

**INDIGENOUS COLLABORATION IN IMPACT ASSESSMENT
CHALLENGES AND OPPORTUNITIES**

Submitted to the Impact Assessment Agency of Canada
Indigenous Advisory Committee

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Executive Summary

This report was produced in support of the Impact Assessment Agency of Canada's Indigenous Advisory Committee in the development of advice for the Agency on collaboration agreements with Indigenous Peoples in Impact Assessment. Under the direction of the Indigenous Advisory Committee's collaboration sub-committee, the author conducted research on past agreements and arrangements with the intent of providing information and perspective to the Committee to inform their discussions at the big-picture level and provide a basis for the Committee's advising the Agency on challenges and opportunities in this area. The report is the result of research and analysis conducted by the author in dialogue with strategic principles currently in development by the Committee and with the main goal of providing an objective analysis of past and present examples of collaboration agreements and advice on designing agreements drawing on the experiences and perspectives of participants in various collaborations.

This report integrates information gathered through both documentary research and interviews with select individuals from Indigenous governing bodies and organizations (mainly First Nations), other experts, and federal agency staff. It is focused on providing relevant observations and practical advice drawn from an analysis of existing collaborative agreements and negotiated collaborative processes. Its research and the recommendations that flow from it are designed as responses to three basic questions: 1) What are the elements of existing agreements and collaborative processes that are valued and seen as important to build on in the view of Indigenous people? 2) What can the Impact Assessment Agency of Canada do to realize its goal of working collaboratively with Indigenous nations and communities? and, 3) Are there aspects of existing collaboration agreements that are instructive and useful in guiding the Impact Assessment Agency of Canada in its implementation of Canada's reconciliation commitments?

An environmental scan of past and present collaborations between provincial and federal governments and project proponents and those involving other Indigenous groups in the international context in the realm of environmental/impact assessment led to a number of useful observations on the state and working of the current impact assessment regime, with the main

conclusions being: 1) there are in fact very few actual collaborations of any kind, the North being especially notable in this regard, and there are none with Métis groups; beyond this even among those that do exist with First Nations there are no existing agreements or processes that meet the objectives framed by principles of Indigenous collaboration, or the standards set by UNDRIP or the concept of FPIC; 2) successful collaboration and efforts to transcend historically colonial in nature relations in this area have been hindered by the federal government continuing to allow impact assessment processes be driven by proponents and continuing to limit its role to that of a messenger between parties rather than seeking to exploit the potential of the new Impact Assessment legislation, which allows for movement towards a more just and equitable relationship in the decision-making process; and 3) there have been observable shifts in certain agreements and processes that demonstrate more respect for First Nations' governmental jurisdiction, but the transformative potential of this shift has been constrained by the federal and provincial governments' evident determination to limit Indigenous groups' roles to an increased level of participation in the impact assessment system, and not extending the scope of change to them having control or meaningful influence in the approvals process.

An analysis of the issues facing Indigenous groups engaging in processes under the Impact Assessment Act and dialogue with participants led to the development of several substantive recommendations and suggested specific measures on how to address the identified challenges and opportunities. These involve: 1) focusing on recognizing Indigenous governance, law, jurisdiction and the reciprocal responsibility of Indigenous nations to the natural environment; 2) decolonizing existing relationships in terms of governance, law and jurisdiction; 3) establishing lasting institutions for Indigenous-state collaboration in impact assessment that respect and embody the principles of reconciliation, UNDRIP and FPIC; 4) supporting the development of governmental and technical capacity for Indigenous groups to effectively assume and exercise their authorities and responsibilities; and, 5) developing and constantly adapting the fiscal framework between Indigenous governments and the Crown to reflect changing needs as Indigenous groups assert and exercise more authorities and capacities.

Introduction

This report was produced in support of the Impact Assessment Agency of Canada's Indigenous Advisory Committee. It is an analysis of past and present examples of collaboration agreements in the realm of environmental/impact assessment and is intended to provide the Committee with information and perspective to inform their discussions on the design of collaboration agreements for Impact Assessment at a "big-picture" level, and offer relevant, practical advice on how Indigenous nations and communities, the federal and provincial governments, and project proponents can work together respectfully and design agreements for conducting Impact Assessments that maximize the potential of the *Impact Assessment Act*, that respect the Impact Assessment Agency of Canada's emergent guiding principles document, and in general reflect the stated objectives of reconciliation and the Government of Canada's commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples.

In producing this report, under the direction of the Indigenous Advisory Committee's collaboration sub-committee, the author first conducted an environmental scan of past and present Indigenous governing body collaboration agreements containing provisions related to environmental assessment or impact assessment, accessing documentation and information available online and via personal and professional contacts in various networks related to government, policy-making and in impact assessment circles. He also conducted a general search for academic research related to the theme of the paper (this work was constrained somewhat and had to be conducted using scholarship available only online, due to COVID pandemic related restrictions). Paired with this documentary research was a series of direct engagements with experienced practitioners in the field of environmental/impact assessment from the technical, legal and political perspective. The author conducted a set of in-depth interviews with select individuals from Indigenous organizations (mainly First Nations), legal experts and federal agencies, all of whom offered insight, candid perspective and commentary drawing on their real-world experiences as participants in various roles in collaborations and negotiations processes.

This report also integrates the results of previous work done for the Committee by the Centre for Indigenous Environmental Resources to identify key principles in existing approaches in Indigenous collaboration, and as well, a previous environmental scan submitted to the Committee by the Firelight Group in 2020, which surveyed the current state of Indigenous-led impact assessments in Canada and which contains useful information and a number of observations that are salient to an analysis of the potential of existing collaboration agreements as well. This report draws and builds on both of these documents' insights and conclusions.

All of this information was the basis for the author's analysis, which was conducted in dialogue with strategic principles currently in development by the Committee, and with the goal of providing an objective analysis of past and present examples of collaboration agreements and advice on designing agreements drawing on the experiences and perspectives of participants in various collaborations. This report does not provide detailed analysis of the individual agreements surveyed nor does it engage critically with the academic literature on this subject. Instead, it draws out and considers, at a high level of analysis, the lessons learned and insights gained thus far in Canada and internationally through the collective experience of attempting to forge robust and effective Indigenous-state collaborations in the area of impact assessment.

In the context of these overall objectives, this report sought to answer the following three questions, which are central challenges facing the Agency presently and which define the core mandate of the Agency's Indigenous Advisory Committee:

- What are the elements of existing agreements and collaborative processes that are valued and seen as important to build on in the view of Indigenous people?
- What can the Impact Assessment Agency of Canada do to realize its goal of working collaboratively with Indigenous nations and communities?
- Are there aspects of existing collaboration agreements that are instructive and useful in guiding the Impact Assessment Agency of Canada's in its implementation of Canada's reconciliation commitments?

Environmental Scan

Documentation related to the following thirty-four collaboration agreements and negotiation processes was accessed and reviewed in the development of this report's analysis:

- Carrier Sekani Tribal Council and First Nations' Pathways Forward Agreement with BC
- Carrier Sekani First Nations Omineca Demonstration Project Agreement with BC
- Central Coast First Nations Reconciliation Agreement with BC
- Cheslatta First Nation – Rio Tinto Alcan NeToo Hydroelectric Project Agreement
- Cree Nation Rose & James Bay Lithium Projects Agreement with Canada
- Gitanyow Nation Recognition and Reconciliation Agreement with BC
- Gwa'sala – 'Nakwaxda'xw Nation Consultation Engagement Framework
- Gwets'en Nilt'l Pathway Agreement with BC and Canada
- James Bay Northern Quebec Agreement – COMEX
- Kaska Dene Strategic Engagement Agreement with BC
- Keeyask Cree Nations – Manitoba Hydro Keeyask Hydroelectric Project
- Ktunaxa Nation – Strategic Engagement Agreement with BC
- Ktunaxa Nation - BC Hydro Revelstoke Unit 6 Project Agreement
- Lake Babine Nation Foundation Agreement with BC and Canada
- Mikisew Cree Strategic Engagement Agreement with Parks Canada
- Mikisew Cree Impact Assessment Methodology Collaboration with CEAA
- Squamish Nation – Woodfibre LNG
- Tahltan Nation Shared Decision-Making Agreement with BC
- Tahltan Nation Northwest Transmission Line Agreement with BC Hydro and BC
- Taku River Tlingit First Nation *Wóoshtin yan too.aat* Agreement with BC
- Tlcho Government – Fortune Minerals NICO Project
- Treaty 8 First Nations Strategic EA Agreement with BC
- Tsawwassen First Nation Roberts Bank MOU with the Vancouver Port Authority

- Tsey Keh Nay First Nations Kemess Mine Collaboration Agreement with BC
- Tsilhqot'in Nation Land Stewardship and Shared Decision-Making Agreement with BC
- Tseil-Waututh – TransMountain Pipeline Expansion Project
- Ulkatcho and Lhoosk'uz Dené Nation Blackwater Gold Project MOU with BC and Canada
- North Coast LNG Environmental Stewardship Initiative (BC)
- North Coast Cumulative Effects Demonstration Project Agreement (BC)
- Nunavik Inuit – Raglan Nickel Mine Sivumut Project
- Nunavut Impact Review Board
- Secwépemc – BC Letter of Commitment on Reconciliation
- Shíshálh Nation Foundation Agreement with BC
- Stk'emlupsemc Te Secwepemc Nation – KGHM Ajax Mine Project

First Nation and Inuit organizations involved in the agreements above, other experts with knowledge of the Canadian and international contexts, and Impact Assessment Agency of Canada personnel were contacted, where contact information was available, to solicit their participation and to offer the opportunity to provide organizational input or their personal perspective. Interviews were conducted with the following seventeen leaders and practitioners in the field of Impact Assessment and Indigenous-state relations:

Chief Terry Teegee
 Regional Chief, Assembly of First Nations - BC Region
 Former Tribal Chief of the Carrier-Sekani Tribal Council

Chief Ian Campbell and Aaron Bruce
 Hereditary/Council chief and legal counsel, Squamish Nation

Melody Lepine
 Mikisew Cree Nation, Director of Government and Industry Relations

Chris Herc, Hailey Krolyk, and Lucas King
 Grand Council of Treaty 3

Renée Pelletier
Attorney, Olthuis Kleer Townshend

Susan Winger, Analise Saely, and Jason Boivert
Impact Assessment Agency of Canada

Marci Riel
Senior Director of Energy, Infrastructure and Resource Management
Manitoba Metis Federation

Will David and Graeme Reed
Environment & Economics Analysts, Assembly of First Nations

Lisa Strelein
Executive Director, Australian Institute for Aboriginal and Torres Strait Islander Studies

Stephanie Burnham
Community Planner, Six Nations of the Grand River

Robert Unsworth
Industrial Economics, Inc. (Boston, MA)

An academic literature review and critical analysis of the following twenty-one scholarly articles and other documentary sources was conducted in order to inform the author's perspective and on which to base the development of the recommendations contained in this report:

Armitage, D.R., et al., Collaborative Environmental Assessment in the Northwest Territories, Canada, *Environmental Impact Assessment Review* 25:3, 2005.

Arsenault, R., et al., Including Indigenous Knowledge Systems in Environmental Assessments: Restructuring the Process. *Global Environmental Politics* 19:3, 2019.

Baker, J.M. and C.N. Westman, Extracting knowledge: Social science, environmental impact assessment, and Indigenous consultation in the Oil Sands of Alberta, Canada, *The Extractive Industries and Society* 5:1, 2018.

da Silva, G.P., et al., Social Impact Assessment Methods for Predicting Cumulative Effects involving Extractive Industries and Indigenous People. Report #20- 02, Dept. of Resource Economics and Environmental Sociology, University of Alberta, 2020.

Eckert L.E., et al., Indigenous Knowledge and Federal Environmental Assessments in Canada: Applying Past Lessons to the 2019 Impact Assessment Act, *Facets*, 2020.

Firelight Group, *Environmental Scan of Indigenous-led Impact Assessments in Canada*, Developed for the Impact Assessment Agency of Canada, 2020.

Gregory, et al., Compensating Indigenous Social and Cultural Losses: A Community-based Multiple-attribute Approach. *Ecology and Society* 25(4):4, 2020.

Hoogeveen, et al., Gender Based Analysis Plus: A knowledge synthesis for the implementation and development of socially responsible impact assessment in Canada, Evidence Brief, SSHRC/IAAC, Society and Community Series, 2020.

Janzwood, A.A., The Contentious Politics of Mega Oil Sands Pipeline Projects, Doctoral Thesis, Department of Political Science University of Toronto, 2021.

Jolly, D. and M. Thompson-Fawcette, Enhancing Indigenous Impact Assessment: Lessons from Indigenous Planning Theory, *Environmental Impact Assessment Review*, 87, 2021.

Papillon, M. and T. Rodon, The Transformative Potential of Indigenous-Driven Approaches to Implementing Free, Prior and Informed Consent: Lessons from Two Canadian Cases, *International Journal on Minority and Group Rights* 27, 2020.

_____. Proponent-Indigenous Agreements and the Implementation of the Right to Free, Prior, and Informed Consent in Canada, *Environmental Impact Assessment Review*, 62, 2017.

Scott, et al., Implementing a Regional, Indigenous-Led and Sustainability-Informed Impact Assessment in Ontario's Ring of Fire Synthesis. Knowledge Synthesis Grant Program: Informing Best Practices in Environmental and Impact Assessments, Social Sciences and Humanities Research Council of Canada and the Impact Assessment Agency of Canada, 2020.

Thompson, K.L., et al., A Review of Indigenous Knowledge and Participation in Environmental Monitoring. *Ecology and Society* 25(2):10, 2020.

Unsworth, R. and T. Alfred, *An Introduction to Tribal Natural Resource Damage Claims*, Law Seminars International Conference on Natural Resource Damages, 2011.

_____, *Economics in Tribal Natural Resource Damage Claims*, prepared for The United States Department of the Interior Office of Policy Analysis and Natural Resource Damage Assessment and Restoration Program, 2018.

U.S. Department of Interior, *Natural Resource Damage Assessment and Restoration in the Tribal Context*. Office of Policy Analysis, Washington, D.C., 2018.

U.S. Council on Environmental Quality and Advisory Council on Historic Preservation, *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106*, 2013.

Venier, et al., Scientific Considerations and Challenges for Addressing Cumulative Effects in Forest Landscapes in Canada, *Environmental Review* 29, 2021.

Wang, Y., How Participation Influences Environmental Assessment decisions: Mackenzie Valley, Canada. Doctoral Thesis, Department of Resource Economics and Environmental Sociology, University of Alberta, 2020.

Wright, D., Public Interest Versus Indigenous Confidence: Indigenous Engagement, Consultation and "Consideration" in the Impact Assessment Act, *Journal of Environmental Law and Practice* 33:3, 2020.

Analysis

After reviewing all of the information above and considering the perspectives and insights offered by the interviewees, the author has made the following conclusions.

The Minister is not respecting the recommendations of the expert panel in *Building Common Ground*. Consistent with the historic and endemic problem of Crown insincerity with respect to its commitments to Indigenous peoples, there is apparently no formalized commitment to carry out or follow through on any of the recommendations made by the expert panel.

Colonialism and neo-colonialism continue to define the Indigenous-state relationship systemically, and there is a general failure of federal and provincial governments to substantially address the basic paternalism and racist dynamic of the core of the relationship in all areas and across jurisdictions. As this relates to the impact assessment regime, it has perpetuated a situation where Indigenous people engaging in these processes operate from a perspective which has at its core, and for sound reasons, skepticism, fear and distrust of the motives and potential actions of the Crown and industry proponents.

There are evidently problems in the federal-provincial political relationship that manifest in the context of impact assessment. Primarily, issues arising from communication problems and jurisdictional conflicts inherent to Canadian federal-provincial politics. All attempts to forge collaboration necessarily take place in this larger political context, and this affects the integrity and independence of decision-making, as does the broader social context framed by Canadian society's assumptions in regard to Indigenous nationhood and rights – to ignore or deny this fact would be disingenuous or naïve. These factors have to be taken into account, factually, and also because it is a strongly held view among Indigenous people in community and in leadership.

There is a strong perception among practitioners in the field that the reason no progress has been made toward realizing the full potential of the new legislation is fear held by federal and provincial governments. Specifically, four fear-related factors emerged as obstacles from this research: 1) undue apprehension about allowing progress or movement in particular situations for fear of setting precedent for other Indigenous groups; 2) unwillingness to seriously engage with Indigenous groups due to the perception that all Indigenous groups are opposed to development and collaboration with industry and the Crown; 3) trepidation over becoming involved in or exacerbating inter-Indigenous conflict; and 4) discomfort at being seen by industry to be too close or not objective in relation to Indigenous groups or interests.

It is apparent that the fear and apprehension stifling movement towards the acceptance and implementation of a just regime in impact assessment at the federal and provincial levels is

rooted in a lack of cultural awareness among Agency personnel and the fact that there is very little appreciation and understanding of the cultural and social/political context of impact assessment for Indigenous peoples or of the dynamics of such within Indigenous communities.

Being that the system is organized and operates hierarchically, it is at the Deputy Minister and Assistant Deputy Minister (and other central agencies) levels that the character and quality of leadership on this issue manifests in success and failure in achieving collaboration or progress in negotiating agreements that represent substantive movement toward the stated objectives of the new legislation and reconciliation. Simply put, in situations where Deputy Ministers and Assistant Deputy Ministers have truly engaged and embraced the effort and challenge of reforming the relationship and sought to personally educate themselves about Indigenous realities by experiencing the land and culture of the people affected by development proposals and participating in processes, there have been successes in collaboration.

Yet as it stands, it is apparent that the federal government sees its function essentially as a messenger between parties, and there are currently no mandates and no legalized authority for Agency staff in negotiations to make binding commitments – this is a holdover from the previous regime. First Nations leaders with experience negotiating in this context see the Crown’s focus on developing collaboration agreements not as a sign of progress, but as an attempt to maintain control of the process and as an effort to maintain the imbalance of power in determining the outcomes of decision-making, not as indicative of a serious effort to substantially transform the dynamic at play. It was expressed numerous times in interviews that previous to the new legislation, there was great frustration that the Crown would not engage with Aboriginal rights holders, and that now, post-2019, the Crown is requiring collaboration agreements as a way to shape the outflow from the new legislation rather than simply committing to engage with First Nations as full partners in impact assessment and decision-making on major projects. This has left the entire process in limbo because the cooperation framework envisioned in the legislation is not defined.

In a broad perspective, considering the current political landscape, it appears that the Crown has realized, with the passage of the new legislation in 2019, that it has a role in impact assessment beyond being a messenger and that it can no longer rationalize offloading processes and responsibility on project proponents. It appears that the Agency is mid-point in a major shift in its own self-conception and legally and political defined place within the impact assessment regime. The country is in the midst of moving from the old way of doing things in environmental assessment (colonial, paternalistic and divisive) and creating a new way. The new legislation, informed by the work of the expert panel, mandates a shift from the old way to one that accepts and operationalizes the fact of Indigenous law as a distinct reality and reconciles it with Crown law in creating imperatives and setting the parameters for collaboration.

To reiterate, this new regime is as yet unrealized and is still fundamentally unformed. It is certainly untested. Yet there is great expectation among all participants, most especially First Nations people, that the intended results should be forthcoming and manifesting in collaborations that realize the potential of the significant new elements on the legal and political landscape, such as United Nations Declaration on the Rights of Indigenous Peoples, the principle of Free Prior and Informed Consent, reconciliation, and nation-to-nation relationships. It appears that personnel and mechanisms and structures whose experience and expertise is rooted in the old reality are very discomforted by the new framework, with its challenging new ideas and objectives. It is generally acknowledged that an alternative is emerging, but there is a tense question to be answered in who will shape and define the parameters of this new normal in impact assessment. Clearly, given Canada's stated commitments, it is Indigenous groups that must lead the way in defining the meaning and setting the pace if the legislation and reconciliation are to have actual meaning beyond rhetoric.

Bluntly speaking, based on their experience thus far, many practitioners see the 2019 Act as just a minor reworking of the old system. This is apparently a rational conclusion on their part because of the evident reluctance to pair the Act to Canada's commitments in regard to Indigenous rights.

And to restate: the problem at the base of this situation is that changes in legislation have not been accompanied by necessary cultural changes within the federal government structure.

Clearly there has been a shift toward acknowledgements, statements and positioning by the Crown respecting Indigenous governmental jurisdiction, but the transformative potential of this shift has been constrained by the limitation of the shift to granting Indigenous groups only increased levels of participation in the system, not extending the effect of this shift to provide Indigenous groups with meaningful influence in the approvals decision-making process. There is a failure thus far to break the structural problem that consists in the fact that the entire impact assessment system up until now has been oriented to supporting proponents – even though the new legislation allows for movement towards a more just and equitable relationship in the decision-making process, previously established patterns of ingrained thinking limit the realization of the Act's potential, which does in fact allow for jurisdiction over impact assessments to be handed over to Indigenous groups.

In terms of the nature of engagements that do happen in the impact assessment process, the problems of historical mistrust, a lack of understanding of Indigenous knowledge, and a lack of community capacity are the main challenges for Indigenous participation. Meaningful community involvement has not occurred because of a lack of clarity and understanding concerning participation, problems of insufficient information available to project proponents about rights holders and stakeholders, and the lack of documented traditional knowledge available to proponents. These factors, among others, lead to adversarial political environments and the failure of collaborations and to the reliance on litigation to advance Indigenous objectives.

Overall, it must be kept in mind that there is a fundamental conflict between Indigenous environmental ethics and the belief system and worldviews undergirding industrial development and capitalism economic relations. Thus, Indigenous peoples' visions of justice and perspectives on impacts (both environmental and social/cultural) differ greatly from that of mainstream Canada. Engaging in the system of impact assessment involves a compromise of their vision and

sense of responsibilities they hold toward each other and the natural environment, and a necessarily pragmatic maneuver in the face of what they determine to be unstoppable forces. It is still a strongly held view that the impact assessment process and its potential results rarely, if ever, reflect an Indigenous sense of justice, rightness or respect.

There is also a problematic issue related to Indigenous governance in impact assessment and in designing collaboration generally, and that is the question: Who is the Indigenous governing body that the Crown and proponents should be dealing with? The larger challenge here is in figuring out how to conduct impact assessment fairly and justly in a still-colonial context defined by destabilized political and social environments, issues of community disunity, the legitimacy of community and nations' leadership and leadership structures being contested, and weak governing authority. Unfortunately, due to the lingering effect of colonial interference in First Nations, Métis and Inuit politics, communities and nations, Indigenous governance is in many cases in disarray.

Differential capacity among Indigenous groups is also a problem inherently in that Indigenous peoples' ability to engage and advocate for their perspectives and interests are generally prejudiced by relative deficits in expertise and funding versus proponents and the Crown. But this issue also manifests as differences among neighboring nations and communities and engenders political and social conflicts among Indigenous peoples themselves because of differentials in expertise and knowledge or access to funding and the direct impacts these differences have on the outcomes and perceived legitimacy of the processes in communities. Internal political differences and social conflicts within Indigenous communities and nations are a reality of the environment and provide the backdrop in real terms for these processes, and they are made worse by engagement in processes that disregard the divisive effects of engagement and the social, psychological and spiritual impacts of project proposals and of participation in the impact assessment process itself.

Addressing these in a practical sense, the emergence and integration of a cumulative effects approach and methodology is a generally positive development - this brings Western science a bit closer to being able to effectively interface with Indigenous knowledge and the possibility of accounting for impacts of projects from a holistic perspective of human beings' place in the natural world. However, it must be considered a challenge as well because the potential of this methodology and approach is limited by the lack of baseline data in most situations and regions; baseline data is crucial to operationalizing cumulative effects analyses and a full and accurate conceptualizing of impacts is nearly impossible where it is lacking. Regarding cumulative effects as a method and approach, there is a serious challenge fundamentally though: how do we distinguish impacts related to the proposed project from those of other factors? This is a methodology that is still undeveloped, science wise, and beyond this, leading experts acknowledge that understanding the direction of research is being influenced by differing understandings of the role of and views on the relative validity of science and Indigenous knowledges.

There is positivity in the field of Indigenous peoples and impact assessment as well. Some practitioners noted the distinction between formal agreements and informal and *de facto* collaborations, either verbal or implied, that do exist presently with various First Nations and, in the form of the Agency's agreement to fund an impact assessment coordinator position, with the Manitoba Metis Federation. The notion of these, and other so-called "collaborative spaces", put into effect real collaboration in spite of the formal intransigence of parties bound by legal and political constraints. This appears to be a great opportunity for movement and is generally consistent with First Nation parties' strategic visions and pragmatic approaches in this area.

Considering the information on impact assessment collaborations from the Canadian and international contexts, it is possible to discern the institutional, organizational, and socio-political conditions that have encouraged more collaborative forms of impact assessment thus far. These are: 1) decentralized regulatory organizations more responsive to changing circumstances; 2) integrating strategies for effective communication of Indigenous perspectives; 3) efforts to build

a shared vision for development through local and region-specific planning; 4) the integration of Indigenous knowledge; and 5) developing capacities required to effectively participate in impact assessment processes.

There are limited examples of successful collaboration in some ongoing process, focused on co-drafting and First Nations-led production of s.35 parts of impact assessments that directly impact Indigenous rights, and as well collaboration on non-assessment matters that provide a basis for trust and working relationships. The leading examples of this are the structures and specific agreements of the Cree Nation, the Squamish Nation agreement on LNG, the Tsleil Wututh Nation on TMX, and SSN/Ajax processes, all of which demonstrate the possibility of the exercise of decision-making power by First Nations governments and the emergence of pragmatism among First Nations leaders.

Processes that do exhibit qualities that reflect articulated Indigenous principles, FPIC, reconciliation and UNDRIP are those that First Nations have initiated and achieved through their own strategic initiative and political acumen, and which have largely been enacted through bilateral engagement with proponents and not with the Crown. It must be noted that the Cree Nation's particular advantage in this situation is its strong infrastructure and institutions resulting from its decades long experience in developing its corporate structure and myriad of processes in land and environmental management. The Squamish Nation too benefits from operating in a complex legal context and the fact that governments and industry have great incentives to collaborate with them. Smaller First Nation communities may not have the same capacity to engage in such mechanisms or to ensure, as the above nations have done, that their rights are centered in negotiation processes.

First Nations that have been successful in moving things forward in terms of gaining power over the processes have done so by understanding their position in the broader political and economic framework of Indigenous-state relations, and have taken advantage of their strategic position and their involvement in other processes at play in their political and economic relationships,

with the Crown and industries. And, by politically asserting inherent rights and natural law as governments within their territories as the framework for all engagement with the land and people by proponents and the Crown. This is a shift from earlier era where, in some cases, such as 2004 Robert's Bank Vancouver Port Authority and Tsawwassen First Nation, Aboriginal rights considerations were required to be explicitly excluded from agreements. The progress that has been made is evident in the present project's ongoing Terminal 2 process, where informal collaborations in the conduct of studies and various groups' providing comment and input on rights-affecting areas of the impact assessment, and in other cases Indigenous groups have written the submission on rights impacts.

Though limited, there are a number of examples of current agreements and processes that represent successful attempts at collaboration. Not in the overall sense, but in specific provisions reflecting various aspects of a possible new regime being included in various agreements.

The province of British Columbia has been actively pursuing collaboration agreements with First Nations since 2015, with many agreements being signed relative to the rest of the country. However, the BC agreements are illustrative of the general situation across the country. They reflect the fact that there is some progress towards the Crown engaging with First Nation governments in a collaborative manner, and explicitly with the objectives of reconciliation at the forefront. But the agreements nonetheless contain only limited expansions of First Nation government roles relative to previous approaches, and none contain any serious shift in the decision-making power structure.

The 2016 Letter of Understanding between BC and several North Coast First Nations on LNG ESI North Coast Regional Stewardship Forum illustrates the potential for collaboration and creativity in engaging First Nations on their own terms when First Nations are either proponents or supportive of the project – where the Crown and the Indigenous interest are determined to be in synch. So even at this early date in the collective process of moving from the old regime to the new, and toward the foregrounding of reconciliation as a frame for negotiations, there was

evident creativity in the kind of mechanisms for collaboration envisioned, and the agreement reflected a recognition of strong principles of Indigenous governance and nation-to-nation relationship. The agreement was followed in 2018 by a supplementary agreement with First Nations in the region advancing a cumulative effects collaboration approach called ESI (ecosystem assessment, restoration and research and knowledge sharing and stewardship training).

More instructive and relevant to the objectives of this report – recognizing that there are relatively few situations in which rights-holding or constitutionally implicated Indigenous groups are project proponents or business partners in projects – are the agreements negotiated with First Nation groups who stand independent of project proposals.

Prominent among these, the CSFS signed a collaboration agreement in 2015 which created a framework for BC and the CSFN to engage in what is referred to in the agreement as collaborative decision-making, for legally designated major projects and other projects requiring CSFN authorization. The key aspect of this framework is that it commits the parties to seeking to develop consensus recommendations in relation to the design and conduct of environmental/impact assessments and other processes. This agreement is basically the same in this regard as a host of other collaboration agreements with sections dealing with environmental/impact assessment signed between British Columbia and various First Nations, including a 2011 agreement between BC Hydro, the province and the Tahltan Nation with regard to the Northwest Transmission Line that foreshadowed this approach, the 2015 Taku River Tlingit updated *Wóoshtin yan too.aat* / Land and Resource Management and Shared Decision Making Agreement, the 2016 Gitanyow Hereditary Chiefs reconciliation agreement, the 2016 environmental assessment agreement between the federal and provincial governments and the Ulkatcho and Loosk'uz Dené First Nations in regard to the Blackwater Gold proposal, the 2017 Gwa'sala-'Nakwaxda Nation Consultation Engagement Agreement, the 2018 regional strategic environmental assessment renewal agreement with the Treaty 8 First Nations, and the 2018 CSFN Omineca Demonstration Project agreement, and so-called Strategic Engagement

Agreements with the Kaska Dena Council Strategic Engagement Agreement in 2018, and with the K'Tunaxa Nation and Stó:lō Nation in 2019.

The mechanics of the BC collaborative decision-making framework were enhanced and developed more fully starting in 2019. The 2019 CSFN Pathways Forward agreement, for example, states that consensus is the core principle of the collaboration, and includes three specific measures to operationalize this commitment among the parties:

- a. Establish a collaboration plan at the outset of the project's development detailing how the parties will collaborate and seek to achieve consensus;
- b. Form a collaboration team to develop recommendations on the consensus; and,
- c. Design a dispute resolution mechanism to assist in overcoming disagreements.

These three elements are innovative, and they are illustrative of the kind of measures that could be built into future collaboration agreements. However, their actual impact is questionable because the agreement also contains provisions that undermine the effectiveness of this collaborative decision-making by allowing parties to opt-out of collaboration at any point (albeit with ten days' notice). The CSFS agreement, and all the other BC agreements are alike in this respect, is non-binding on the parties when it comes to collaboration. The agreement states that if consensus is not reached and the parties are unable to resolve a disagreement, "each party may proceed with its decision-making process." This quite obviously, given the political and economic realities in Canada that currently structure the Indigenous-state relationship and social realities on the ground, provides the provincial and federal governments with a mechanism to abandon collaboration if issues are encountered which political leaders find too challenging to overcome or unacceptable in a calculation of the issues' bearing on the interests of the Crown.

An example of another form of collaboration in the area of impact assessment, reflecting the unique treaty-structured relationship and long-established institutional ties between the James Bay Cree and the federal government (in this case, the Agency), is the 2019 Memorandum of Understanding in relation to the Rose-Tantalum and James Bay lithium projects. In this

agreement, though like the BC agreements, the ultimate decision-making authority on project approvals remains vested with the Crown, the Cree Nation has a mandated role in decision-making, specifically, in “deciding whether the projects are likely to cause significant adverse environmental effects”, and the Minister is legally required to consider “the views of the Cree Nation Government and Cree First Nations potentially affected” along with conclusions of environmental/impact assessment reports and proposed mitigation measures to address not only assessment reports but also the views of the Cree. This agreement also contains a consensus principle, with a mechanism that, unlike the BC agreements which take a procedural approach, is political in that it requires the President of the Agency and the Executive Director of the Cree Nation Government to meet and attempt to work out a compromise in the event of a fundamental disagreement at conclusion of the assessment process on the potential impacts of a project.

The current high-water mark in Indigenous collaboration agreements appears to be the kind of collaborations enacted in the 2019 Gwets’en Nilt’in Pathway Agreement and the 2020 Lake Babine Nation Foundation Agreement. To a lesser extent, the 2018 Shíshálh Foundation Agreement and the agreement contained in the 2019 Secwépemc BC government-to-government Letter of Commitment also represent the expansion of collaboration on sound principles. These expand on the approach taken in the CSTC Pathway Agreement in terms of the kinds of explicit recognitions of inherent rights and specific mentions of UNDRIP, FPIC, Indigenous governance concepts and mechanisms and objectives across various sectoral areas that are built into the agreements. Yet, in spite of the rhetorical commitment to reconciliation and stated recognition of modernized principles, the general provisions section of the agreement, as with all others in Canada thus far, maintain existing decision-making pathways and authorities and do not challenge the current dynamic of the Indigenous-state relationship.

Recommendations

Overall and systemically, as part of a broader process of reconciling the relationship between Indigenous peoples and the state in Canada, the Crown should ensure that all future collaboration processes and agreements with Indigenous peoples reflect the following principles:

- Recognize Indigenous rights, governance, law and jurisdiction
- Decolonize existing relationships in terms of governance, law and jurisdiction
- Establish lasting institutions for collaboration that respect UNDRIP and FPIC
- Respect the reciprocal responsibilities of Indigenous people to the natural environment
- Support Indigenous nations in exercising their rightful authorities and responsibilities
- Adapt fiscal frameworks to reflect the increasing needs of Indigenous nations

To support this movement, Crown mandates should be developed to allow the Agency and provincial bodies to transfer jurisdiction over impact assessments to Indigenous governments in all cases where they determine that their Constitutional rights are implicated in a project proposal. In the new regime of impact assessment, the Agency should be positioned as the vehicle interfacing between Indigenous governments and federal and provincial ministries, agencies and proponents to enable and support independent assessments by Indigenous governing bodies. It is evident from the research that Indigenous-led assessments are the preferred option for impact assessment and that prioritizing and supporting the implementation of Indigenous-led assessments will lead to more and better collaborations. Also, methodologically, prioritizing Indigenous-led assessments will likely lead to decisions on environmental questions that consider the full spectrum of influencing factors because of the more effective interface between Indigenous knowledge and worldviews and those of Canadian mainstream science and cultural perspective.

To operationalize these commitments, the Crown should allow for and empower the exercise of Indigenous approval of project proposals as full partners in decision-making with federal and provincial governments and project proponents. A truly collaborative process is one that respects

the inherent rights and jurisdiction of First Nation, Inuit, and Métis governments and positions them as partners in decision-making and ensures that the principles of Indigenous collaboration, the right of self-determination and human rights generally are factored into impact assessments. The experience with First Nation-centered and led collaborations thus far, even though the extent of such collaborations are limited, demonstrates that there is emerging Indigenous capacity to undertake this role and to lead the conduct of processes that embody the state of the art in impact assessment. Processes that centre Indigenous governments have a positive effect on Constitutional rights and result in the full and accurate consideration of environmental impacts of proposed projects, ensuring certainty for proponents in results.

The specific elements that should be integrated into collaboration agreements are:

- Confidentiality of Indigenous knowledge and information shared by communities
- Transparency, openness and the mutual accountability of parties
- Direct and cooperatively conducted working relationships between parties
- Legally binding frameworks structure all processes
- Proponents fully fund processes and the conduct of assessments
- Ensuring at the outset that proponents commit to respect Indigenous and human rights
- Providing training in this area to employees working with Indigenous communities
- Establishing autonomous complaint mechanisms for Indigenous communities
- Identifying criteria and indicators to allow monitoring of potential rights violations
- Establishing and legally empowering effective enforcement measures and sanctions

To address present discrepancies that prejudice impact assessment against Indigenous peoples, the Crown should increase the capacity of Indigenous peoples to autonomously engage in impact assessment. First Nations, Inuit, and Métis should be supported by the Crown, using varied strategies and multiple mechanisms adapted to their distinct situations, to achieve the objective of individual community capacity development leading to the establishment of an Indigenous Impact Assessment regime. By supporting and funding capacity development and internal

conflict resolution as integral parts of impact assessment processes, through both impact assessment specific and enhanced core funding of organizations, there is an opportunity to promote Indigenous resurgence and thus have broader positive impacts on Indigenous nations and the lived experiences of Indigenous people through their engagement with the impact assessment system. Specific measures with respect to capacity building may include:

- Develop expertise in and integrate sex and gender-based analyses
- Designing impact assessments using cumulative effects matrix'
- Training Indigenous people in community-based and qualitative research
- Employing Indigenous community-based and independent experts
- Generating baseline information using traditional knowledge and methods
- Supporting Indigenous communities' administrative and planning needs

The design of processes and the conception of timeframes of impact assessments must account for the potential internal social and political divisions within communities caused by project proposals and must include community-based means to resolve these conflicts prior to the decision-making phase. Specific measures with respect to this may include:

- Providing education and awareness regarding projects by subject matter experts
- Engagement with community to determine their concerns and anticipated benefits
- Focused discussion of the project proposal by stakeholder and cultural practice groups
- Public meetings structured on Indigenous protocol for debate on project proposals
- Including dissenting views and the rationale of perspectives that disagree with decisions
- Committing to integrate community direction, expert and legal advice in decisions

Finally, and crucially, Indigenous languages and culture, ceremonial protocols and spiritual practices should be integral in the impact assessment process, including physically hosting hearings in Indigenous communities and in spaces arranged or especially constructed in accord with Indigenous cultural protocols and spiritual beliefs.