.pdf>.

project impacts, and determining appropriate mitigation and monitoring methods." [151] On one reading, MFFN's deliberate centering of IK can be seen as a foregrounding of Indigenous ways of knowing.

Additionally, MFFN is in the process of establishing an Indigenous Knowledge Sharing Agreement and a Memorandum of Understanding with Aroland First Nation. These documents will govern how both communities will work together on the MFCAR. [152] These documents are put forward as an exercise of self-determination as two First Nations come to an agreement on the operation of each community's own protocols and knowledges, independent of the Crown.

WFN explains that the Webequie Project Team is being provided guidance from community Elders to ensure that consultation and engagement is undertaken in a respectful manner that reflects WFN's culture and traditions. [153] The Project Team is likewise guided by six Elders' Guiding Principles (see Figure 5, below). [154] They include the "Mutual recognition of ancestral knowledge" and "Mutual recognition of traditional protocols", amongst others. This guidance and these principles demonstrate that WFN is eager to incorporate elements of their distinct Indigenous legal principles into the conduct of the environmental/impact assessments.

- ☑ Mutual recognition of nation to nation;
- ☑ Mutual recognition of ancestral knowledge;
- ☑ Mutual recognition of traditional knowledge and practices;
- ☑ Mutual recognition of clan families and relationships;
- ☑ Mutual recognition of sustainable livelihodd; and
- ☑ Mutual recognition of traditional protocols.

Figure 5: WFN Elders' Guiding Principles[155]

Further, WFN has introduced a Three-Tier Model to guide their approach to Indigenous consultation. This incorporates traditional cultural values, customs, and beliefs alongside modern-day protocols for engagement. It aims for an intersectional and intercultural consultation approach. [156] The Core Tier assesses the community and their overall wellbeing, which is broken down into the community's physical, mental, and social health, education, employment opportunities, and income. The Relational Tier deals with the preservation of the Indigenous culture of the community and incorporates increasing understanding of the culture by others, language, traditional cultural activities, and ancestral knowledge inheritance. The Foundational Tier assesses Treaty and Partnerships, looking to the fair sharing of benefits from the land between the First Nation, the state, and industry. [157] In their "Detailed Project

[151] "Indigenous Knowledge Program Fact Sheet" (January 2021) at 1, online (pdf): Marten Falls Community Access Road <https://www.martenfallsaccessroad.ca/wp-content/uploads/2021/01/MFFN-CAR-Project-IK-Program-Fact-Sheet-English-Version-Final-January-2021.pdf>.

[152] MFFN, "Detailed Project Description of a Designated Project," *supra* note 144 at 80, 100.

[153] "Community Approach" (no date), online: *Webequie Supply Road* <https://www.supplyroad.ca/community-approach/> ["Community Approach"].

[154] *Ibid.*

[155] *Ibid.*

[156] *Ibid.*

[157] Webequie First Nation, "Webequie Supply Road: Detailed Project Description" (November 2019) at 129–31, online (pdf): *Canadian Impact Assessment Registry* <https://iaac-aeic.gc.ca/050/documents/p80183/133147E.pdf> [WFN, "WSR: Detailed Project Description"].

Description for a Designated Project," WFN explains that the Three-Tier Approach forms the basis for their own EA process, which will "run in parallel and be [integrated] with the existing provincial and federal EA/IA processes." [158] Overall, the Three-Tier approach articulated says that Webequie aims to centre Indigenous protocols for consultation, rather than the typical Crown consultation protocols that accompany standard environmental/impact assessments. [159] In this, it could be argued that Webequie First Nation is deliberately reshaping the consultation framework to suit WFN's own values and legal order. It is fair to say, however, that not all neighboring First Nations have experienced Webequie's approach to consultation as significantly different from the Crown's. [160] For the NRL, the two proponent First Nations have established Joint Principles to guide the assessment. These principles combine MFFN's Elder's Principles with the WFN Three-Tier consultation model. [161] It is unclear how these principles will guide the assessment process and how the final decisions will be made.

During the December 2022 Empire Club panel discussion, Ontario Minister of Mines George Pirie emphasized how Ontario, in supporting Marten Falls and Webequie First Nations to lead the environmental assessment processes, as well as to "lead the consultation process with the other communities in their traditional territory", are "doing it differently." [162] Reacting to Pirie's comment, however, Chief Moonias dismissed the idea that this is an 'Indigenous-led' process, saying it is yet another example of "Ontario attempting to hand off its obligation to consult with First Nations to someone else." [163]

Are the road proponent First Nations conducting Indigenous-led Assessments?

Indigenous knowledge systems are obviously crucial sources of knowledge when conducting assessments of developments that may impact the socio-ecological and cultural values of a community. However, as indicated in the Introduction to this report, there is a serious risk that Indigenous knowledge, when "integrated" into a settler IA process, will be misinterpreted, deliberately misused, or hollowed out in an exercise of justifying decisions already made. Perhaps MFFN and WFN feel they have secured an appropriate level of control in this situation. But there are reasons to question whether that will be possible, despite their intentions and efforts. The assessments are being carried out under Ontario and Canadian law, in settler institutions and structures, by conventional large corporate consultancies, and according to settler state timelines and habits. Will these permit Anishinaabe principles, values, and logics to penetrate the highly administrative and bureaucratized world of environmental assessment? Can they transform those processes and logic to reflect local realities, capacities, and priorities?

Some scholars are not optimistic, writing that there is a persistent incommensurability of Indigenous and non-Indigenous knowledges. To Paul Nadasdy, for example, Indigenous people's knowledges and experience often cannot be actualized through institutional processes designed and implemented by the settler state. [164] If the proponent First Nations lead IAs that

[158] *Ibid* at 139.
[159] *Ibid* at 129–31.
[160] Niall McGee, "Neskantaga First Nation says it wasn't adequately consulted in key Ring of Fire environmental study", *The Globe and Mail*, March 6, 2023.
[161] "Joint Principles" (no date), online: *Northern Road Link* <https://northernroadlink.ca/a-joint-principles/>.
[162] Minister George Pirie "Ring of Fire Progress Update" (remarks delivered at the Empire Club of Canada, Toronto, (14 December 2022), online: *Empire Club of Canada* <https://empireclubofcanada.com/event/ring-of-fire-2022/> [notes on file with the author].
[163] Alan S. Hale, "PCs must find way to bring other First Nations on board, or Ring of Fire will stall: Chief," *supra* note 82. In my own support of Neskantaga First Nation's position, I gave an interview at the PDAC meeting in March 2023 in which I stated, "Instead of meaningfully engaging with Neskantaga on their terms, as Neskantaga's own laws require, the proponent's consultants continue to just send email updates and invite them to webinars", quoted in Aidan Chamandy, "Ring of Fire environmental assessment takes next step over some First Nations' objections" *Northern Ontario Business*, March 7, 2023.
[164] Paul Nadasdy, "The Anti-Politics of TEK: The Institutionalization of Co-Management Discourse and Practice" (2005) 47(2) Anthropologica 215-232.

follow what has been the experience to date in Canada, adopting an approach of weak "incorporation" of Indigenous knowledges without applying the Indigenous law binding in the territory, it must be questioned whether it can constitute Indigenous-led IA. [165] As Kris Statnyk says, "the efficacy of traditional knowledge is dependent on respect for the underlying force and weight of the Indigenous legal traditions that are an integral aspect of the Indigenous knowledge systems." [166]

These assessments, conducted by First Nation proponents operating within settler environmental/impact assessment processes are important to follow for learning more about how Indigenous legal orders are deployed within a colonial legal framework. The main concern is whether or how the character of an Indigenous legal order is affected when operating wholly inside Ontario's and Canada's processes and applying those logics. As mentioned, it is safe to say that at least some of the neighboring First Nations have not experienced the approach to consultation undertaken by the road proponent First Nations to be significantly distinct from the approach taken in the past by the Crown or mining company proponents. However, it is possible that *within* the road proponent communities, members have experienced the process completely differently. There is little publicly available information about this, and thus, it is very difficult to assess. Some might argue it is inappropriate for outsiders to do so.

Conclusion: Contested Authorities, Competing Visions and a Clash of Legal Orders

A joint statement by Matawa Chiefs Council in November 2022 emphasized the communities' focus on inherent jurisdiction in their territories. Although Chief Achneepineskum of Marten Falls emphasized the right of his First Nation to choose to support development in the Ring of Fire, the statement also included a quote by Former Chief Wayne Moonias of Neskantaga emphasizing the need for each First Nation to provide their "free, prior and informed consent... as Rights-Holders in [their] homelands". [167] Chief Moonias also pointed to the need to respect community voices and elders and to respect applicable Indigenous laws and protocols, stating that the "First Nations are waiting for the Government of Canada and the province of Ontario to demonstrate the proper respect and for an appropriate government-to-government relationship and dialogue to be established." [168]

In fact, the quote from Chief Sol Atlookan of Eabametoong First Nation seems to speak directly to the issues at the core of the debate over environmental/impact assessment in the region: "The reality is that no decision can be made yet about the ring of fire roads or possible mines; the assessments must give our membership an informed view of the risks and possibilities of those things in due time ... If we are really talking about forever change to our homelands, there must be a new approach to shared decision-making and real commitment to positive generational change driven by our people." [169] Indigenous-led assessments would ideally provide this "new approach". They should overcome at least some of the obvious shortcomings identified in Crown processes. Ideally, both legal orders would operate side-by-side as two equally valid legal frameworks, rooted in separate constitutional orders and values but capable of productive outcomes based on shared jurisdiction. Possibilities for this are addressed in the conclusion of this report.

[165] Carol Hunsberger & Sâkihitowin Awâsis, "Energy Justice and Canada's National Energy Board: A Critical Analysis of the Line 9 Pipeline Decision" (2019) 11(3) Sustainability 783–802.
[166] Kris Statnyk, "Throwing Stones: Indigenous Law As Law in Resource Management" (Pacific Business & Law Institute, Aboriginal and Environmental Law Program, January 20, 2016) at 8 [unpublished].
[167] Matawa First Nations, "Matawa Chiefs' Council Acknowledge the Support of the Chiefs of Ontario," *supra* note 28.
[168] *Ibid.*
[169] *Ibid.*

Exploring the Transformative Potential of Indigenous Impact Assessment

Donna Ashamock, Dawn Hoogeveen, Sarah Morales, Jennifer Sankey, Dayna Nadine Scott, Laura Tanguay & Estair Van Wagner*

This report explores the trend towards Indigenous-led impact assessment across so-called Canada. We examined, in-depth, various assessments completed by different Indigenous nations on different territories, for different purposes, in very different contexts. In the end, we conclude that assessments conducted by Indigenous nations are, to varying degrees, undermined by the lack of a true consent mechanism and the inability to deeply engage Indigenous legal orders. This is primarily due to the background conditions created under settler law and specifically the conditions established within Crown environmental/impact assessment (EA and IA, respectively) processes. For this reason, we find that making meaningful change to settler legal regimes is an essential step in realizing the transformative potential of Indigenous impact assessment.

Until legal regimes evolve so as to uphold Indigenous nations' authority to genuinely provide *or withhold* their consent for every project proposed in their lands and waters, Indigenous-led impact assessment will not be able to produce the transformation it promises. Another key theme that emerged in our cross-case analysis is the relationship between the relative power or control a community can achieve through Indigenous IA and the status of the land in question, according to settler law. That is, we should expect variability in what can be achieved across title lands, unceded territories, historic treaty lands, modern treaty lands and privately held lands, for example. Notwithstanding the current constraints placed on the transformative potential of Indigenous IA by the state of settler law and its continuing colonial underpinnings, another key finding was the important positive role Indigenous IA plays within Indigenous nations. Participants in Indigenous IA across several case studies emphasized that the mere exercise of engaging in it, regardless of the degree of success in making its outcomes 'authoritative' as against either the settler state or the project proponent, can energize Indigenous communities, revitalize Indigenous laws, and strengthen life-affirming connections to Indigenous laws and territories.

Below we discuss some of the reasons Indigenous-led IA is not always reaching its full transformative potential, despite growing uptake of it by Indigenous nations, and increasing recognition of Indigenous-led IA by proponents and settler governments.

As mentioned, the main constraint on the potential of Indigenous IA is the lack of a true consent mechanism in the prevailing settler legal regimes. Further, we found that Indigenous-led processes are not themselves the starting point for most assessments. In large part, impact assessment processes are triggered by the plans and priorities of proponents, in proponent-driven systems designed by settler authorities. These systems provide for initial engagement with Crown governments rather than Indigenous nations, centering both Crown relations with land and resources and the interests of private third parties. Thus, a key risk in applying the category of 'Indigenous-led assessment' too broadly is that it implies Indigenous nations have a high level of autonomy and self-determining power in creating, designing, carrying out, and applying the results from their assessments when that is not always yet the case within the confines of current IA in Canada. The factors Indigenous nations must consider

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within communities when making decisions about contested projects are often heavily impacted by the settler legal order. Using the term Indigenous-led assessment can mask how the broader Canadian legal landscape bears on Indigenous decision-making at the community level. Settler law's allocation of legal rights and duties profoundly shapes how Indigenous governments learn about proposed activities, confront issues, and make strategic decisions about land and resource use at the community level. Another risk associated with using the term Indigenous-led assessment too loosely is that it normalizes and legitimates assessment models where Indigenous nations are not making decisions that can be imposed on (or made authoritative against) proponents and the broader Canadian society. In other words, they cannot yet be 'operationalized'. A central concern that emerged from our research was the potential for this to breed complacency by lending legitimacy to models that do not challenge prevailing settler understandings of jurisdiction and the constitutional division of powers in so-called Canada. By preserving the purported applicability and superiority of Crown sovereignty across all lands and waters, such processes leave little room for the full exercise of Indigenous self-determination.

The Crown's Duty to Consult and Accommodate

It is important to center Indigenous decision-making authority as we evaluate the different emerging models for Indigenous-led assessment in order to address the power dynamics at play in conflicts between Indigenous nations and the Crown in EA/IA. Struggles over jurisdiction are shaped by the settler jurisprudence, judicial interpretations of the purpose of s.35 of the Constitution, and the parameters of the Crown's duty to consult and accommodate (DTCA) that flow from that interpretation. In *Sparrow*, the Supreme Court of Canada (SCC) ruled that there "was from the outset never any doubt that sovereignty and legislative power, and indeed underlying title, to such lands vested in the Crown."[1] With the presumption of Crown sovereignty as its starting point, the SCC in *Delgamuukw* stated that the purpose of s.35 is to reconcile the prior presence of Aboriginal peoples with the assertion of Crown sovereignty.[2] This presumption of Crown sovereignty has been maintained even through the first declaration of Aboriginal title in the *Tsilhqot'in* decision.[3] As Morales and Nichols explain, the established "background rules" of the existing constitutional order, including the ongoing presumption of Crown sovereignty, drives settler courts to uphold Crown title and decision making power rather than seek out new and effective ways to achieve "reconciliation beyond the box."[4] Moreover, Hamilton and Nichols call attention to the limitations of the DTCA. The doctrine continually undermines Indigenous sovereignty because it depends on a sovereign-to-subject, rather than a nation-to-nation, relationship.[5] By operating as though the question of Crown sovereignty is settled, settler courts construct the DTCA in the IA context as a right to a certain *process*, rather than a substantive right to provide or withhold consent. Courts thereby assess the adequacy of consultation processes, which are determined and implemented by the Crown, without ever questioning whether the Crown or Minister holds the authority to make the decision in the first place. This interpretation of the DTCA fails to recognize the unsettled, competing claims of territorial jurisdictional authority between the Crown and Indigenous nations, and provides the Crown with unilateral authority to determine what the forms of 'engagement' will look like. As Hamilton and Nichols' explain:

[1] *R v Sparrow* [1990] 1 SCR 1075, 70 DLR (4th) 385 at para 1103.
[2] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC).
[3] *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257.
[4] Sarah Morales and Joshua Nichols, *Reconciliation beyond the Box: The UN Declaration and Plurinational Federalism* (2018) Centre for International Governance in Canada, online: <https://www.cigionline.org/publications/reconciliation-beyond-box-un-declaration-and-plurinational-federalism-canada> at 8.
[5] Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult" (2019) 56:3 Alta LR 729.

> While the Supreme Court has emphasized that the duty to consult is a right to a process, not a particular outcome, it has always already chosen an outcome on crucial constitutional questions of Crown legitimacy by stacking the deck, thereby undermining judicial legitimacy. In other words, the current Section 35 framework, including the duty to consult, undermines the possibility for a nation-to-nation relationship grounded on the negotiation of areas of shared and exclusive jurisdiction. The reason it does this should be clear from the forgoing: by promulgating constitutional interpretations that entrench unilateral Crown authority, the courts have maintained a hierarchical ordering of legal systems and peoples that have reduced Aboriginal claims to contingent, Charter-analogous rights.[6]

In other words, achieving the transformative potential of Indigenous IA depends on new interpretations and meaningful recognition of Indigenous jurisdiction within the Canadian constitutional order.

Defining Indigenous-led Impact Assessment

In the analysis below, we draw on the lessons learned in the four in-depth case studies included in this report in order to put forward criteria for more robust models of Indigenous IA. We do this by building on and adapting the criteria initially proposed in the Gwich'in Council International report of 2018.[7]

Indigenous-led IA is:

1. Completed *prior* to any approvals, agreements or consent being provided for a proposed project (that is, communities should be able to apply a threshold determination as to whether a project is in line with identified priorities for the territory, or would violate established no-go zones, before they even decide to conduct an assessment);
2. Undertaken with some degree of control by affected Indigenous parties – on their own terms and subject to their approval;
3. Structured according to the relevant Indigenous nations' determination of the appropriate scope; methods for data collection; values to be protected; principles for assessment, follow-up and monitoring; and threshold for decision-making about a project (according to their own protocols);
4. Governed by a process determined by local realities, capacities, challenges, priorities, practices, knowledge, and relations; and
5. Subject to the applicable Indigenous legal order and oriented towards maintaining the life-affirming practices that flow from reciprocal relations with lands and waters.

The case studies in this report highlight aspects of Indigenous IA that were strengthened or weakened by the presence or absence of these criteria. We open up discussion below about how the assessments could have been more robust, if conditions had been different. As indicated above, we recognize that a great deal depends on the Crown's view of the status of the land in question (unceded, historic treaty, modern treaty, private, 'Crown land', etc.): Indigenous nations conducting IA are able to achieve varying levels of autonomy and self-determining power in creating, carrying out, and operationalizing their assessments. These

[6] *Ibid* at 751.
[7] Gibson et al., Impact Assessment in the Arctic: Emerging Practices of Indigenous-Led Review, (2018) <https://gwichincouncil.com/sites/default/files/Firelight%20Gwich%27in%20Indigenous%20led%20review_FINAL_web_0.pdf>.

legal understandings of land and territory remain colonial in that they do not conform to Indigenous notions of relationality, authority and grounded normativity.[8]

The Stk'emlúpsemc te Secwépemc Nation Assessment of the Ajax Mine

The SSN assessment process (SSNAP) illustrates the first criteria listed above - an Indigenous-led assessment must be completed *prior* to any approvals, agreements or consent being provided for a proposed project. In that case, a collaboration plan was negotiated between British Columbia (BC) and the Stk'emlúpsemc te Secwépemc Nation (SSN) to establish a procedural framework to embed the Nation's process within the Crown EA process, and the SSN's Panel Recommendations Report was submitted with the BC Environmental Assessment Office (EAO) Assessment Report to the BC Ministers. Here, community members from the SSN came together to build the assessment and determined that an open-pit mine was not in line with identified priorities for their territory, thus recommending to BC and the Crown, the 'decision-makers' under settler law, that the project not be accepted. Collaboration was central to the process of this Indigenous-led assessment. However, the provincial and federal Ministers retained the power to make the final decisions about whether to grant or withhold EA Certificates. Thus, the ultimate power to halt the Project remained with the Crown(s). Indeed, in our analysis, unilateral Ministerial authority was a recurring theme and barrier within Indigenous-led IA.

Sunny LeBourdais, project coordinator for the SSN assessment, elaborated on how the SSN assessment unfolded during the *Contested Authorities* workshop we held to inform this report. She explained how the Nation took their own path because Crown processes were not going to work for them:

> The Ajax mine was on its way through an Environmental Assessment process and we [Stk'emlúpsemc te Secwépemc Nation] had an opportunity through their re-development of the mine to take a pause, and look at the information, and look at what was going on, and strategically assess how we were going to engage with this system and with these assessment processes... it just became very real that these [colonial EA processes] were not going to work for us. So [we] were like 'heck with it, we'll do our own thing, why not' and one of the real challenges for us was... 'how do we make it stick? how do we make the consequences of our law, and our enforcement, how do we make it real?'[9]

In determining an SSN-led process, the Nation appointed a community member-based review panel that "leaned on kinship relations" with an emphasis on getting out on the land. The panel ultimately recommended that an open-pit mine was inconsistent with Secwépemc law:

> [We] included 13 panel members from Skeetchestn and 13 panel members from Tk'emlúps te Secwepemc, and that panel then disseminated over bucketloads of information. They sat and heard oral histories and oral evidence given at a panel hearing, and throughout the whole process, we really adopted and lived by the principle of 'walking

[8] Gina Starblanket & Heidi Kiiwetinepinesiik Stark, "Towards a Relational Paradigm – Four Points for Consideration: Knowledge, Gender, Land and Modernity" in Michael Asch et al, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press 2018) 175-208; See also Glen Sean Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (Minnesota: University of Minnesota Press, 2014); Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minnesota: University of Minnesota Press, 2017); and Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake against the State* (Minnesota: University of Minnesota Press, 2017).

[9] Sunny LeBourdais, "Stk'emlúpsemc te Secwépemc Nation Assessment Process" (Presentation delivered at Contested Authorities: Operationalizing Indigenous Impact Assessments Workshop, Vancouver, 5 May 2022), online (video): <https://vimeo.com/709738681/9f74aa7910>.

> on two legs'; throughout the entire process, if there was something that was done that was a very western focus, if it was very english, or written, or tangible or science, we would have an indoor meeting, and the next meeting that we had would be on the land, it would be oral, and it would be with knowledge keepers, and that relationship that was developed built and revitalised and rekindled within those family members was just as important as the information that they received through any sort of reports. The relationship that they built with that land allowed them then to deliberate on all of the different information, evidence, and their experiences, where they ultimately developed a recommendation report and found that an open-pit mine was inconsistent with the land-use objectives for that area. They found that it was inconsistent with Secwépemc law and with the Trout Children.[10]

This passage is illustrative of our findings about what constitutes a robust assessment. The described process is structured by the territory-specific, place-based and applicable legal order(s) and oriented towards maintaining the life-affirming practices of the Nation. In this case, as in many others, these practices flow from long-standing relations with lands and waters.

The SSN's position was that the settler EA process must not interfere with SSN's Aboriginal title and the right to decide the use and preservation of the land and resources for future generations as per SSN law. The SSNAP was thus oriented toward SSN laws, namely the Trout Children stspetékwll, the principle of x7ensqt, and life affirming practices. According to LeBourdais, the Trout Children stspetékwll is an epic story that contains lessons, laws, and teachings, passed down from SSN ancestors, that illuminate the interconnectedness of the Secwepemc people with the Sky World, Water World, Prayer Tree, and those who inhabit those different worlds. In the *Contested Authorities* workshop, LeBourdais explained the SNN law of x7ensqt. X7enq't stipulates that there are consequences to the people for not respecting the land – if proper respect is not given, the "land and sky will turn on you". The law of x7enq't "expresses the respect for certain places on the land that are imbued with spiritual power that derives from past events and experiences of ancestors as deeds to present generations."[11] Today, x7enq't translates into a deep sense of responsibility on the part of the SSN to protect and steward their land. To this end, maintaining interconnectedness and acknowledging respect and responsibility for the land were key SSN legal principles that grounded and guided the SSNAP.

LeBourdais acknowledged the SSN assessment "didn't get to the point of a consent-based agreement [with the Crown], but it certainly made sure that our decision was going to be well and truly in their [Ministers] hands for their consideration moving forward."[12] This case study illustrates how IA can be considered a strategic front in the larger struggle for Indigenous self-determination. Communities are trying to build capacity, secure benefits and transformation, and advance cultural revitalization. In the SSN-led assessment, beneficial outcomes included revitalization of law and cultural protocols, along with increased engagement and a more politicized community. Given the independence that the SSN-led process had as a parallel process grounded in ceremony and kinship, we concluded this Indigenous-led IA is among the strongest examples represented in the accompanying case-based chapters.

[10] *Ibid.*
[11] Stk'emlúpsemc te Secwépemc Nation, SSN Panel Recommendations report for the proposed KGHM Ajax Project at Pipsell (17 February 2017) at 10.
[11] LeBourdais, *supra* note 9.

The Squamish Nation Assessment of the Woodfibre LNG Project

The Squamish Nation assessment involved the Nation completing an assessment at the community level, separate from, but roughly parallel to, the Crown EA process. Squamish Nation delineated a set of conditions to be placed on the proponents in carrying out the LNG facility and pipeline projects (the Squamish Conditions). The Nation then used private contracts to legally bind each proponent to perform the Squamish Conditions in exchange for Squamish Nation's consent. Central to the Squamish Nation's process, and to the Conditions that allowed for it, then, were the use of private contracts, the entanglements of private land status, and the fact that the project was proposed on a former pulp and paper mill site. This case highlights how the degree of power or control that a community can achieve through IA, and the choices it makes, are shaped by the status of the land in question. For example, the Squamish had to weigh the fact that the proposed site of the Woodfibre facility was, in the settler regime, a privately-owned brownfield site. In Canadian law, there is a great deal of uncertainty surrounding Aboriginal rights and title claims to private land. Thus it is unclear the extent to which a litigation strategy within the settler legal system would have assisted if Squamish Nation withheld its consent to the project. In other situations, Indigenous decision-making can be impacted by the socio-economic consequences of not consenting to a project. Nations that have been pushed into poverty as a result of colonization and land dispossession can feel compelled to make decisions that will grant immediate financial relief to the Nation that can be put towards addressing real material needs. This pressure can result in Nations exchanging their consent to a project for economic benefits through the use of an impact benefit agreement (IBA) with the project proponents, even if the project does not fit with the Nation's overall objectives for land and resource use. Moreover, as Dayna Nadine Scott has argued in the context of these privately negotiated contracts: "settler law's allocation of legal rights and duties come to shape the private ordering," and "the most crucial of these allocations is that the Crown claims underlying title to, and jurisdiction over, all of the lands within the settler state's borders."[13] This case study, then, provides an example of the way the background legal regime and the status of the land in question constrained what the Nation would be able to accomplish from the outset.

At the same time, the Squamish Nation process also provides an example of the potential for strategic or even subversive re-deployment of the settler legal order. The Squamish Nation used a process of community engagement over many months followed by technical review of proponent data to prepare an internal assessment report for the Nation's Council. The assessment report focused on Squamish-specific concerns about the LNG projects and evaluated proponent data according to Squamish values and laws. The Nation used the Squamish assessment report to decide on whether to grant or withhold consent. The Squamish Nation Council decided to approve the Woodfibre LNG Projects only if the proponents were willing to agree to a set of Squamish Nation Conditions that would be imposed upon them and enforced via private contracts. In other words, because Squamish Nation's jurisdiction was not adequately recognized under Crown EA law, the Nation made the strategic decision to turn to private law. Private contracts provided the Nation with an avenue to compel the proponents to adhere to Squamish Nation legal principles in carrying out the Woodfibre LNG Projects. However, the move has also generated uncertainty. Because the Squamish Conditions are entrenched within the realm of private law, they lack the level of authority of those imposed by provincial and federal regulators. This means that if Squamish Nation were to revoke its consent due to breach of the Conditions, it is unclear what would happen outside the context of private contractual remedies, such as commercial arbitration. The lack of jurisdictional coordination between the Crown and Squamish EA processes likely means that Squamish Nation would

[13] Dayna Nadine Scott, "Extraction Contracting: The Struggle for Control of Indigenous Lands" (2020) 119:2 The South Atlantic Quarterly 270 at 281.

have to seek judicial review to halt the projects through settler courts and argue that the governments did not meet their constitutional duty to consult Squamish Nation when carrying out the Crown EA processes. Thus, the private law model of Indigenous-led IA holds potential when there is agreement between the parties; however, in event of disagreement, much uncertainty is generated. The Nation could be forced back into the consultation context where they will be forced to once again confront the prevailing assumption of the Crown's underlying jurisdiction. This parallels the weaknesses referenced above in terms of the limitations within Crown systems and the DTCA.

First Nation Proponents' Assessments of the Roads to the Ring of Fire

As noted above, a crucial criterion is whether the assessment is subject to the relevant Indigenous nations' own determination of the appropriate scope; methods for data collection; values to be protected; principles for assessment, follow-up and monitoring; and threshold for decision-making about a project. In the Ring of Fire case study, Webequie First Nation and Marten Falls First Nation signed on to be the 'proponents for the purpose of environmental assessment' of three road projects that will allow for an infrastructural corridor to open up a previously remote region in the boreal lowlands to 'generational' mining development. In theory, these First Nations were able to determine the appropriate scope of the project; they also exercised some control over methods for data collection, the designation of values to be protected, and the principles for assessment, follow-up and monitoring. At the same time, because they voluntarily agreed to subject the projects to Ontario's legal regime for EA, they lost some control over the threshold for decision-making about the project, and they surrendered control over timelines. As explored in the case study, affected neighbouring First Nations have continuously opposed mining in the region, as well as its associated infrastructure. They have been negatively impacted by Ontario's "divide and rule" approach which was implemented through the deal-making that turned Webequie and Marten Falls First Nations into 'proponents for the purpose of environmental assessment'. This type of proponency is unprecedented in the region and thus created novel dynamics between neighbors and kin who have governed these interconnected and interdependent watersheds in the boreal peatlands for generations.

Neskantaga First Nation, who asserts that their homelands in the Attawapiskat River watershed will be harmed by the proposed mining and roads, vigorously defends its authority to decide. It puts forward Anishinaabe protocols for community decision-making that depend on in-person community discussion in the Anishinaabe language, with youth and elders, and consensus-building. Neskantaga continues to assert that they have not granted their free, prior, and informed consent to permit the roads to proceed.[14] The situation is complex: there are multiple applicable legal orders, overlapping territories, divided opinions and aggressive Crown tactics justified in the language of climate mitigation, 'critical minerals' and 'green economy' interests.[15] As described, the road assessments are now mired in controversy because of fundamental disagreements about who holds jurisdiction, who can provide or

[14] *Neskantaga First Nation v Ministry of Northern Development*, 2021 ONSC (Notice of Application), online: <https://falconers.ca/wp-content/uploads/2021/11/Neskantaga-First-Nation-Rule-14.05-Application-%E2%80%93-Nov-23-2021-FINAL-ISSUED.pdf>.

[15] See Dayna Nadine Scott, "How the Settler State Primes a New Extractive Frontier: Indigenous Jurisdiction and Vital Infrastructures in the Ring of Fire" (2022) *Midnight Sun: A magazine of socialist strategy, analysis and culture*, online: <https://www.midnightsunmag.ca/how-does-the-settler-state-prime-a-new-extractive-frontier>; Dayna Nadine Scott, "'Critical' Minerals and the Politics of Refusal", (2021) Special issue of Toxic News: Locating the 'where' of just energy transitions: places, homes, communities, online: <https://toxicnews.org/2021/04/30/critical-minerals-and-the-politics-of-refusal>.

withhold their consent to major projects in the region, and whose law applies when environmental/impact assessments are conducted. [16]

In the Ring of Fire, any potential for wealth generation in developing the region is also accompanied by the potential for significant negative impacts on both the First Nation proponents' immediate remote Anishinaabe neighbors, and several 'down-muskeg' Anishini communities.[17] Each of these communities is already experiencing an ongoing state of social emergency: youth suicide and addiction crises are recurring, COVID-19 exposed major health vulnerabilities, and persistent deficits of essential community infrastructure, including adequate housing, safe drinking water and fire protection equipment.[18] In fact, an "open letter" written by a member of Webequie First Nation in April 2023, made a point of emphasizing the disconnect between the settler urgency behind the Ring of Fire infrastructure and complete disregard for community well-being made obvious by the lack of urgency in addressing ongoing community infrastructure needs. The letter writer lost his home in a housefire on the Webequie First Nation reserve in early April 2023. He says he is a "caretaker of [his] homelands which happen to be located in the area known as the Ring of Fire where high-grade critical minerals like nickel, copper, cobalt, chrome, platinum and palladium are known to thrive below-ground in the permafrost on our traditional territories and where an all-season supply road is currently being studied, led by [his] First Nation". He continues:

> While we live in poverty, our lands are being valued in the trillions and exploration/mining is being aggressively pushed to promote Canada and Ontario's future prosperity.... We have heard that when the De Beers mine was in operation near Attawapiskat First Nation, De Beers avoided the problem of lack of infrastructure by putting in 'company-only' services (like clean drinking water). This will not happen in Webequie First Nation and I will advocate amongst the people of my community that meeting our basic infrastructure needs (starting with a fire station and fire truck) ***should come before the supply road*** and other development.[19]

The example demonstrates the way the background legal context for IA can determine the types of projects that are made priorities, and their timing. Even when Indigenous nations become proponents, they may not be fully in control of decision-making and may be, as in the Squamish Nation case, trying to make the best of a challenging situation. Marten Falls First Nation, another proponent community, also consistently raises material needs, such as hunger in their community, as a justification for why the road is needed. High food prices on

[16] Premier of Ontario. "Premier Ford makes an announcement in Brampton" (11 May 2023), online: *Youtube*.; Ian Ross, "'We're building that Ring of Fire,' says Doug Ford" *TBnewswatch* (12 May 2023), online: <https://www.tbnewswatch.com/local-news/were-building-that-ring-of-fire-says-doug-ford-6992566>.; Christopher Moonias, *Neskantaga Chief Christopher Moonias issues response to Premier Ford's Statement that he will move forward with mining the ring of fire despite Indigenous opposition* (May 2023), online: Neskantaga First Nation Office of the Chief and Council <https://miningwatch.ca/sites/default/files/neskantagafn_responsedougford_may2023.pdf>.

[17] See for example maps and analysis in Dayna Nadine Scott et al, Knowledge Synthesis Report for the Impact Assessment Agency of Canada: Implementing a Regional, Indigenous-Led and Sustainability-Informed Impact Assessment in Ontario's Ring of Fire, September 2020, online: <https://digitalcommons.osgoode.yorku.ca/scholarly_works/2807>.

[18] Jonathan Migneault, "People from First Nations 10 times more likely to die in a fire, says Indigenous Fire Marshal" *CBC News* (2 February 2023), online: <https://www.cbc.ca/news/canada/sudbury/indigenous-fire-safety-1.6733751>. ; Erik White, "'We're in a humanitarian crisis,' Attawapiskat chief calls for more land to build adequate housing" *CBC News* (10 April 2023), online: <https://www.cbc.ca/news/canada/sudbury/sudbury-attawapiskat-housing-crisis-1.6804202#:~:text=Sudbury-,'We're%20in%20a%20humanitarian%20crisis%2C'%20Attawapiskat%20chief,host%20of%20other%20social%20issues>.

[19] Open Letter to Governments and Ring of Fire Metals from Norman Shewaybick on the Demand for a Fire Truck and Fire Station in Webequie First Nation Paralell to the Study on the Webequie Supply Road, Monday, April 17, 2023, online: <http://www.matawa.on.ca/wp-content/uploads/2023/04/Norman-Shewaybick-Open-Letter-on-Demand-for-Fire-Truck-Fire-Station-in-Webequie-FN-1.pdf>.

the remote reserves in Treaty No.9 territory are an undisputable hardship.[20] With these local realities on the ground in mind, it is hard to see how the road projects in the Ring of Fire can move forward under a robust application of Indigenous-led IA. This case demonstrates how a lack of a meaningful consent mechanism in settler law undermines processes that strive to incorporate aspects of Indigenous-led IA and ultimately thwarts efforts to unsettle the existing hierarchy of decision-making power. In the Ring of Fire, community capacity is extremely limited as leadership is preoccupied with recurrent crises, communities are divided, and tensions are very high as the settler governments proceed with increasing urgency under a 'critical minerals' banner. The case study also illustrates how difficult it can be to apply a term such as 'Indigenous-led IA' in a context of overlapping territories, competing authorities and multiple legal orders. There is a danger that Indigenous law may be rendered inoperative if an 'Indigenous-led' IA denies its applicability. If the MFCAR and WSR assessments, operating under Ontario law, on Ontario's timeline, and subject to Crown Ministerial approval are 'Indigenous-led IA', the transformative potential must be brought seriously into question.

The Nunavut Impact Review Board's Assessment of Baffinland's Mary River Mine

We also find it relevant to consider the extent to which the assessment is governed by a process determined by local realities, capacities, challenges, priorities, practices, knowledge, and relations; that is, whether the process itself is appropriate to the territory. In the Mary River mine case, as per Nunavut Impact Review Board requirements, mechanisms were embedded into the assessment process that outlined expectations that proponent would incorporate Inuit Qaujimajatuqangit (IQ), which captures lived local realities, capacities, challenges, priorities, practices, knowledge, and relations. However, despite active participation and designation of various groups to collect and mobilize knowledge, community members voiced concerns about how this knowledge was being integrated into considerations for project approvals. Inuit shared concerns over barriers to participation as a result of the COVID-19 pandemic, observed impacts to wildlife and the land as a result of current mining activities, and how these impacts might affect traditional practices and culture. In terms of meaningful integration of IQ and its utility in mitigation measures, Olayuk Akesuk of the Qikiqtani Inuit Association voiced concerns during the November 2021 Nunavut Impact Review Board (NIRB) Phase 2[21] expansion hearings: "Inuit have had little to no trust that integration of Inuit Qaujimajatuqangit will work. They have never seen evidence that it has been done. The proponent has repeatedly rejected concerns raised by Inuit in the current project…".[22] Without mechanisms for proponent accountability, the cultural resources Inuit are putting into the project with the intention of exerting agency over their lands becomes futile. During the same hearings, Anita Uuttuvak, an intervenor from Pond Inlet expressed concern over Baffinland's tactics of coercion and highlighted issues with Baffinland's promise of Inuit authority to halt the project by pressing the "red button." As described in the case study, the "red button" in question is a mechanism outlined in the Inuit Certainty Agreement and does not halt the project until community concerns are resolved, but for a maximum duration of 5 days. Uuttuvak's intervention highlighted these issues:

[20] Sarah Law, "Would you pay $40 for a bag of flour? Some remote First Nations in northern Ontario have no choice" *CBC News* (10 February 2023), online: <https://www.cbc.ca/news/canada/thunder-bay/food-insecurity-funding-firstnations-1.6743020>.
[21] Nunavut Impact Review Board, "Public Hearing Transcript: Phase 2 Development Project Proposal – Mary River Iron Ore Mine NIRB File Number 08MN053 Volume 17" (2021), online: <https://www.nirb.ca>. at p. 3428.
[22] *Ibid*.

> During our community table talks last night, and the hearing before this one, valuable community questions were being set aside to show a Baffinland video full of propaganda, manipulation, and brainwashing tactics to get Inuit to believe Baffinland is the answer to all their needs. Even with the Baffinland poster stating, if you say "no" to Phase 2, the list of benefits will be taken away. And if you say "yes" to Phase 2, you'll live a glorious new life with Baffinland in it. This ultimatum and rush to get Phase 2 approved without a proper timeline to consider the detrimental and irreversible effects to the Pond Inlet area from Phase 2 will be devastating[23]...For example, talking about working groups...What are you going to do working groups on if you have no more animals left? Are you going to work around that, just make us all go work so none of us will hunt anymore?[24] Yesterday, Udlu Hanson [a Baffinland employee] spoke about giving Inuit a big red button that they will be able to push if environmental effects of Phase 2 are raising alarms. How can we believe this? Baffinland's own studies show that they were half as many narwhal last year in the mine than in the previous years. Our hunters say it's worse, and that it will get worse again with Phase 2. *Can Udlu please show me where the red button is so I can push it?*[emphasis added].[25]

Frustrations with lack of transparency regarding how Inuit concerns about wildlife management, the impact of red dust in the food chain, and a range of other general concerns would be addressed and mitigated, resulted in a blockade by the Nuluujaat Land Guardians, which is detailed in the case study. Blockades are a manifestation of the frustration of land defenders opposed to extractive projects on their territories,[26] which can be linked to the very constraints imposed on even Indigenous-led IA by the lack of a consent mechanism in prevailing settler law.[27] This is exemplified by Uuttuvak's interventions.

The Nunavut case study exists in the context of a modern treaty where ongoing relationships of mutual respect and benefit are set out in the terms of "co-management" arrangements. These shared decision-making structures have emerged over the past two decades to implement joint authority over certain resource management decisions.[28] Co-management boards are comprised of representatives from Indigenous and settler governments. The precise contours of the structure and arrangements vary "with the nature of the resource, the political context, the expertise of participants, the authority exercised, and the range of management decisions involved".[29]

The literature shows that the process of developing co-management regimes is often an exercise through which the state expands its authority, legitimacy, and capacity to govern where it presently does not possess these attributes.[30] How collaborative processes can also "enhance the role of Indigenous leaders and negotiators but not necessarily that of

[23] NIRB *supra* note 17 at p.3409-3410.
[24] *Ibid*. at p.3412.
[25] *Ibid*. at p.3417.11.
[26] Pasternak, Shiri and Ceric, Irina, 'The Legal Billy Club': First Nations, Injunctions, and the Public Interest (February 24, 2023). TMU Law Review, forthcoming, available at SSRN: <https://ssrn.com/abstract=4370375>; Blomley 1996: "Shut the Province Down": First Nations Blockades in British Columbia, 1984-1995; Bosworth and Chua, 2021: The Countersovereignty of Critical Infrastructure Security: Settler-State Anxiety versus the Pipeline Blockade <https://doi.org/10.1111/anti.12794>.
[27] Alook et al., *The End of This World: Climate Justice in So-Called Canada* (Between the Lines Press, 2023).
[28] Joseph J Spaeder & Harvey A Feit, "Co-management and Indigenous Communities: Barriers and Bridges to Decentralized Resource Management: Introduction" (2005) 47:2 Anthropologica 147; Michele-Lee Moore, Suzanne von der Porten & Heather Castleden, "Consultation is not Consent: Hydraulic Fracturing and Water Governance on Indigenous Lands in Canada" (2017) 4:1 Wiley Interdisciplinary Reviews: Water 1180.
[29] Sari Graben, "Assessing Stakeholder Participation in the Sub-Artic Co-Management: Administrative Rulemaking and Private Agreements" (2011) 29:1 Windsor YB Access Just 199; Curran, *supra* note 9.
[30] Harvey Feit, "Re-cognizing Co-management as Co-governance: Visions and Histories of Conservation at James Bay" (2005) 47:2 Anthropologica 267.

community members" has been illustrated in the Mary River case study.[31] The negotiation of co-management regimes can be a process through which settler institutions are forced to explicitly recognize the authority and legitimacy of Indigenous governance systems.[32] However, similar to Indigenous-led IA, there is risk in of co-optation to make processes appear to facilitate meaningful engagement with Indigenous, and in this case Inuit, Nations when meaningful consent is not on the table. Much depends on the actual structure of the arrangements achieved and the degree to which the Indigenous authorities exercise meaningful control beyond opportunities for participation and the provision of feedback on proposals. In our view, co-management agreements do present an opening to destabilize the assumed exclusivity of state sovereignty and to facilitate expressions and applications of alternative legal orders. In the Mary River case, however, despite sometimes being considered Indigenous or Inuit-led, the arrangements do not yet meet this standard.

Therefore, our analysis suggests that while northern co-management processes will typically involve significant levels of Inuit participation, they do not always produce robust opportunities for control over decision-making. The case study documents ample opportunities for Inuit participation in Nunavut's IA process, and instances of Inuit success in using IA to stop proposals for unwanted extraction. However, Inuit authority over the structure and final decision making of IA remains limited. In our assessment, the degree of Inuit authority over IA processes and final decisions should be a fundamental consideration in determining whether a co-managed assessment process is Indigenous-led. There are many positive attributes to the NIRB process that can help inform the development of more robust forms of Indigenous-led IA. Nonetheless, there are also important lessons regarding the lack of Inuit authority to be drawn from interventions by Inuit organizations and communities in IA processes to date.

Conclusion

The examples reviewed in this Report do illustrate how Indigenous-led IA is flourishing at the community level. Nations implementing processes that reconnect their communities to their lands and laws provide vital opportunities for Indigenous communities to strengthen their legal orders and engage in important nation-building processes. The challenges and limitations for Indigenous-led IA arise when nations attempt to implement or operationalize the decisions that flow from those processes in relation to actors beyond the Indigenous nation(s). This continues to be the case even though Canada has committed to the *United Nation's Declaration on the Rights of Indigenous Peoples* and its domestic implementation.[33] As such, the transformative potential of Indigenous-led assessment cannot be realized without Crown acknowledgement of Indigenous peoples' governing authority taking place through Indigenous institutions. As John Borrows writes:

> While I agree that Indigenous self-determination derives from sources external to the Canadian political and legal authority, and is not created by the nation-state, in my view, *Canada's recognition and implementation of this fact is necessary to move to a plurinational existence.* There can be no effective plurinational relationships between Indigenous nations and the rest of Canada without Indigenous participation through their own governments and legal institutions'.[34]

[31] Papillon & Rodon, "Indigenous Consent", *supra* note 12 at 15. One of the reasons this is the case relates to the fact that engaging in policy-making requires a high degree of technical expertise that many Indigenous communities do not at present possess; this is a power imbalance that is not easily compensated for by institutional design.
[32] *Ibid;* see also Paul Nadasdy, "Reevaluating Co-Management Success Story" (2003) 56:4 Arctic Institute of North America 367.
[33] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) [UNDRIP]. *Canada's United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c.14 [*UNDRIP Act*] received royal asset on 21 June, 2021.
[34] John Borrows, Foreword, in Morales and Nichols, *supra* note 4.

If Indigenous-led IA is to advance Indigenous participation in lands and resource governance through the application of Indigenous laws and protocols, two legal orders are often expected to come together in hybrid processes, which combine elements of both Indigenous and settler law.[35] Co-management regimes, including EA processes implemented by modern treaty, are hybrids; they aim to position two largely incommensurate constitutional logics in tandem. In Karen Drake's view, this results in one of these logics serving "as the medium through which differing constitutional norms are translated."[36] Inevitably, she argues, the Indigenous legal order is translated through the lens of the colonial legal order. These "attempts to implement Indigenous laws within the political and legal architecture of a liberal state result in incoherence and structural violence to Indigenous law."[37] This leads to what Karen Drake and Aaron Mills call "constitutional capture," where the colonial legal order establishes the outer limits within which the Indigenous legal order is allowed to operate.[38] We agree with this analysis in the present moment, although we question its 'inevitability'. Our case studies demonstrate that an IA process, even when led by an Indigenous nation, today operates within the confines of a colonial constitutional logic, and is thus marked by this dynamic. This obviously constrains the Indigenous nation's ability to freely exercise the full scope of Indigenous legal jurisdiction. In many of our case studies, Indigenous legal principles are expected to operate within the boundaries that the settler EA frameworks allow.

Referring to the process of attempting to operate two incommensurable legal orders in tandem, Gordon Christie introduces the concept of the 'colonial snare', within which the Indigenous legal order becomes inextricably trapped, like a rabbit in a hunting snare.[39] In practice, the operation of the Indigenous legal order is limited by the way it operates within the world and conceptual worldview of the dominant colonial system.[40] Christie explains that the "institutions and authorities of the dominant legal and political system are ready to force upon Indigenous peoples and communities certain ways of thinking of themselves, the snare is around the neck, already fairly snug, and ready to tighten to the point of suffocation."[41] In opening space for Indigenous legal traditions within the ambit of the dominant legal order, the colonial system delineates permissible Indigenous legal processes but effectively prohibits any exercise of Indigenous jurisdiction that could be a challenge to the notion of the state itself.[42] As Indigenous nations reassert control over decision-making on Indigenous homelands and continue to exercise their jurisdiction in relation to lands and waters, "the liberal state … may simply not be able to cut and hack out a square hole within which to place the square peg of Indigenous legal systems."[43] Rather, Christie challenges the state, and Canadian society as a whole, to "accommodate [themselves] to the emergence of Indigenous legal traditions" instead of forcing these re-emerging traditions to contort to fit within the colonial framework.[44] The question remains how to do so. Drake argues not for hybrid processes, but the mutual operation of two distinct legal traditions operating in dialogue with each other.[45]

[35] Karen Drake, "Indigenous Constitutionalism and Dispute Resolution Outside the Courts: An Invitation" 2020 48:4 Federal L Rev 570 at 581. See discussion on this point in the EA context specifically, by many contributors, in Aimée Craft and Jill Blakley, *In Our Backyard: Keeyask and the Legacy of Hydroelectric Development* (University of Manitoba Press, 2022).
[36] *Ibid* at 582.
[37] *Ibid at 571.*
[38] *Ibid* at 571–72.
[39] Gordon Christie, "Culture, Self-Determination, and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2006) 6:1 Indigenous LJ 13.
[40] *Ibid*.
[41] *Ibid* at 20.
[42] *Ibid* at 18.
[43] *Ibid* at 24.
[44] *Ibid* at 21–22.
[45] Drake, *supra note* 35 at 581–82.

As we observed in the case studies, in impact assessment – as in many other fields of contemporary Indigenous governance – colonial structures and practices are often incorporated into or subversively redeployed in community-designed processes. Some people think of these as "strategies of survival", or perversely, as ways of staying on the territory and fulfilling responsibilities under Indigenous law.[46] Whatever the motivation, however, as Andrew Curley demonstrates in relation to the Navajo Nation, the effect is often that more Indigenous territories are drawn into relations designed to intensify extraction. But we can also observe how Indigenous peoples work the colonial structures in order to preserve future possibilities for bringing about their own – possibly non-extractive, vital and regenerative – visions for the future of their homelands. To this end, in striving towards the transformative potential of Indigenous IA, it is imperative that the settler state bring its laws into line. Legislative frameworks for IA must either accommodate Indigenous *decision-making* authority, or completely give way to Indigenous jurisdiction. Indigenous legal orders must govern autonomously and be engaged in collaborative processes on their own terms.

[45] See for example, Andrew Curley "T'aa hwo ajı t'eego and the Moral Economy of Navajo Coal Workers" at 73.