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Alberta Energy Projects and Indigenous Accommodation?

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1.0 INTRODUCTION

The Courts have yet to rule on appropriate Aboriginal accommodation measures, preferring to direct a negotiated resolution between Indigenous Groups, governments, and project proponents. This lack of judicial direction, regardless of the reasoning, introduces uncertainty into the process of consultation and accommodation and affects all parties and Canadian society generally. This paper summarizes the relevant law regarding governments' obligations to accommodate Indigenous peoples living in Canada[1] in making development approval decisions.

The Courts are not the only source of guidance for this process. Consultation policies in other provinces and territories can assist Alberta decision-makers in the consultation and accommodation process. The *Alberta First Nation Consultation and Accommodation Handbook* (2014) and the *Alberta First Nation Consultation and Accommodation Handbook – Updated to 2016*-were intended to provide guidance for participants and the public in Alberta's First Nation consultation processes.[2]

Alberta's Consultation Policy, *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* [Consultation Policy][3] and its associated *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management (July 28, 2014)* [Guidelines][4] does not, like some other

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[1] Indigenous People living in Canada people prefer the name for themselves in their language and are mostly indifferent to the Canadian name accorded to them in English or French, although they may include First Nation as a descriptor to emphasize their priority. I will attempt to use the preferred appellation of the relevant Indigenous Nation in English. Collectively describing the peoples involved however remains a problem, as section 35(2) of *The Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. [*Constitution Act, 1982*] defines "Aboriginal peoples" as including "Indian, Inuit and Métis peoples." Inasmuch as "Aboriginal law" refers to Canada's mechanism to regulate its relationship to Indigenous People, Aboriginal will be used in contrast to Indigenous law under which Indigenous Nations have, since time immemorial, governed themselves and their traditional territories. Historical references may require the use of now discouraged appellations. No offence is intended in this usage. The use of "Canadians" is deliberate. Current Canadian residents have, since 1867 inherited the territories, resources and obligations of Britain arising from historical encounters with Indigenous Peoples, as well as incurring new obligations. Current Canadian residents may not have participated in the history of Indigenous Peoples suppression and dispossession, but they live in a Canadian society *that has prospered on that history*.

[2] David Laidlaw & Monique Passelac-Ross, *Alberta First Nations Consultation & Accommodation Handbook*, Occasional Paper #44 (Calgary: CIRL, 2014) [Laidlaw and Ross, *Handbook*], at <https://prism.ucalgary.ca/bitstream/handle/1880/50216/ConsultationHandbookOP44.pdf?sequence=1&isAllowed=y> and David Laidlaw, *Alberta First Nations Consultation & Accommodation Handbook Updated to 2016*, Occasional Paper #53 (Calgary: CIRL, 2016) [Laidlaw, *Handbook Update*] at <https://prism.ucalgary.ca/ds2/stream/?#/documents/40730f6e-ed25-419b-b17b-2d5c3fee941c/page/1> The Alberta Métis Consultation Policy, *The Government of Alberta's Policy on Consultation with Metis Settlements on Land and Natural Resource Management, 2015* [Métis Consultation Policy] at < https://open.alberta.ca/publications/policy-on-consultation-with-metis-settlements-2015>. For a background discussion of Métis Rights in this regard see: Catherine Bell and Paul Seaman, "A New Era for Métis Constitutional Rights? Consultation, Negotiation and Reconciliation" (2015), 38(1) Manitoba LJ 29.

[3] *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013*, [Alberta Consultation Policy] at < https://open.alberta.ca/publications/6713979>.

[4] *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management (July 28, 2014)* [Alberta Guidelines] at < https://open.alberta.ca/publications/3775118-2014>.

policies, describe potential First Nation accommodation measures.[5] We identified this as a flaw in the *Handbook*, and referred to other policies—most notably the Government of Canada's *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (2011) [Federal Consultation Policy], which elaborates on the Federal government's role in providing and assessing the adequacy of Aboriginal accommodation.[6]

The current Federal Consultation Policy[7] has the most detailed consideration of Aboriginal accommodation measures. It considers the Environmental Assessment [EA] Process for project approvals as the best method to satisfy the Crown's constitutional obligations to consult and accommodate Aboriginal rights and interests.[8]

Canada maintains a comprehensive public database, the Canadian Environmental Assessment Registry [Registry][9] , containing, among others: project descriptions from project Proponents; submissions from affected groups (including Indigenous groups); and Project approval rulings or recommendations from the Canadian Environment Assessment Agency [Agency], the National Energy Board [NEB] and the Canadian Nuclear Safety Commission [CNSC] with attached conditions for approval [Panel Report or NEB Report]. It also contains Decision Statements from the relevant Ministries, where necessary, that contain the formal Project approval decision.

This paper examines project approvals issued before December 31, 2017, to ascertain what, if any, affects the incorporation of proposed Aboriginal accommodation measures had on the conditions attached to project approvals. Potential insights may also be derived from:

- Proponent's design of a project (e.g. practical accommodation measures); and
- Environment Assessment rulings on Aboriginal accommodation measures based on:
    - Aboriginal peoples' submissions on appropriate accommodation measures; and
    - Proponent's and other third parties' responses to those submissions.

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[5] Laidlaw and Ross, *Handbook supra* note 2 at 35 to 37.

[6] *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (2011) [Federal Consultation Policy] at <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf>.

[7] Other policies referenced in the *Handbook* included provincial and territorial consultation instruments, including Québec's *Interim guide for consulting the Aboriginal Communities* (2008) at 12, online at <https://www.autochtones.gouv.qc.ca/publications_documentation/publications/guide_inter_2008_en.pdf >. Notably it includes participation of Aboriginal peoples in environmental monitoring; Newfoundland's, *The Government of Newfoundland and Labrador's Aboriginal Consultation Policy On Land and Resource Development Decisions* (2013) at 3-4 online at <https://www.gov.nl.ca/iias/wp-content/uploads/Aboriginal_consultation.pdf>. The project proponent will bear all the cost of consultation, accommodation, and compensation for First Nations; and British Columbia's *Updated Procedures For Meeting Legal Obligations When Consulting First Nations Interim* (2010) at 6, 17-18 [BC Consultation Policy] available from <http://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations>.

[8] Federal Consultation Policy *supra* note 6 at page 25.

[9] Canadian Environmental Assessment Registry [Registry] online at: <http://www.ceaa-acee.gc.ca/050/index-eng.cfm>.

This paper may be used in a number of ways. Firstly, as a guide to standardize accommodation measures for particular Aboriginal concerns—to assist government and corporate policy makers in environmental tribunal hearings and the courts in dispensing justice. Secondly, to assist energy developers in developing best practices for Aboriginal accommodation on a practical level. Thirdly, to assist Aboriginal groups in advancing their concerns.

Organization of this Paper

This Paper is organized as follows:

1. This Introduction
2. Court Rulings and Remedies
3. Federal Consultation Policy
4. Environmental Assessment Overview & Methodology
5. Completed Environment Assessments – Alberta Focus
6. Conclusions and Recommendations
7. Appendices

A Glossary of Acronyms is attached in the frontispiece for reference.

2.0 COURT RULINGS AND REMEDIES

The Federal and Provincial Crown's duty to consult and accommodate Aboriginal peoples when their interests are affected is well established in Canadian jurisprudence.[10] The Crown's constitutional duty to consult and accommodate Aboriginal peoples was summarized in a unanimous judgement of the Supreme Court of Canada by Justice LeBel in *Behn v Moulton Contracting Ltd* (2013), as follows:

> [27] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511, this Court confirmed that the Crown has a duty to consult Aboriginal peoples and explained the scope of application of that duty in respect of Aboriginal rights, stating that 'consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands': para. 38. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII), [2005] 3 S.C.R. 388, the Court held that the duty to consult applies in the context of treaty rights: paras. 32-34. The Crown cannot in a treaty contract out of its duty to consult Aboriginal peoples, as this duty 'applies independently of the expressed or implied intention of the parties': *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 (CanLII), [2010] 3 S.C.R. 103, at para. 61.
>
> [28] The duty to consult is both a legal and a constitutional duty: *Haida Nation*, at para. 10; *R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 S.C.R. 483, at para. 6; see also J. Woodward, *Native Law*, vol. 1 (loose-leaf), at p. 5-38. This duty is grounded in the honour

[10] Laidlaw and Ross, *Handbook supra* note 2 at pages 2 to 12. See also: Chris W Sanderson, Keith B Bergner and Michelle S Jones, "The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty" (2012) 49:4 Alta L Rev 821.

> of the Crown: *Haida Nation*, *Beckman*, at para. 38; *Kapp*, at para. 6. As Binnie J. said in *Beckman*, at para. 44, '[t]he concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose.' The duty to consult is part of the process for achieving 'the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown': *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010, at para. 186, quoting *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507, at para. 31; *Haida Nation*, at para. 17; see also D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009).
>
> [29] The duty to consult is triggered 'when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it': *Haida Nation*, at para. 35. The content of the duty varies depending on the context, as it lies on a spectrum of different actions to be taken by the Crown: *Haida Nation*, at para. 43. An important component of the duty to consult is a requirement that good faith be shown by both the Crown and the Aboriginal people in question: *Haida Nation*, at para. 42. Both parties must take a reasonable and fair approach in their dealings. The duty does not require that an agreement be reached, nor does it give Aboriginal peoples a veto: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII), [2004] 3 S.C.R. 550, at paras. 2 and 22; *Haida Nation*, at para. 48.[11]

The *Tsilhqot'in Nation v British Columbia* (2014)[12] case which granted the first Court declaration of Aboriginal title on a territorial basis for the semi-nomadic *Tsilhqot'in Nation,* in accordance with the requirements of *Delgamuukw v British Columbia* (1997),[13] raised concerns over previously approved projects saying,

> [o]nce [aboriginal] title is established, *it may be necessary for the Crown to reassess prior conduct* in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, *it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing*.[14] [emphasis added]

This may apply to Treaty Land Entitlement Claims [TLE] under historical treaties if settled.[15]

The circumstances under which the Crown's duty to consult Aboriginal peoples arises are, relatively speaking, clear. What is not so clear is the accommodation arm of that duty.

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[11] *Behn v Moulton Contracting Ltd* 2013 SCC 26, [2013] 2 SCR 227 [*Moulton*].
[12] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257, 374 DLR (4th) 1 [*Tsilhqot'in*].
[13] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*].
[14] *Tsilhqot'in, supra* note 12 at 92. See e.g. Sharon Mascher, "Today's Word on the Street – "Consent", Brought to You by the Supreme Court of Canada" (July 8, 2014) ABlawg Post at <https://ablawg.ca/2014/07/08/todays-word-on-the-street-consent-brought-to-you-by-the-supreme-court-of-canada/> and Martin Papillon and Thierry Rodon, "Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada" (2017), 62 EIA Review 216 [Papillon, "Implementation of FPIC in Canada"] at 219
[15] TLE legislation and Framework Agreements exist in Manitoba and Saskatchewan dealing with claims on an individual basis. See: <http://yqfn.ca/wp-content/uploads/2017/06/TLE-Framework-Agreement-Synopsis.pdf> and < https://www.gov.mb.ca/inr/resources/pubs/tle%20framework%20agreement%201997.pdf>. Alberta does not have one.

2.1 ABORIGINAL ACCOMMODATION

In *Haida Nation v British Columbia (Minister of Forests)*, the landmark case establishing the Crown's duty to consult and accommodate Aboriginal peoples, the Supreme Court said:

> [47] When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus, the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.
>
> [48] This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal 'consent' spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.
>
> [49] This flows from the meaning of 'accommodate.' The terms 'accommodate' and 'accommodation' have been defined as to 'adapt, harmonize, reconcile' . . . 'an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise': *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.
>
> [50] The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 S.C.R. 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands 'cannot be accommodated to reasonable exercise of the Hurons' rights.' And in *R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139, at para. 81, the Court spoke of whether restrictions on Aboriginal rights 'can be accommodated with the Crown's special fiduciary relationship with First Nations.' Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.[16]

In *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage*) (2005)[17] the Supreme Court extended this duty to consult to established Treaty rights where the province was, under the

[16] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*] at para 47-50. The companion case is *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].

[17] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage*), 2005 SCC 69 [*Mikisew*]. See also: Jimmie R Webb, "Unfinished Business: The Intent of the Crown to Protect Treaty 8 Livelihood Interests (1922-1939)", in

Treaty, allowed to "take up" those lands for any other purpose. The Numbered Treaties, in this case Treaty No. 8, contemplated future land use changes: from lands upon which Treaty signatory First Nations could obtain a livelihood and exercise associated rights – to a separate category impairing that capacity. This process of change was not subject regulation in the Treaties and the honour of the Crown, that infuses all dealings between the Crown and Aboriginal peoples, gave rise to a similar Crown duty to consult Aboriginal peoples about this change.

The Numbered Treaties give rise to First Nations procedural rights in consultation as well as substantive rights in accommodation measures.[18] As the Crown is always party to a Treaty, the depth of consultation will be found in the treaty specificity, the seriousness of the impact, the nature of the particular treaty right, and the history of dealings.[19] The impact will be measured on lands over which First Nations traditionally harvested for a livelihood and continue to do so today.[20] If a particular First Nation has no meaningful right to harvest there is a potential action for treaty infringement.[21]

This distinction as to current use, may not be clear, the cyclical nature of Indigenous harvesting involving certain hunting grounds "rest and recover" for a period of time only to return to that territory in the future, Indigenous Nations could still be "currently using" the fallow territory.

2.2 PURPOSE OF ABORIGINAL ACCOMMODATION

In *R v Van der Peet* (1996) the Court described reconciliation as the central purpose of the Aboriginal rights in section 35 of the *Constitution Act, 1982*[22] saying:

> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the Aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the *reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown*.[23]

This was extended in *Haida* where the Supreme Court described the purpose of accommodation negotiations, in the context of unproven Aboriginal rights, as "a process of balancing interests, of

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Marc G Stevenson and David C Natcher, eds, *Planning Co-Existence – Aboriginal Issues in Forest and Land Use Planning* (Edmonton: CCI Press, 2010) at 61-80.

[18] *Ibid* at para 57.

[19] *Ibid* at para 63.

[20] *Ibid* at para 48. Consultation is not required for all signatories to a Treaty, just the project affected First Nations at par 55.

[21] *Ibid.* See also; *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163, Justice Greckol, concurring, as to cumulative effects of development at 79 to 81, Nigel Bankes "The AER Must Consider the Honour of the Crown" (April 28, 2020) ABlawg Post at <https://ablawg.ca/2020/04/28/the-aer-must-consider-the-honour-of-the-crown/>

[22] *Constitution Act, 1982*, *supra* note 1.

[23] *R v Van der Peet* [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*] at para 31. See also: *Haida, supra* note 16 at paras 17 and 27; *Taku River, supra* note 16 at para 24; *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 [*Manitoba Métis*] [*Emphasis added*].

give and take"[24] to seek compromise "in an attempt to harmonize conflicting interests and move further down the path of reconciliation."[25] The need for reconciliation arose "from the 'Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."[26]

In *Haida* the goal was to reach modern treaties through honourable negotiations that would "serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act*, 1982."[27] However, "[r]econciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*."[28]

Similarly, in *Mikisew*, treaty making is "an important stage in the long process of reconciliation, but it is only a stage", the signing of Treaty 8 "was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it."[29] Further, "consultation is key to achievement of the overall objective of the modern law of treaty and Aboriginal rights, namely reconciliation." [30]

We have argued in the *Handbook Update*, that the logic of *Mikisew,* consistent with Indigenous understandings of Treaties as a process of adjusting shared lands, would require provinces to provide advance notice of lands being taken up, perhaps by sharing mineral lease notifications or through other mechanisms.[31] In this paper we extend this argument to suggest when a Project has serious impacts on Treaty livelihood rights – the Province in upholding the honour of the Crown is obliged to provide, from Crown lands, replacement lands to ensure the livelihoods of Aboriginal people.

2.3 COURT REMEDIES

Court proceedings may be brought on the basis that a government failed in its duty to consult and accommodate.[32] In those proceedings analogies from administrative law are applicable and the standard for review would focus on the process,

> [If] the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by a standard of correctness. When the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable.[33]

[24] *Haida supra* note 16 at para 48.
[25] *Ibid* at para 49.
[26] *Ibid* at para 32.
[27] *Ibid* at para 20.
[28] *Haida, supra* note 16 at para 32.
[29] *Mikisew, supra* note 17 at para 54.
[30] *Mikisew, supra* note 17 at para 63.
[31] Laidlaw, *Handbook Update, supra* note 2 at 20. Mineral lease grants are specifically excepted from Alberta's Consultation Policy.
[32] *Haida, supra* note 16 at para 60.
[33] *Ibid* at para 63.

One law review article noted that current litigation over Aboriginal rights has been largely confined to the question of whether the Crown adequately discharged its duty to consult. [34]

In *Haida,* the British Columbia [BC] Government had never consulted the Haida Nation before deciding to grant a forestry licence. This was a breach of the duty and the Court directed additional consultation negotiations with the Haida Nation.[35] The Court speculated that the strength of the Haida peoples' claims would mandate some accommodation but that was not part of the ruling. In *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage*), the Court ruled that any consultation that excludes from the outset any form of accommodation would be meaningless and directed additional negotiations with the Mikisew Cree First Nation.[36]

This preference for negotiation has the support of the Court—in *Haida*, "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests."[37] Court supervision of accommodation negotiations was attempted in *Hupacasath First Nation v British Columbia (Minister of Forests)*[38] including the appointment of a mediator to oversee negotiations for a two-year period.[39]

Courts have confined themselves, when a breach of the Crown's duty to consult, to remedies of ordering further consultation with the same Crown that misapprehended "the seriousness of the claim or impact of the infringement."[40]

The Supreme Court has never substantially revisited the accommodation aspect, aside from noting in 2010 in *Beckman v Little Salmon/Carmacks First Nation*, that "[t]he test is not, as sometimes seemed to be suggested in argument, a duty to accommodate to the point of undue hardship for the non-Aboriginal population."[41]

2.4 ENVIRONMENTAL ASSESSMENT AND CONSULTATION POLICIES

In *Haida*, the Supreme Court noted that a subsequent Provincial Policy for *Consultation with First Nations* (2003) was in place and "a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers."[42] In *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, a companion case to *Haida,* the Supreme Court found that BC had satisfied their duty to consult and accommodate the Taku River

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[34] Lynda M Collins and Meghan Murtha, "Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish and Trap" (2010) 47:4 Alta L Rev 959 at 989-991. See generally Verónica Potes, "The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?" (2006) 17 J. Envtl L & Prac 27 [Potes, Duty to Accommodate].
[35] *Ibid* at para 77.
[36] *Mikisew, supra* note 17 at 54. The Minister was directed to re-negotiate in accordance with the decision at para 69.
[37] *Haida, supra* note 16 at 14.
[38] *Hupacasath First Nation v British Columbia (Minister of Forests)* (2005), 51 BCLR (4th) 133 (BC SC) [*Hupacasath*].
[39] An extension was denied *Ke-Kin-Is-Uqs v British Columbia (Minister of Forests)*, [2009] 1 CNLR 30 (BCSC).
[40] See e.g.: Alberta: *Siksika First Nation v Alberta (Director Southern Region Environment),* 2007 ABCA 402; Québec: *Kruger inc c. Première nation des Betsiamites*, 2006 QCCA 569
[41] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 [*Beckman*] at para 81.
[42] *Haida, supra* note 16 at para 51.

Tlingit First Nation by their participation in the legislated EA process for project approval that provided, *in substance*, an appropriate level of consultation and accommodation.[43]

After *Haida* and *Taku River*, the federal and provincial governments have developed consultation policies[44] focussed on a project-based EA to guide consultation and accommodation negotiations with Aboriginal peoples.[45] These consultation policies generally delegate procedural aspects of Aboriginal consultation and accommodation[46] to project proponents as allowed under *Haida*.[47] Governments remain responsible for fulfilling the constitutional duty to consult and accommodate Aboriginal groups before making a decision affecting Aboriginal interests.[48]

The environment is a shared jurisdiction with federal and provincial environmental protection and assessment legislations.[49] The number of these legislations, substitution agreements, policies, guidance documents make EA very complicated locating the satisfaction of the Crown's duty to consult and accommodate in the EA process becomes more indeterminate, lessening Indigenous peoples' confidence in reconciliation.

Screening Measures

Subjecting every proposed project to an EA is impractical, and there are pre-screening measures in environmental legislation to ascertain the necessity and scope of an EA. However, these environmental screening standards may not coincide with the proposed project's impacts on Aboriginal rights. This discrepancy will engage the Crown's duty to consult and accommodate and be open to court challenge on the basis of correctness.[50]

Brownfield v Greenfield Projects

This distinction arises from the Supreme Court of Canada's decision in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, where the Court said,

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[43] *Taku River, supra* note 16 at para 44.
[44] This, despite the invitation in *Haida, supra* note 16 at para 51 to develop "regulatory schemes to address the procedural requirements appropriate to different problems at different stages ... reducing recourse to the courts," was the basis of potentially delegating the duty to consult to a regulatory tribunal. See *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 [*Rio Tinto*] at 56.
[45] Laidlaw and Ross, *Handbook*, *supra* note 2 at 9 and pages 23-44 where Consultation Policies from other jurisdictions are compared with Alberta's First Nation Consultation regime. See also: Rachel Ariss, Clara MacCallum Fraser & Diba Nazneen Somani, "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?" (2017) 13:1 MJSDL (Online) at<https://www.mcgill.ca/mjsdl/files/mjsdl/2_volume_13_ariss.pdf>.
[46] Saskatchewan's Consultation Policy is a notable exception.
[47] For example, Alberta Consultation Policy, *supra* note 3 at 5.
[48] *Haida, supra* note 16 at para 53. Alberta does not require this—its Consultation Policy states that "Crown decisions will generally occur within the applicable statutory and regulatory timelines and in accordance with the Guidelines" at page 4, *supra* note 3.
[49] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 1992 CanLII 110. See generally: Stepan Wood, Georgia Tanner & Benjamin J. Richardson, "What Ever Happened to Canadian Environmental Law?" (2010), 37 Ecology Law Quarterly 981 at 1025-1027 [Wood and Tanner, *Canadian Environmental Law*].
[50] See *White River First Nation v Yukon Government*, 2013 YKSC 66 at 92 to 95.

> [45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The *claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts* on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.
> ….
> [49] The question is whether there is a claim or right that potentially may be adversely impacted by the current government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, *will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right*.[51]

For example, of the two major pipeline projects Northern Gateway was a "greenfield project" that involved, for the most part, consultation on *new impacts* on aboriginal interests along the route.[52] Trans Mountain in contrast was a "brownfield project" that involved, for the most part, following the existing pipeline right-of-way [ROW] along the route,[53] limiting consultation to additional *new impacts* on aboriginal interests. This limited consultation on brownfield projects has been extinguished by policies[54] and legislation[55] that dispense with aboriginal consultation in areas where there have been previous disturbances from development *of any kind*. This is non-sensical as Aboriginal rights can be exercised on disturbed land, albeit at some lower level and that exercise requires consultation.

Aboriginal Participation in EAs

After a proponent decides to construct a project on traditional lands, Aboriginal participation in the EA is compulsory as that information will be used, in part, to satisfy the Crown's constitutional duty to accommodate and Aboriginal groups cannot frustrate that process.[56] If an Aboriginal group refuses to participate in the EA of a project, or imposes "unreasonable conditions," they will lose the opportunity to consult and potentially affect decision making on the project.

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[51] *Rio Tinto*, *supra* note 44 at para 45 to 49; See also para 53 [*Emphasis added*]. *Rio Tinto* also raised the possibility that a decision by an administrative Tribunal, if it had sufficient legislated powers to decide constitutional questions could satisfy the Crown's duty to consult and accommodate at paragraphs 55 to 65 with the answer found in the governing legislation. See: Nigel Bankes, "The Supreme Court of Canada clarifies the role of administrative tribunals in discharging the duty to consult" (November 2, 2010) at <https://ablawg.ca/2010/11/02/the-supreme-court-of-canada-clarifies-the-role-of-administrative-tribunals-in-discharging-the-duty-to-consult/>.

[52] Northern Gateway's route described in Volume 1 of the Proponent's EIS (May 27, 2010) at 8-3 "Approximately 516 km of the RoW will be in Alberta, with about half on Crown land and half on private land. Approximately 656 km of the RoW will be in British Columbia, of which more than 90% will be on Crown land." Volume 1 is available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=43426>.

[53] Trans Mountain's route is on the project home page, *supra* note 158, and the route is described there as "Approximately 892 km (90 per cent) of the proposed Project would be contiguous to the existing [Trans Mountain Pipeline] easement or to existing linear disturbances and a total of 98 km (10 per cent) of the Project would be in a new corridor." The existing Trans Mountain pipeline had been approved by the Federal Board of Transport Commissioners on December 13, 1951 based on economic and strategic considerations without any environmental assessment, public or aboriginal input.

[54] Alberta's Consultation Policy is an example. See: Laidlaw, *Handbook Update, supra* note 2 at 24.

[55] Physical Activities Regulations, SOR/2019-285, s 41 limit EA (and consultation) for pipelines unless they involve 75 km of new right of way defined in s 1(1) as land "that is not alongside and contiguous to an area of land that was developed for an electrical transmission line, oil and gas pipeline, railway line or all-season public highway."

[56] In *Haida, supra* note 16, at 42, cited *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470, [1999] 4 CNLR 1 [*Halfway*] at 4. See para 161 in *Halfway* citing *Ryan v Schultz*, 1994 CanLII 181 (BC CA).

Regulatory and Complementary Consultation

In *Taku River,* aboriginal consultation could be fulfilled "at the broader stage of treaty negotiations" and "as well as in the development of a land use strategy" [*complementary consultation*]. After EA approval, additional aboriginal consultation on the project was contemplated "throughout the permitting, approval and licensing process, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate [*regulatory consultation*]."[57]

Complementary consultation is an amorphous concept implying ongoing or promised future negotiations wherein the honour of the crown would be upheld. These may involve treaty or land use planning negotiations with First Nations as in *Taku River* or other matters.

Regulatory consultation is an unknown – particularly where the EA Tribunal has delegated a significant matter to *regulatory consultation* and the lack of publicly accessible guidance as to the implementation of aboriginal consultation and accommodation in "the permitting, approval and licensing process. For example, in the EA of Ridley Island Project (2011) the Proponents were proposing to develop and operate a potash export terminal.[58] The potential environmental effects identified in the EA process were impacts on aboriginal fishing rights from the disposal at sea of dredged material. Three options were identified and evaluated as follows: Site A : approximately 1 km west, using a cheaper pipe network to transport the majority of material to the disposal site and eliminate most water transport; Site B : approximately 6 km southwest, a shorter water transport to the disposal site; and Brown Passage : 30 km west - this was EC's designated disposal site for the PRPA. [59] Brown Passage was the Aboriginal groups' preferred option but the Proponents' preferred Site A. The Agency did not decide that issue and deferred it to subsequent licencing processes administered by EC, which ultimately gave permission to dispose dredged material at Site A.[60] There is no information on why they changed from their own designated disposal site at Brown Passage or if there was any aboriginal consultation. This is particularly puzzling as the EA for the Pacific NorthWest LNG Project (2013) in Prince Rupert Harbour, did direct Brown Passage for dredged material dumping.[61] Delegation may be challenged under the common law doctrine of *delegatus non potest delegare* which prevents the holder of statutory discretionary power from conferring the exercise of that power on some other person, but that may be unsuccessful in the aboriginal context.[62]

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[57] *Taku River, supra* note 16 at 45.
[58] Ridley Island Project Home Page <http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=47632>. The proponents were Canpotex Terminals Ltd. and the Prince Rupert Port Authority [PRPA].
[59] Proposed New Disposal at Sea Sites for Canpotex Potash Export Terminal, Ridley Island (October 2011) at 1 at <http://www.ceaa-acee.gc.ca/050/documents_staticpost/47632/53481.pdf>.
[60] Environmental group wants health risks for Prince Rupert harbour dredging explored, February 12, 2016, CBC News <http://www.cbc.ca/news/canada/british-columbia/environmental-group-wants-health-risks-for-prince-rupert-harbour-dredging-explored-1.3444529>.
[61] Pacific NorthWest LNG Project Decision Statement (2017) Conditions 6.28 and 6.29 at <https://www.ceaa.gc.ca/050/evaluations/document/115669?culture=en-CA>
[62] *Forget v Quebec (Attorney General)*, [1988] 2 SCR 90, 1988 CanLII 51 [*Forget*]. See: John Willis, "Delegatus Non Potest Delegare" (1943), 21 Can Bar Rev 257.

Other projects have received guidance, for example the DFO conducted aboriginal consultation in 2013 in accordance with a *Protocol for Regulatory Phase Aboriginal Consultation Lower Churchill Generation Project* discussed in *Nunatsiavut v Canada (Attorney General)*, however consistent with the lack of information on regulatory consultation that *Protocol* is no longer publicly available.[63]

The uncertainty over both of these doctrines, render the location and satisfaction of the duty to consult more indeterminate, lessening Indigenous peoples' confidence in reconciliation

Project Based Consultation in EA

A project-based EA approval process poses several additional problems, including:

- private project proponents have no ability to authorize government accommodation measures such as additional Crown lands, replacement lands, co-management agreements,[64] or other government measures to satisfy Aboriginal peoples' concerns, leading to a distortion of the process and negative impacts on reconciliation;[65]
- difficulties of incorporating cumulative effects of several existing, planned, or proposed projects into a single project-based approval process where cumulative development impacts on Aboriginal rights may lead to the denial or nullification of them;[66] and
- "strategic decisions" such as land use strategies, forestry allocations, or other policies or legislation affecting Aboriginal interests [67] are not part of the project approval process.

2.5 LITERATURE ON ABORIGINAL ACCOMMODATION IN EA

Literature on Aboriginal accommodation in EA is limited. More common is the extensive consideration of Aboriginal consultation in EA and the problems that this entails.

In the 2013 text, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in*

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[63] *Nunatsiavut v Canada (Attorney General)*, 2015 FC 492 [*Nunatsiavut*] at 63 to 66.

[64] See e.g., David Laidlaw and Monique M. Passelac-Ross, *Sharing Land Stewardship in Alberta: The Role of Aboriginal Peoples* (2012), (Calgary: Canadian Institute of Resources Law, 2012) discusses government arrangements. Online <https://dspace.ucalgary.ca/bitstream/1880/48941/1/CoManagementOP38w.pdf>

[65] Laidlaw and Ross, *Handbook*, *supra* note 2 at 36.

[66] See e.g., Peter Duinker and Lorne Greig, "The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment" (2006), 37 Environmental Management 153, *Mikisew, supra* note 17 at paras 44 and 47. See also *ibid* at page 31 to 32. This is the situation of the Beaver Lake Cree First Nation, a signatory to Treaty No 6 who claimed that the cumulative effect of development has deprived them of any meaningful Treaty harvesting rights in their traditional territories. They sued in 2008, and the Amended Amended Statement of Claim is at <https://raventrust.com/wp-content/uploads/2014/04/Beaver-Lake-Cree-Amended-Further-Amended-Statement-of-Claim_filed_13-July-2012.pdf>. The case has been directed to trial, *Lameman v Alberta*, 2013 ABCA 148. See also: Bram Noble, *Getting the Big Picture: How regional assessment can pave the way for more inclusive and effective environmental assessments* (Ottawa: Macdonald-Laurier Institute, 2017) [Noble, *Big Picture*] at 9 to 13 at <https://macdonaldlaurier.ca/files/pdf/Noble_Aboriginal%233Study_FinalWeb.pdf>

[67] *R v Lefthand,* 2007 ABCA 206 at para 38: "There can however be no duty to consult prior to the passage of legislation, even where Aboriginal rights will be affected." *per* Slattery JA. See also: *Treaty Eight First Nations v Canada (Attorney General)* (2003), [2003] 4 CNLR 349 (FCT); See also *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40, [2018] 2 SCR 765 affirming [2017] 3 FCR 298, 2016 FCA 311; revg *sub nom Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244.

Canada,[68] Kirk Lambrecht sets out to describe in a functional and contextual analysis how Aboriginal consultation can be practically integrated into EA processes to advance reconciliation.[69] He describes the project development process in Canada as progressing through three stages: planning, approval, and control with corresponding Crown obligations of EA,[70] project approval, and, if the project proceeds, regulatory oversight.[71] EA assessments are not limited to the biophysical sphere but must consider the human environment of the economy and social well-being.[72] In the project approval stage, agencies or tribunals may make recommendations to decision-makers or exercise decision-making powers that usually have conditions attached.[73] Thereafter, if the project proceeds, it would be subject to the control phase through regulatory oversight, which Lambrecht describes as enforcing conditions of approval and particularly mitigation measures, which is beyond this paper.[74]

In terms of Aboriginal rights and interest, relying on pronouncements from the Supreme Court, Lambrecht lays out the basic principles discussed above.[75] The integration of the duty to consult and accommodate into the EA process *is more efficient* and allows for better decision making in project approvals because the Crown needs to be informed by both EA and Aboriginal consultation.[76] The ultimate goals for EA (sustainable development and protection of the environment) and Aboriginal consultation (reconciliation) differ, EA alone cannot effect reconciliation but it can, by protecting the environment from project effects protect Aboriginal practices in that environment.[77] EA process needs to be robust to properly accomplish this

[68] Kirk Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013) [Lambrecht, *Aboriginal Consultation, Environmental Assessment*] See also: Aniekan Udofia, Bram Noble, and Greg Poelzer, "Meaningful and efficient? Enduring challenges to Aboriginal participation in environmental assessment" (2017), 65 Environmental Impact Assessment Review 164 [Udofia, "Meaningful and Efficient"]
[69] *Ibid.*
[70] *Ibid* at 4, 39 to 41.
[71] *Ibid* at 4.
[72] *Ibid* at 41.
[73] *Ibid* at 116 to 118. There is a nuanced argument that *Rio Tinto, supra* note 44, does not embody a categorical imperative respecting tribunal jurisdiction. See also: Janna Promislow, "Irreconcilable? The Duty to Consult and Administrative Decision Makers" (2013), Vol 22(1) Constitutional Forum 64. The most recent NEB cases, *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*] and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.* 2017 SCC 41, where the NEB was given this jurisdiction in section 58 applications for exemptions for preparatory work, are discussed by Professor Nigel Bankes in his August 4, 2017 ABlawg post "Clyde River and Chippewas of the Thames: Some Clarifications Provided But Some Challenges Remain" at <https://ablawg.ca/2017/08/04/clyde-river-and-chippewas-of-the-thames-some-clarifications-provided-but-some-challenges-remain/>.
[74] *Ibid* at 7 to 8 and 43. He does not address the challenges in locating the satisfaction of the duty to consult in this regulatory oversight, particularly where the Crown argues additional opportunities for consultation exist in the "regulatory stage" or where EA Tribunals defer significant matters to that regulatory oversight. See e.g.: Chilenye Nwapi, A Review of the Environmental Enforcement Culture in Alberta in Relation to the Oil Sands (March 1, 2013). Canadian Institute of Resources Law Occasional Paper No. 40 at < https://live-cirl.ucalgary.ca/sites/default/files/Occasional%20Papers/Occasional%20Paper%20%2340.pdf>
[75] *Ibid* at 3. This is amplified by his discussion of Aboriginal rights, title and treaties in Chapter 2, environmental assessment fundaments in Chapter 3 and the development of crown consultation obligations in Chapter 4.
[76] *Ibid* at 3 and 108.
[77] *Ibid* at 3.

integration.[78] In terms of Aboriginal accommodation measures, other than equating mitigation measures for adverse impacts as accommodation, there is little discussion, but he does make a useful distinction between *practical accommodations* proffered by project proponents and mitigation measures in conditions of approval.[79]

In Professor Neil Craik's 2016 article "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment," he says that the EA process provides much of the same information to assess impacts on Aboriginal rights such that they are in part inseparable.[80] He draws an analogy between the purposes of EA in generating harmony with the environment by balancing competing social goals with the duty to consult, reconciling Aboriginal rights with other societal interests.[81] This common purpose leads to similar structures and procedures with an assumption that proper attention to procedure will lead to the proper outcomes—the avoidance of substantive impacts on the environment and on Aboriginal rights.

However, EA process will identify impacts on the environment and while mitigation is mandated, ultimately other objectives may lead to approval of environmentally damaging projects. He argues that the constitutional nature of consultation and accommodation, particularly where Aboriginal rights are established, the justification requirement for this infringement is higher. Craik focuses on procedural requirements that can contribute to a "generative" process of constitutional redefinition.[82] He identifies the duty to consult as having a variable content dependant on the nature of the rights; but as to the duty to accommodate it:

> … is best understood as a distinct obligation in the sense that a duty to consult at the lower end of the spectrum may still yield an obligation to accommodate, and an obligation for deep consultation will not necessarily require accommodation. The duty to accommodate reveals itself through consultation.[83]

However,

> [a] set of clear substantive rules respecting accommodation is not possible because the duties to consult and accommodate necessarily respond to the particular facts at hand. … the presence of a substantive duty cannot be determined *ex ante* [prior to], since part of the purpose of the duty to consult is explore whether there is a duty to accommodate.

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[78] *Ibid* at 110 and 113. Consideration as to the role of industry proponents is threaded throughout the book. He provides two examples of robust regulatory review that have been considered and upheld by the Courts: the Mackenzie Gas Project and the Alberta Clipper, Keystone and Southern Lights Interprovincial pipelines.
[79] *Ibid* at 108 and 109.
[80] Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" (2016), 53 Osgoode Hall LJ 632 at 633. [Craik, "Process and Reconciliation"] at <http://digitalcommons.osgoode.yorku.ca/ohlj/vol53/iss2/8/ >.
[81] *Ibid* at 634.
[82] *Ibid* at 636. He cites Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR (2d) 433 [Slattery, "Aboriginal Rights and Honour of the Crown"]. Professor Slattery doctoral thesis, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (D. Phil. Thesis, Oxford University, 1979) (Saskatoon: University of Saskatchewan Native Law Centre, 1979) underlies much of the modern law of Aboriginal rights, available at: <https://www.researchgate.net/publication/35701740_The_land_rights_of_indigenous_Canadian_peoples_as_affected_by_the_Crown%27s_acquisition_of_their_territories_microform> .
[83] *Ibid* at 639.

> … But adherence to procedural duties alone will not satisfy the duty to accommodate, which requires, by definition, efforts to address Aboriginal concerns.[84]

This accommodation has been frustrated by the Court's emphasis on negotiating accommodation measures. And while good faith efforts are required, the Court's have said there is no requirement to agree, he argues this conflates the substantive component of accommodation with a form of process obligation.[85] He notes that the increased procedural focus in Aboriginal accommodation and the EA process reveal the political nature of both issues, requiring "the government engage in a form of decision making that is transparent, participatory, and justificatory"," requiring decision makers to provide reasons.[86] Thus proceduralization respects the political content of the choices being made, "the SCC's approach in refraining from giving substantive content to the duty to accommodate is sound, so long as it is accompanied by a robust understanding of the potential of process to transform legal relationships, as well as the stringent requirements that are necessary to realize that potential."[87] To do so he suggests that the EA process, which already has the necessary procedural structure, must move from a technical exercise to a transformational model which recognizes "that the parties must be open to reconsidering their interests in light of the factual and normative information that emerges within the EA process."[88]

Lorne Sossin's earlier paper, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010),[89] canvassed the earlier literature, and said that the Crown's duty to consult and accommodate was an experiment in procedural justice but with a significant caveat: parties do not seek procedural rights for their own sake, rather they seek procedural rights to allow for better substantive outcomes.[90] While parties may seek specific remedies on specific matters, Courts retain the inherent discretion to decide how those problems can be resolved and *process* may be the most prudent choice in Aboriginal law, because:

> First, process builds on both Canadian and Aboriginal norms of dialogue and reasoned engagement by disputing parties, and enjoys significant acceptance by the public; second, even where not welcomed by the parties, process is difficult to challenge or oppose, as the meaningful exchange of views and perspectives has inherent value and appeal; third, process defers difficult decisions, and leaves open further opportunity for compromise, settlement, building of trust and improvement of relations — in this way, process results in the parties taking 'ownership' over the substantive resolutions which result from the process; fourth, a better process minimizes the risk of error in the substantive determination at issue; and fifth and finally, imposing a process is not viewed as 'judicial activism' in the same way as imposing a substantive result. Process implies respect for the parties and their positions, which particularly important in the

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[84] *Ibid* at 644.
[85] *Ibid* at 640.
[86] *Ibid* at 645. He argues that both processes involve integrating competing sets of values, best captured in the mantra of sustainable development as well as considerations of good faith.
[87] *Ibid* at 680.
[88] *Ibid* at 636. This an attempt to capture the requirement that consultation must be meaningful and the iterative nature of consultation.
[89] Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010), 23 CJALP 94 [Sossin, "Procedural Justice as Aboriginal Rights"] at <http://digitalcommons.osgoode.yorku.ca/scholarly_works/2305/>.
[90] *Ibid* at 94.

> context of Aboriginal rights, where the role of judicial intervention has come under particular scrutiny.[91]

Sossin argues that procedural solutions have pre-dated the development of the Crown's duty to accommodate, locating the choice in constitutional doctrine in the adoption of Peter Hogg's influential "dialogue theory" in *Vriend v Alberta* (1999)[92] used in subsequent divisive cases.[93] This procedural turn is based "on the unshakeable belief that sensible and reasonable people of good faith are capable of working out their differences if given a fair and transparent process to do so."[94] The applicability of this nostrum may be lacking in the Aboriginal context given the long historical experience by Indigenous peoples of bad faith by Canadian governments.[95]

In *Haida* and *Taku* the Court, while building on earlier Aboriginal law cases, took a decided turn to procedural solutions based on the honour of the Crown.[96] In this, he cites Brian Slattery's views as to how the Supreme Court sees its role as protecting historical rights[97] and suggesting that the honour of the Crown had a "generative purpose" to develop a new Aboriginal legal order through Court assisted Crown negotiation with Aboriginal peoples.[98] Soisson locates this generative purpose in the unique bifurcation of standard of review for Aboriginal consultation into a

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[91] *Ibid* at 95. He is careful to suggest that this procedural turn is not a deliberate coordinated strategy, although he does not discount this in particular cases.

[92] *Ibid* at 96. *Vriend v Alberta*, [1998] 1 SCR 493, 1998 CanLII 816 (SCC). Peter Hogg, an influential constitutional scholar developed this dialogue metaphor in Peter Hogg & Allison Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall LJ 75; Peter Hogg & Allison Thornton, "The Charter Dialogue Between Courts and Legislatures" (1999) 20 Policy Options 19, and on the 10th anniversary Peter Hogg, Allison Thornton & Wade Writh, "Charter Dialogue Revisited - or Much Ado about Metaphors" (2007), 45 Osgoode Hall LJ 1.

[93] *Ibid.* The examples include abortion: *R v Morgentaler*, [1988] 1 SCR 30, 1988 CanLII 90 (SCC) and Québec separation: *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC).

[94] *Ibid* at 97.

[95] See *R v Spar*row, [1990] 1 SCR 1075, 1990 CanLII 104 (SCC) [*Sparrow*] at 1103 where the Court said "there can be no doubt that over the years the rights of the Indians were often honoured in the breach … As MacDonald J. stated in *Pasco v Canadian National Railway Co.*, [1986] 1 CNLR 35 (BCSC) at 37: "We cannot recount with much pride the treatment accorded to the native people of this country."" See generally, Laidlaw, *Handbook*, *supra* note 2.

[96] Sossin, Procedural Justice as Aboriginal Rights, *supra* note 89 at 101. Another contributing factor may be that ever since *Calder v Attorney-General of British Columbia,* [1973] SCR 313, 34 DLR (3d) 145 [*Calder*] the Supreme Court has been concerned about the lack of treaties, which in the words of *Haida* "serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty" – *Calder* generated new modern treaty processes at the federal level, albeit taking a long time with government controlling the pace of negotiations. With the British Columbia Treaty Process (discussed by Lambrecht*, supra* note 68 at 25 to 27) having made little progress, and development progressing in areas of asserted title, *Haida* and *Taku* added conditions to developments in an indirect effort to speed the treaty making process.

[97] Historical rights have been protected by the Crown's unique fiduciary relationship derived from *Guerin v The Queen*, [1984] 2 SCR 335, 1984 CanLII 25 (SCC)1984 [*Geurin*] as elucidated in *Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259 and recently affirmed to include Pre-Confederation Colonial BC in *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4; and in *R v Sparrow*, *supra* note 95, where an infringement of unextinguished Aboriginal right is established (low burden) that infringement must be justified by the government demonstrating a compelling legislative justification, such as safety, conservation or, later in some cases the development of Crown lands subject to finding a specific justification per: *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648 [*Gladstone*] and that infringement must be minimal in accordance with the honour of the Crown (high burden). The definition of Aboriginal rights was set out in *Van der Peet, supra* note 23 and *R v Sappier; R v Gray,* 2006 SCC 54, [2006] 2 SCR 686 [*Sappier; Gray*] and aboriginal title in *Delgamuukw*, *supra* note 13; and in *Tsilhqot'in, supra* note 12 as to territorial occupation.

[98] Sossin, Procedural Justice as Aboriginal Rights, *supra* note 89 at 101 to 193.

correctness standard for identification and depth of consultation with the operational component assessed on a reasonableness standard. These standards would indicate a deferral to Crown actions (if honourable) – without requiring agreement on specific accommodation measures – giving the necessary flexibility to develop new legal orders for specific groups.[99]

Slattery's interpretation may be reflected in the subsequent *Manitoba Métis* case in 2013 where the honour of the Crown was applied in circumstances of explicit promise in Canada's constitution to Aboriginal peoples outside of section 35,[100] requiring the Crown to take a broad purposive approach to that promise and act diligently to fulfill it.[101] The Supreme Court's faith in the honour of the Crown doctrine may explain the removal of interjurisdictional immunity on Aboriginal title in *Tsilhqot'in*[102] and lands taken up by treaty in *Grassy Narrows First Nation v Ontario (Natural Resources)*.[103] Those decisions have disregarded established precedents with potentially disastrous consequences for Aboriginal peoples, as discussed in Kerry Wilkin's 2017 article "Life Among The Ruins: Section 91(24) After Tsilhqot'in and Grassy Narrows."[104] Subsequently, the Saskatchewan Court of Appeal in *Peter Ballantyne Cree Nation v Canada (Attorney General)*[105] have interpreted these cases as allowing provincial infringement of Treaty rights, subject only to the *Sparrow* test, interpreting section 88 of the *Indian Act*[106] as legislation directed at "regulatory gaps."[107] The Supreme Court of Canada has refused leave to appeal.

Soisson described the early jurisprudence noting the similarities of administrative duties of procedural fairness but distinguished the duty to consult, noting it:

> involves not just a procedural guarantee, but also, importantly, a substantive constraint. Governments cannot discharge their duty to Aboriginal communities simply by demonstrating that they provided a venue for those communities to be heard. It is also necessary to show that the governments' substantive position has been modified as a result. The duty, in other words, includes accommodation and not just consultation, and in this sense provides a far more significant constraint on the Crown than the duty of fairness at administrative law.

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[99] The fact specific nature of its decisions has been a consistent theme in the Supreme Court's Aboriginal rights and title jurisprudence.

[100] *Manitoba Métis, supra* note 23 at 70. This was a reference to the Court's interpretation of the *Manitoba Act, 1870* as a constitutional document. At paragraph 71 the Court analogized the Constitution to treaty negotiations which was perhaps a reference to "treaty federalism" as an organizing principle such as James [Sákéj] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask L Rev 241.

[101] *Ibid* at para 75.

[102] *Tsilhqot'in, supra* note 12 at paras 101 to 106.

[103] *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447.

[104] Kerry Wilkins, "Life Among the Ruins: Section 91(24) After Tsilhqot'in and Grassy Narrows" (2017) Vol 55:1 Alta LR 91. See also: Kent McNeil, "Aboriginal Title and the Provinces after Tsilhqot'in Nation" (2015), 71 SCLR (2d) 67 at <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1306&context=sclr>.

[105] *Peter Ballantyne Cree Nation v Canada (Attorney General),* 2016 SKCA 124; leave refused 2017 CanLII 38581 (SCC) [*Ballantyne*].

[106] *Indian Act,* RSC 1985, c I-5 [*Indian Act*]. Section 88 section incorporated provincial laws of general application, subject to any Treaties, in the absence of existing federal legislation. see Kerry Wilkins, ""Still Crazy After All These Years: Section 88 of the *Indian Act* at Fifty" (2000) 38(2) Alta L Rev 458 at 458. [Wilkins, "Still Crazy"], Margaret Stephenson, "Canadian Provincial Legislative Powers and Aboriginal Rights Since *Delgamuukw:* Can a Province Infringe Aboriginal Rights or Title?" (2003) 8 Int'l. Trade & Bus L Ann 57.

[107] *Ballantyne, supra* note 105 at 247-262 and 244.

> As the Court made clear, guidance may be found in administrative law principles, but something 'more' is also needed to discharge the particular duty, and the elaboration of that something 'more' was largely left to later judicial comment.[108]

That "something more" was the meaning and judicial oversight of the accommodation arm. He cites Veronica Potes,[109] who makes a distinction between a "procedural approach," the satisfaction of which removes Crown constraints providing certainty to industry, and a "purposive approach" that reflects the entrenchment of Aboriginal rights, the infringement of which mandates a higher standard. He reviewed the existing lower court decisions and noted their unsettled nature, with some cases such the *Hupacasath*[110] emphasizing a purposive approach with others emphasising the procedural approach such as *Tzeachten First Nation v Canada*.[111] With the procedural approach, now forming the preponderance of lower court decisions and in the absence of clarification by the Supreme Court, Soisson notes that:

> [i]t is becoming increasingly clear that a vision of procedural justice unhinged from a focus on outcomes will be viewed as deficient by Aboriginal communities, and therefore unlikely to contribute to the project of reconciliation. The future of procedural justice thus rests with whether a more just process is able to facilitate more just outcomes.[112]

Equally prescient is his argument that:

> Ultimately, the promise of procedural justice lies to a considerable extent in the Crown's efforts to give life to its obligation to act 'honourably.' One way in which this commitment can affect bureaucratic culture is to entrench the commitment in legislation authorizing executive authority itself.[113]

Indigenous Perspective

Indigenous groups are frustrated by the lack of good faith on the part of governments.[114] From a functional and contextual perspective, most Canadians never engage with their Indigenous citizens unless they want something. Most project proponents wanting to develop a project on traditional territories are no different. They merely check off the consultation and accommodation boxes in the regulations. Indigenous groups are not averse to all development, they just want development that provides long term benefits from sustainable development that respects their environmental understandings and laws.

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[108] Sossin, *supra* note 89 at 106 to 107.
[109] *Ibid* at 107 to 108; See Potes, *supra* note 34.
[110] *Ibid* at 108, see *Hupacasath, supra* note 38.
[111] *Ibid* at 109, *Tzeachten First Nation v Canada (Attorney General*), 2008 FC 928; affirmed 2009 FCA 337.
[112] *Ibid* at 111-112
[113] *Ibid* at 112.
[114] As described in the Alberta context in the *Handbook, supra* note 2 at pages 21-22. See: Annie L Booth and Norm W Skelton, "Industry and government perspectives on First Nations' participation in the British Columbia environmental assessment process" (2011), 31 EIA Review 216 [Booth and Skelton, "Industry and Government Perspectives"] at 220 to 221, 223 and 225.

In the Aboriginal law of consultation and accommodation, there is a sense of the exotic—Canadians use consultation to gain an "understanding" of activities governed by Indigenous law. Rather than the "twilight existence of Aboriginal accommodation" revealed by Aboriginal consultation, as argued by Craik—accommodation is embedded in Indigenous laws regarding care and respect for the environment.[115] They are not secret. Indigenous peoples know their environment and understand their relationship in it. The question is, why do some Canadians not have the same understanding? Many Indigenous groups are more than willing to educate Canadians who ask, and indeed, some First Nations are embarking on Cultural Awareness sessions with governments, agencies, and industry to provide that information out of necessity.[116]

The sheer number and rapid pace of development requests overwhelm Indigenous groups' capacity to respond and adequately explain the impacts to Canadians within arbitrary deadlines. When Indigenous Nations attempt to explain their Indigenous laws governing their land use - that explanation is rejected on any number of Canadian justifications, either as unscientific or beyond the jurisdiction of the tribunal who cannot determine Aboriginal rights or, worse totally ignored.

For the lack of a better phrase, some Indigenous people view developers as analogous to entitled tourists—short-term guests that extract resources, litter, and despoil the environment, sometimes significantly altering traditional lands in the process. Some developers are better than others in that they are sensitive to the environment, provide resources to Indigenous groups in the form of Impact Benefit Agreements, preferential hiring, training, and service jobs. From an Indigenous perspective, there is a sense that this is imbalanced - why does the host have to explain the rules? Is there not a corresponding obligation to be a good guest?

Canadian governments have actively encouraged this development for the sake of revenue and Canadian jobs far from the local impacts.[117] Courts, the last resort for Indigenous groups, have looked the other way—invariably deferring to government actions by assessing the process used in consultation on a reasonableness standard. Presently, the benefits of procedural justice in better outcomes for Indigenous peoples remains the exception rather than the rule.

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[115] The twilight existence of accommodation measures comes from Craik, "Process and Reconciliation", *supra* note 66 at 644. This may arguably be reflected in Canadian law in the concept of sustainable development although that is a slippery concept particularly when the resources are non-renewable. See: Benjamin J Richardson, "The Ties that Bind: Indigenous Peoples and Environmental Governance" (2008). Comparative Research in Law & Political Economy. Research Paper No. 26/2008; David A Lertzman and Harrie Vredenburg, "Indigenous Peoples, Resource Extraction and Sustainable Development: An Ethical Approach" (2005), 56 Journal of Business Ethics 239; Nicolas Houde, "The six faces of traditional ecological knowledge: challenges and opportunities for Canadian co-management arrangements" (2007) 12(2) Ecology and Society 34 [Houde, "Six faces of ATK"].

[116] Booth and Skelton, "Industry and Government Perspectives", *supra* note 114 at 224. Parenthetically, at the Roundtable meeting discussed in the Handbook I suggested that the Province collating land use maps from First Nations was a problem but was swiftly disabused of that notion, the attendees wanted that information widely dispersed. In the interests of full disclosure, I have participated in The Stoney Nakoda Cultural Awareness Programs, presented by their Consultation Office in presenting historical Stoney Nakoda rights to water and hunting, along with other presentations by Stoney Nakoda Elders and members.

[117] See e.g.: Bearing The Burden: The Effects of Mining on First Nations in British Columbia (2010), Report of The International Human Rights Clinic at Harvard Law School at <https://harvardhumanrights.files.wordpress.com/2011/08/rightburden.pdf>

3.0 FEDERAL CONSULTATION POLICY

Canada's current guidance is the *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (2011).[118] Some concerns in the Federal Consultation Policy include:

1. *Distributed Policy*: The Federal Consultation Policy is a *distributed model* that is intended to be incorporated into separate federal departments and agencies policies as set forth in the *Guiding Principles and Consultation Directives* [Guiding Principles].[119] The Federal Consultation Policy notes that the implementation of consultation and accommodation "should integrate, to the extent possible, the fulfilment of consultation obligations with departmental policy objectives and with other overarching government policy objectives."[120] This information is not publicly available on the Internet. For example, when it is available in the Treasury Board of Canada Secretariat's *Guide to Real Property Management: Aboriginal Context,*[121] it talks of dispositions of real property where an Aboriginal "interest in acquisition is expressed" where the legal duty to consult is not involved. Where there is no duty to consult, the Treasury Board requires neutrality in disposition of "surplus federal lands" between parties such as provincial, municipal governments, or Aboriginal groups. This neutrality requirement can frustrate Aboriginal groups where they have historical claims to lands under the surrender provisions in the Numbered Treaties.[122]

2. *Jurisdictionally Limited*: The Federal Consultation Policy is jurisdictionally limited to requiring consultation dealing with *activities* on federal lands such as airports and federally regulated activities like interprovincial works, impacts under the *Fisheries Act,*[123] approvals under the *Navigation Protection Act*[124] for a limited number of waterways.

3. *Canada Driven*: Canada will determine *how* proposed federal regulated activities impact Aboriginal interests with limited direct input from Aboriginal peoples. This is exacerbated by the definition of accommodation in Guiding Principle No. 4, that seeks to balance Aboriginal interests with other societal interests.[125] This definition is problematic when dealing with established Aboriginal constitutional rights, as they are not mere "interests." The description of a "meaningful consultation process" appears to address the procedural rights of Aboriginal peoples with no reference to substantive accommodation.

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[118] Federal Consultation Policy, *supra* note 6.
[119] *Ibid* at 1.
[120] *Ibid* at 8. A review of decision-making processes affecting Aboriginal peoples is in the Third Guiding Principle at page 12 but "Key departments involved in Aboriginal consultation should develop a consultation approach that is responsive to the needs of the department or agency and reflects its operational realities."
[121] *Guide to Real Property Management: Aboriginal Context* at <https://www.canada.ca/en/treasury-board-secretariat/services/federal-real-property-management/guide-real-property-management-aboriginal-context.html > < http://www.tbs-sct.gc.ca/rpm-gbi/doc/grpmac-ggbica/grpmac-ggbica-eng.asp>.
[122] *Long Plain First Nation v Canada*, 2012 FC 1474 (dealing with a long running dispute as to surplus military land in Winnipeg) and *Chief Joe Hall v Canada Lands Company Limited*, 2011 BCSC 1031 (dealing with a long running dispute involving Aboriginal title).
[123] *Fisheries Act,* RSC 1985, c F-14 [*Fisheries Act*].
[124] *Navigation Protection Act*, RSC 1985, c N-22.
[125] Federal Consultation Policy, *supra* note 6 at 13.

4. *Design of Consultation*: It is notable that only Federal officials are considered capable of developing consultation processes.[126] Indeed it is the Agency's current policy to *not invite* Aboriginal groups to the design committee, but merely to invite comments from them on the resultant design, such as commenting on Draft Panel Agreements.[127] There is a split in the jurisprudence on participation of Aboriginal groups in the design of the consultation process:

- British Columbia: In *Gitxsan First Nation v British Columbia (Minister of Forests)* (2002) the BC Supreme Court said, "the first step of a consultation process is to discuss the process itself."[128] This has been incorporated into the British Columbia Consultation Policy.[129]
- Alberta: In *Cold Lake First Nations v Alberta (Tourism, Parks & Recreation)* (2013) the Court of Appeal said as a "matter of law, the Crown has discretion as to how it structures the consultation process and how the duty to consult is met." [130]
- Federal Court: In *Gitxaala Nation v Canada* (2016) cited *Cold Lake* in rejecting arguments that the Crown's consultation process had been imposed on Aboriginal groups.[131]

Accommodation Measures in the Federal Consultation Policy

The Federal Consultation Policy describes "[t]he primary goal of accommodation is to avoid, eliminate, or minimize the adverse impacts on potential or established Aboriginal or Treaty rights, and when this is not possible, to compensate the Aboriginal community for those adverse impacts."[132]

The principal accommodation measures in the Federal Consultation Policy include: *project modification* as changes to design or route may eliminate some adverse impacts; if not eliminated, the focus of accommodation should be on[133] *mitigation measures* to reduce or eliminate adverse impacts proposed by proponents, Aboriginal groups, or directed in approval conditions;[134] and in some circumstances, *project cancellation*.[135] Where it is not possible to avoid, eliminate, or substantially reduce adverse impacts, it may be appropriate to provide *compensation* such as habitat replacement; providing skills, training, or employment opportunities for members of the Aboriginal group; land exchanges; impact-benefit agreements; or cash compensation.[136]

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[126] *Ibid.* It is noted in Guiding Principle No. 6 that the Government may rely on existing processes such as EA.
[127] CEAA Policy on Aboriginal design of consultation [CEEA Aboriginal Design Policy].
[128] *Gitxsan First Nation v British Columbia (Minister of Forests)*, 2002 BCSC 1701 at para 8.
[129] BC Consultation Policy, *supra* note 7.
[130] *Cold Lake First Nations v Alberta (Tourism, Parks & Recreation)*, 2013 ABCA 443; leave to appeal to SCC refused, [2014] SCCA No 62 [*Cold Lake*] at para 39. The majority did not address the standard of review to be applied to determination of the scope of the duty to consult.
[131] *Gitxaala Nation v Canada*, [2016] 4 FCR 418, 2016 FCA 187 [*Gitxaala*] at para 203. That case also noted evidence of revisions from the Draft to Final JRP Agreement to take into account Aboriginal concerns.
[132] Federal Consultation Policy, *supra* note 6 at 53.
[133] *Ibid* at 19 "Industry proponents are often in the best position to accommodate an Aboriginal group for any adverse impacts on its potential or established Aboriginal or Treaty rights, for example, by modifying the design or routing of a project".
[134] *Ibid* at 43 "Determining accommodation, where appropriate: seek to adjust project, develop *mitigating measures*, consider changing proposed activity, *attach terms and conditions to permit or authorization*, financial compensation, consider rejecting a project, etc.". This is proponent *practical accommodation measures*.
[135] *Ibid* at 53 "In some circumstances, appropriate accommodation may be a decision not to proceed with the proposed activity."
[136] *Ibid*.

Selection of potential accommodation measures are discussed with Aboriginal groups but the Crown alone will determine appropriate accommodation measures and "[g]enerally, the most appropriate measure(s) are those which are most effective in eliminating or reducing adverse impacts on potential or established Aboriginal or Treaty rights *while taking into account broader societal interests*."[137] This qualification is significant—the menu of potential accommodation measures may be limited before negotiations begin.

There is a *Draft Consultation and Accommodation Advice for Proponents* (June 5, 2015) containing a Table of Examples of Potential Accommodation Measures to a similar effect.[138] In addition there is a *Proponents' Guide to Aboriginal Affairs and Northern Development Canada's Environmental Review Process* for developments on First Nation's Reserve Lands, which are outside of this paper. [139]

4.0 ENVIRONMENTAL ASSESSMENT OVERVIEW & METHODOLOGY

We will be looking at a selection of project EAs to ascertain commonalities in Aboriginal accommodation measures in Federal EA assessments. The selected EA are organized in a rough chronology and give rise to thematic issues in those EA. There are two distinct phases in Federal EA's covered in this Report:

1. EA's conducted under *Canadian Environmental Assessment Act* [CEAA-1992][140] and continued under the *Canadian Environmental Assessment Act* [CEAA-2012];[141] and
2. EA's conducted under CEAA-2012 alone.

CEAA-2012 was enacted in 2012 under an omnibus budget-bill entitled *Jobs, Growth and Long-term Prosperity Act,*[142] that amended 109 pieces of legislation including the *Fisheries Act* and the

[137] *Ibid* at 55.
[138] *Draft Consultation and Accommodation Advice for Proponents* (June 5, 2015) at <https://www.aadnc-aandc.gc.ca/eng/1430509727738/1430509820338> provides the following table:

Type of Measure	Avoidance	Mitigation	Other Measures
Nature of Measure	Postpone key project activities to limit impact on sensitive seasons (e.g., harvest, hunting, spawning seasons) Divert pipeline course to avoid sensitive areas Divert access roads to avoid wildlife corridors	Finance transportation to other similar sites where traditional practices can resume. Conduct archaeological excavations with community to retain and preserve artifacts	Finance the creation of a training and education program for youth on traditional ecological knowledge Restore habitat to pre-project levels or better, post-project Create or enhance wildlife corridors

[139] *Proponents' Guide to Aboriginal Affairs and Northern Development Canada's Environmental Review Process* at <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-ENR/STAGING/texte-text/derp_1403213813290_eng.pdf>
[140] *Canadian Environmental Assessment Act*, SC 1992, c 37 [CEAA-1992].
[141] *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 5 [CEAA-2012].
[142] *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19, in force July 6, 2012, see SI/2012-56.

Navigable Waters Protection Act.[143] CEAA-2012 came into force on July 6, 2012. There were complicated transition provisions that essentially provided grandfathering of EAs started under CEEA-1992 to continue subject to Agency administration under the CEEA-1992 regime.[144]

The differences between the EA regimes in CEAA-2012 and CEAA-1992 are many. In the Aboriginal context, CEAA-12 represented significant changes, some of which included:

1. EAs applied only to Designated Projects listed in the regulations[145] rather than applying generally to projects having a federal aspect, unless excluded in the regulations under CEAA–1992, reducing the number of projects subject to assessment to an estimated 10%.[146]

2. EA consideration of environmental effects was limited to effects on fisheries, aquatic species at risk, migratory birds, and Aboriginal peoples,[147] instead of any change the project may cause in the environment, including species at risk, health, and socio-economic conditions in CEAA-1992.[148]

3. EAs were given to the Agency, NEB and CNSC with legislated time limits for an EA: Agency EA within 365 days, Review Panel EA within 24 months, NEB EA within 15 months and CNSC EA within 24 months.[149] This was in contrast the potential for multiple departments being designated as the Responsible Authority [RA] to conduct EAs with essentially unlimited timelines under CEAA-1992.[150]

4. EA Aboriginal and public participation was limited for Review Panel EA's and NEB EA's to *interested partie*s, defined as any person who is directly affected by the project or has relevant

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[143] See Denis Kirchho, Holly. Gardner and Leonard Tsuji, "The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples" (2013), 4(3) Int'l Indigenous Policy J 1. See also: Arlene Kwasniak post *Federal Environmental Assessment Re-Envisioned to Regain Public Trust – The Expert Panel Report* on April 12, 2017 in ABlawg.ca at <https://ablawg.ca/2017/04/12/federal-environmental-assessment-re-envisioned-to-regain-public-trust-the-expert-panel-report/>

[144] See: Martin Olszynski post *Northern Gateway: Federal Court of Appeal Applies Wrong CEAA Provisions and Unwittingly Affirms Repressiveness of 2012 Budget Bills* on July 5, 2016 in ABlawg.ca at <https://ablawg.ca/2016/07/05/northern-gateway-federal-court-of-appeal-wrong-ceaa-provisions/>.

[145] Regulations Designating Physical Activities, SOR/2012-147. The Minister may make a direction for a project to be subject to an EA at s 14(2) but may not if the activity has started or is authorized under another act.

[146] Exclusion List Regulations, 2007, SOR/2007-108. See: Robert Gibson, "In full retreat: the Canadian government's new environmental assessment law undoes decades of progress" (2012) 30 Impact Assessment and Project Appraisal 179 [Gibson, "Full Retreat"] at 179, at < https://uwaterloo.ca/next-generation-environmental-assessment/sites/ca.next-generation-environmental-assessment/files/uploads/files/Gibson%20CEAA%202012%20full%20retreat%20IAPA.pdf>, see also: Meinhard Doelle, "The Evolution of Federal EA in Canada: One Step Forward, Two Steps Back?" (2013) Schulich School of Law - Dalhousie University Working Paper SSRN 2384541 at 8 [Doelle, "Evolution of EA"] at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384541&download=yes>

[147] CEAA-2012, *supra* note 141, s 5.

[148] CEAA-1992, *supra* note 140, s 2 (1).

[149] Respectively CEAA-2012, *supra* note 141 s 27(2) and s 38(3); NEB ss 52(4) & (7); *Nuclear Safety and Control Act*, SC 1997, c 9 [NSCA], regulation Class I Nuclear Facilities Regulations, SOR/2000-204 at s 8.3.

[150] CEAA-1992 did provide a 365-day deadline for completion of CSR under the Establishing Timelines for Comprehensive Studies Regulations, SOR/2011-139, s 5 (1).

information or expertise,[151] rather than "in respect of an environmental assessment, any person or body having an interest in the outcome of the environmental assessment for a purpose that is neither frivolous nor vexatious," as was the case under CEAA-1992.[152]

The scope of this paper is limited in its consideration of development projects requiring federal EA's in Alberta - these comprise a small fraction of developments with the potential to affect Aboriginal interests.[153] This is also a small sample size – we hope this will be reflective of trends and requirements, especially with the use of selected EA from other Canadian jurisdictions.[154]

Public Records

This paper is limited to Internet accessible resources including, among others:

1. The Agency's Canadian Environmental Assessment Registry [Registry].[155] The Registry maintains copies of all public records for projects with outstanding follow-up programs;

2. NEB's database of Regulatory Documents [Regulatory Documents]; and[156]

3. Major Projects Management Office's [MPMO]. The MPMO Tracker[157] has some additional information including recent Project Crown Consultation Reports.[158]

The Registry came online on November 1, 2003, and has some 6,819 archives of EAs, and some Decision Documents conducted under CEAA-1992. The list of Projects not requiring EAs under CEEA-1992 in Alberta totals 6,736[159] out of a total of 41,816 in Canada.

There are 13 projects not requiring EA under CEAA-2012 with 4 EAs being abandoned. There are 57 completed Federal EAs, up to December 3, 2017, which remain accessible on the internet, listed in the attached Schedule A. The 13 Alberta Projects not requiring an EA under CEEA-2012 and the 4 Projects the EA of which have been abandoned or terminated is in Schedule B.

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[151] CEAA-2012, *supra* note 141, s 2(2), See also: NEB s 55.2. See: Geoffrey Salomons and George Hoberg, "Setting boundaries of participation in environmental impact assessment" (2014), 45 EIA Review 69.
[152] CEE-1992, *supra* note 140, s 2 (1).
[153] As to development projects not requiring consultation in Alberta see the discussion in Laidlaw, *Handbook Update, supra* note 2 at 53 to 61. There are no EA decisions in Alberta by the CNSC.
[154] The Jackpine Mine Expansion Project is included in Jeffrey Thomson, *The Duty to Consult and Environmental Assessments: A Study of Mining Cases from across Canada* (MSc Env Thesis, University of Waterloo, 2015) at <https://uwspace.uwaterloo.ca/bitstream/handle/10012/9305/Thomson_Jeffrey.pdf?sequence=5>.
[155] Registry, *supra* note 9 at: <http://www.ceaa-acee.gc.ca/050/index-eng.cfm>.
[156] *National Energy Board Act*, RSC 1985, c N-7. [NEB]. Regulatory Documents at < https://apps.neb-one.gc.ca/REGDOCS/Home/Index>.
[157] Major Projects Management Office website at < https://mpmo.gc.ca/home>. This office was established in 2007 to coordinate regulatory review of "major resource projects." Crown Consultation Reports for recent Projects are found at the Publication and Reports page at <http://mpmo.gc.ca/10>.
[158] The Registry and MPMO are "flat-file" databases organized on a Project basis while the Regulatory Documents are organized on a Project Basis with nested folders based on parties and filing dates. Documents on the Registry and MPMO will be referenced in the footnotes as being located "at <document link>" whereas Regulatory Documents will be referenced as "available at <folder link>" because there is no direct linking permitted.
[159] Registry, *supra* note 9 at < https://www.ceaa-acee.gc.ca/050/evaluations/?culture=en-CA>

Future Federal Changes

Aboriginal consultation and accommodation is an evolving area of law. An updated Federal Consultation Policy in development for several years but has not yet been released. The *Principles Respecting the Government of Canada's Relationship With Indigenous Peoples* (July 14, 2017),[160] *Recognition and Implementation of Rights Framework* (February 14, 2018),[161] and political commitment to implement the *United Nations Declaration on the Rights of Indigenous People* (2007)[162] may result in some significant changes in Canadian Aboriginal law.

Recent Acts have been passed[163] applying to Projects started after August 28, 2019[164] including:

1. *Impact Assessment Act*[165] replacing CEEA-2012 and renaming the Agency to the Impact Assessment Agency of Canada [IAC]. The IAA restored evaluation of environmental components, added a pre-assessment process to gauge public controversy, clarified the factors to evaluate projects including, for the first time in federal legislation, explicit consideration of aboriginal rights and revising the public interest definition to include them.[166] However those amendments retained the basic structure of designated projects listed in regulations subject to EA,[167] extended the timelines for EA Tribunal Reports to the federal government to make the decision.[168] Proponents will generate a project description detailing potential project impacts and mitigation measures for screening by the IAC in the Planning Phase to determine if an EA was required and if so, the project will be referred to the IAC or a Review Panel in conjunction with the CER or NSC as may be appropriate for assessment and recommendations to the government. [169]

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[160] *Principles Respecting the Government of Canada's Relationship With Indigenous Peoples* (July 14, 2017) online <http://www.justice.gc.ca/eng/csj-sjc/principles-eng.pdf> .
[161] *Recognition and Implementation of Rights Framework* (February 14, 2018) at <https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework>.
[162] United Nations Declaration on the Rights of Indigenous People, GA Res. 68, 61, UN Doc. A/RES/61/295. Adopted by the General Assembly on September 13, 2007.
[163] *An Act to amend the Fisheries Act and other Acts in consequence,* SC 2019, c 14 (Bill C-68), and *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts,* SC 2019, c 28. (Bill C-69).
[164] EA having started under CEEA-2012 will be completed under that legislation, with the exception that a Screening Report for a Project uncompleted before August 28, 2019 will be subject to the new regime.
[165] *Impact Assessment Act*, SC 2019, c 28 [IAA]
[166] *Ibid,* s 1, see. David Laidlaw, "Bill C-69, the Impact Assessment Act, and Indigenous Process Considerations" ABlawg post March 15, 2018 at <https://ablawg.ca/2018/03/15/bill-c-69-the-impact-assessment-act-and-indigenous-process-considerations/> and other ABlawg.ca posts on these topics at <https://ablawg.ca>.
[167] Designated projects are listed in *Physical Activities Regulations*, SOR/2019-285, notably it only includes linear projects with more than 75 km of right of way that are not adjacent to previous disturbances.
[168] IAA, *supra* note 165, section 28(2), IAC Reports, the default EA process, must be submitted to the government, as directed or within 300+ days; Joint Review Panels as directed or within a maximum of 600+ days in section 37; CER Reports and NSC Reports are due as directed or a maximum of 600+ days in section 37.1. These timelines exclude the 180+ day Planning Phase, are extensible by government on request, can be suspended for further information and are triggered respectively on posting the Notice of Commencement of an EA or final appointments of EA Tribunals.
[169] *Ibid,* s 43.

2. *Canadian Energy Regulator Act*,[170] replacing the NEBA and renaming the NEB as the Canadian Energy Regulator [CER] and elaborating on the factors for consideration in the public interest, including aboriginal rights, but making few substantive changes.[171]

3. *Canadian Navigable Waters Act*, [172] partially restored the pre-2012 protections, and while it maintains the scheduled list of navigable waters in section 3, it amplifies the definition of navigable waters to include *all waters* capable of transportation and prohibits the construction, alteration and removal of works in them unless permitted.[173] Works are comprehensively defined and are separated by regulation into *minor works* that are unlikely to interfere with navigation and *major works* that will affect navigation.[174] Minor works do not require approval by Transport Canada [TC] provided they comply with the legislation, all major works in listed navigable waters will require approval, with major works in un-scheduled navigable waters requiring either an approval *or* public notification and resolution of concerns. Commentators that raise concerns and whose concerns are unresolved have the right to petition TC to require an application for approval.[175] The list of scheduled navigable waters may be added to on application.[176]

4. The *Fisheries Act* incorporates the amendments, restoring the pre-2012 protections in section 35(1) "No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of *fish habitat*" [HADD] with *fish habitat* defined as "water frequented by fish and any other areas on which fish depend directly or indirectly to carry out their life processes, including spawning grounds and nursery, rearing, food supply and migration areas."[177] Permission from DFO is required for project activities that threaten HADD.

5. Finally, the Ministry responsible for Indigenous people has been divided between *Department of Crown-Indigenous Relations and Northern Affairs* and *Department of Indigenous Services* effective as of July 15, 2019.[178]

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[170] *Canadian Energy Regulator Act*, SC 2019, c 28, s 10 [CERA].
[171] Nigel Bankes, "Some Things Have Changed but Much Remains the Same: the New Canadian Energy Regulator" (Ablawg, February 15, 2018) at < https://ablawg.ca/2018/02/15/some-things-have-changed-but-much-remains-the-same-the-new-canadian-energy-regulator/>.
[172] *Canadian Navigable Waters Act*, RSC 1985, c N-22 [CNWA] (renamed from the *Navigation Protection Act*)
[173] *Ibid* ss 2, 2.01 and 3. Navigable waters do not include artificial irrigation canals and drainage ditches.
[174] *Ibid,* s 28(2)(a), *Major Works Order*, SOR/2019-320, *Minor Works and Waters (Navigable Waters Protection Act) Order,* Canada Gazette (Vol. 143, No. 19) - Part I (May 9, 2009) as amended, this is in the process of being updated see <https://www.tc.gc.ca/en/transport-canada/corporate/consultations/minor-works-order.html>; See also: *Navigable Waters Bridges Regulations*, CRC, c 1231; *Navigable Waters Works Regulations*, CRC, c 1232; and *Ferry Cable Regulations*, SOR/86-1026. Representatives from TC indicate they anticipate that proponents will opt for a formal application rather than the potential uncertainty of notice proceedings – personal communication.
[175] *Ibid,* Minor Works in section 4 (1), Major Works listed Navigable Waters in sections 4.1 to 9, Major Works in unlisted Navigable Waters in ss 9.1 to 10.
[176] *Ibid,* s 29.
[177] *Fisheries Act*, *supra* note 123. The Minister shall in making decisions shall consider any adverse effects that the decision may have on the rights of the Indigenous peoples of Canada in section 2.4. see Martin Olszynski, "In Search of #BetterRules: An Overview of Federal Environmental Bills C-68 and C-69" (Ablawg.ca, February 15, 2018) at <https://ablawg.ca/2018/02/15/in-search-of-betterrules-an-overview-of-federal-environmental-bills-c-68-and-c-69/>
[178] *The Budget Implementation Act*, 2019, No. 1 (S.C. 2019, c. 29, s 336), has repealed the former *Department of Indian Affairs and Northern Development Act*, RSC, 1985, c I-6 [DIAND Act], replacing it with the *Department of Indigenous Services Act*, SC 2019, c 29, s 336 [DISA], and in section 337 the *Department of Crown-Indigenous*

These amendments generally expand Federal EA jurisdiction for project applications after August 28, 2019 – but are unlikely to impact EA processes in their operation, and the assessments and conclusions in this paper will remain relevant.

5.0 COMPLETED ENVIRONMENTAL IMPACT ASSESSMENT – ALBERTA FOCUS

We have focussed this Paper on the projects located wholly or partially in Alberta. As of December 31, 2017 these include:

Table 1: Alberta Environmental Assessment List

No	Project Name	Proponent	Project Description	EA Start & End
15620	EnCana Shallow Gas Infill Development Project in the Suffield National Wildlife Area: Suffield, Canadian Forces Base (Alberta)[179] [Infill CFB Suffield]	EnCana Corporation	Drilling up to 1,275 new shallow gas wells in Canadian Forces Base Suffield National Wildlife Area with pipelines and infrastructure.	26/10/05 30/11/12
49421	Little Bow Reservoir Rehabilitation and Upgrading Project Travers Reservoir (Alberta) [180] [Little Bow]	Alberta Transportation	Upgrade dam structures and canals in the Travers and Little Bow reservoirs to be operated in tandem under a common full supply level.	31/07/09 03/07/13
59540	Jackpine Mine Expansion Project Fort McKay (Alberta) [181] [Jackpine Mine]	Canadian Natural Upgrading Limited	Expansion of the Jackpine Mine oil sand mining project.	03/12/10 06/12/13
21799	Enbridge Northern Gateway Project Bruderheim (Alberta); Kitimat (BC) [182] [Northern Gateway]	Northern Gateway Pipelines Inc.	Construct 2 pipelines ~1150 km in length to export diluted bitumen and import dilutant.	31/08/06 06/01/17

Relations and Northern Affairs Act, SC 2019, c 29, s 337 [DCIRNA], ss 338-384 containing consequential amendments. The federal Department responsible for Indigenous Peoples has had several names and applied titles see *A History of Indian and Northern Affairs Canada* at <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/ap_htmc_inaclivr_1314920729809_eng.pdf>.

[179] #15620 EnCana Shallow Gas Infill Development homepage at <http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=15620>.

[180] #49421 Little Bow Reservoir homepage at <http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=49421>

[181] #59540 - Jackpine Mine homepage at <http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=59540>

[182] #21799 - Enbridge Northern Gateway Project Bruderheim (Alberta); Kitimat (British Columbia) homepage at <http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=21799>

No	Project Name	Proponent	Project Description	EA Start & End
80061	Trans Mountain Expansion Project Edmonton (Alberta); Burnaby (BC) [183] [Trans Mountain]	Trans Mountain Pipeline ULC	Twin the existing Trans Mountain Pipeline with 987 km of new pipeline in parallel to the existing ROW.	02/04/14 05/12/16 26/9/18 18/06/19
80062	Wolverine River Lateral Loop (Carmon Creek Section) Carmon Lake, Jackpine Lake (Alberta)[184] [Wolverine Loop]	NOVA Gas Transmission Ltd.	New pipeline 61 km in northern Alberta to transport sweet natural gas in environmentally sensitive areas.	01/05/14 09/06/15
80091	Enbridge Pipelines Inc. - Line 3 Replacement Program: Hardisty (Alberta); Cromer, Gretna, Morden (Manitoba); Kerrobert, Regina (Saskatchewan) [185] [Enbridge Line 3]	Enbridge Pipelines Inc.	Replace existing Line 3 oil pipeline with new ~ 1,096 km of new pipeline to replace Line 3, and decommission exiting pipeline between Enbridge's Hardisty Terminal, Alberta, and Gretna Station, Manitoba.	04/02/15 05/12/16
80099	2017 NGTL System Expansion Project Fort McMurray, Grande Prairie (Alberta)[186] [2017 NGTL System]	NOVA Gas Transmission Ltd.	Construction of a new gas pipeline totalling 230 km in Alberta.	06/01/15 11/09/16
80106	Towerbirch Expansion Project: Gordondale (Alberta); Bessborough, Tower Lake (BC)[187] [Towerbirch Expansion]	NOVA Gas Transmission Ltd.	Construction of 87 km of new gas pipelines in northwest Alberta and northeast British Columbia.	12/22/15 06/23/17

5.1 IDENTIFICATION OF ABORIGINAL GROUPS TO ACCOMMODATE

Early relationship building with Aboriginal groups is seen by most proponents as crucial to the "success of consultation," but identification of who to consult is a common concern of industry that governments struggle with.[188] Errors in identification leads to Aboriginal groups consulted by the Proponent at a later than ideal stage and risk alienation

[183] #80061 Trans Mountain Home Page at < http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=80061>; NEB Project Page at <http://www.neb-one.gc.ca/pplctnflng/mjrpp/trnsmntnxpnsn/index-eng.html>.
[184] #80062 Wolverine Loop homepage at <https://www.ceaa-acee.gc.ca/050/evaluations/proj/80062> >
[185] #80091 Enbridge Line 3 homepage at <http://www.ceaa-acee.gc.ca/050/evaluations/document/exploration/80091?culture=en-CA>; NEB Project page at < http://www.neb-one.gc.ca/pplctnflng/mjrpp/ln3rplcmnt/index-eng.html>.
[186] #80099 2017 NGTL System homepage at <http://www.ceaa-acee.gc.ca/050/evaluations/document/exploration/80099?culture=en-CA>; NEB Project page at <http://www.neb-one.gc.ca/pplctnflng/mjrpp/2017nvgsxpnsn/index-eng.html>.
[187] #80106 Towerbirch Expansion home page at <http://www.ceaa-acee.gc.ca/050/evaluations/document/exploration/80106?culture=en-CA> NEB Project page at <http://www.neb-one.gc.ca/pplctnflng/mjrpp/twrbrch/index-eng.html>.
[188] Aniekan Udofia, Bram Noble, and Greg Poelzer, "Meaningful and efficient? Enduring challenges to Aboriginal participation in environmental assessment" (2017), 65 Environmental Impact Assessment Review [Udofia and

Missing Information

Governments have maintained lists of Aboriginal groups, but other than a mailing address, information is generally outdated.[189] The lack of current information was demonstrated in the EA of Infill CFB Suffield.[190]

EA of Infill CFB Suffield.

In January 2005, EnCana Corporation [Proponent] proposed drilling up to 1,275 new shallow gas wells within the boundary of the Canadian Forces Base Suffield National Wildlife Area [NWA] over a three-year period, doubling the existing 1,154 gas wells installed over the past 30 years. A Department of National Defence [DND] presentation on January 1, 2005,[191] stated that *Access Agreements* were made in 1975 and 1977 by DND and Alberta, who held the mineral rights to allow gas and oil development on Canadian Forces Base Suffield's federal lands [CFB Suffield]. In the Access Agreements, entry to lands could only be denied due to training requirements, and to date parties have acted as if an EA was not required.

An NWA was declared in 2003 within CFB Suffield,[192] and unusually, EA authority over was delegated to DND. The project was subject to a Comprehensive Screening Report [CSR] under CEEA-1992. This was communicated to the Proponent on February 5, 2005.[193] A Joint Review Panel Agreement between the Agency and the Alberta Energy Utilities Board [EUB][194] was signed on November 16, 2006.[195] The Proponent's Environmental Impact Statement [EIS] was filed on May 24, 2007.

Siksika Nation

Alleging that the proponent did not notify them through proper channels in a timely fashion, the Siksika Nation wrote to the Panel on July 24, 2007, asking to be added as a late EA Intervenor and for EUB funding.[196] Additional correspondence dated July 27, 2007, set forth the Siksika Nation's

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Poelzer, "Meaningful and efficient"] 164 at 164 to 165, and 168 and Booth and Skelton, "Industry and Government Perspectives," *supra* note 114 at 224.

[189] The Alberta Consultation Policy, *supra* note 3, provides at page 8 that First Nations must provide a single point of contact without specifying anything beyond a mailing address. See: Indigenous Consultation Contacts webpage at < https://www.alberta.ca/indigenous-consultation-contacts.aspx > where it notes that "First Nations consultation contacts change frequently." and on the downloadable PDF's "Disclaimer: Any websites and links are provided for information purposes only."

[190] #15620 EnCana Shallow Gas Infill Development Project in the Suffield National Wildlife Area Suffield, Canadian Forces Base (Alberta) homepage at <http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=15620>.

[191] DND Presentation (January 1, 2005) at < http://www.ceaa-acee.gc.ca/050/documents/20027/20027E.pdf>

[192] CFB Suffield NWA website at <https://www.canada.ca/en/environment-climate-change/services/national-wildlife-areas/locations/canadian-forces-base-suffield.html>.

[193] DND Letter (February 5, 2005) at < http://www.ceaa-acee.gc.ca/050/documents/20002/20002E.pdf>

[194] The EUB under the *Alberta Energy and Utilities Board Act*, RSA 2000, c A-17 [*AEUB*] was a regulator for petroleum and utilities combining the former Energy and Resources Conservation Board and Public Utilities Board.

[195] Infill CFB Suffield Joint Review Panel Agreement (November 16, 2006) at < http://www.ceaa-acee.gc.ca/050/documents/18753/18753E.pdf>.

[196] Siksika Request (July 24, 2007) at <http://www.ceaa-acee.gc.ca/050/documents/22758/22758E.pdf>. This was pursuant to an Extension Request (July 19, 2007) at < http://www.ceaa-acee.gc.ca/050/documents/22466/22466E.pdf>. These letters from Clayton Leonard, Barrister and Solicitor appear

partial submissions, given that they had yet to receive a full EIS, requesting denial of the Proponent's project.[197] In response to the Panel's Counsel letter of August 3, 2007[198] requesting information about EUB funding, Siksika Nation, by letter date August 20, 2007,[199] said there was continuing Crown obligation to consult with them. In that letter, it referred to the Proponent's EIS that they had obtained that identified pre-contact cultural artifacts in the Project Area which they claimed as their traditional territory.[200]

The Proponent wrote to Siksika Nation on September 25, 2007[201] requesting a private meeting. On November 9, 2007, the Siksika Nation advised the Panel that they had reached an agreement with the Proponent and withdrew their objection.[202] The Panel Report noted that:

> The Siksika Nation did not elaborate on the content of the agreement. However, EnCana indicated that it would involve the Siksika Nation in the proposed pre-disturbance assessments to assist in the identification and avoidance of historical and environmental resources of importance to the Siksika Nation.[203]

After public hearings with objections from environmental groups and the Canadian government, the Panel Report (2009) recommended the project be denied approval on environmental grounds,[204] and the GIC accepted this recommendation on November 30, 2012.[205]

Common Approaches

Common approaches used by proponents to identify Indigenous Groups include:

- Desktop research in the literature and maps;[206]
- Past experience in the area;
- Existing Aboriginal contacts in the project area;
- Information from the BC Treaty Process or Federal Land Claims Process; and
- Advice from the provincial and federal governments including, in Alberta the provincial Aboriginal Consultation Office (ACO), other Provincial or Territorial Indigenous Relations Ministries, Indigenous and Northern Affairs Canada (INAC), and MPMO.

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to be connected with a E-Mail from Duane Good Striker to CEEA dated July 18, 2007 at < http://www.ceaa-acee.gc.ca/050/documents/22484/22484E.pdf>

[197] Siksika Position (July 27, 2007) at < http://www.ceaa-acee.gc.ca/050/documents/22588/22588E.pdf>

[198] Infill CFB Suffield Panel Letter (August 3, 2007) at < http://www.ceaa-acee.gc.ca/050/documents/22757/22757E.pdf>

[199] Siksika Response Letter (August 20, 2007) at < http://www.ceaa-acee.gc.ca/050/documents/23097/23097E.pdf>

[200] Infill CFB Suffield EIS Volume 1 at 1-8 at <http://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_15620/131.pdf>; and Volume 5 at Section 2 pages 2-1 and 2-9 at <http://www.ceaa-acee.gc.ca/050/documents/21321/21321E.pdf>.

[201] Proponent to Siksika (September 25, 2007) at < http://www.ceaa-acee.gc.ca/050/documents/23627/23627E.pdf>

[202] Siksika Withdrawal (November 9, 2007) at < http://www.ceaa-acee.gc.ca/050/documents/24270/24270E.pdf>

[203] Infill CFB Suffield Panel Report (January 27, 2009) at <http://www.ceaa-acee.gc.ca/050/documents/31401/31401E.pdf> at 15.

[204] *Ibid* at viii.

[205] Infill CFB Suffield Decision Statement (November 30, 2012) at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=83796>

[206] A Carpenter and Peter Feldberg, "An Introduction to the Use of Publicly Available Information in Assessing and Managing Aboriginal Risks" (2006), 44(1) Alta LR 65 provides an early example of this effort.

These mechanisms will usually identify the major affected Aboriginal groups, but this is not guaranteed. For example, in the EA of 2017 Nova Gas Transmission Line (NGTL) System, the Proponent undertook the first three steps above in formulating a consultation list only to be advised by the ACO in the mandated Pre-Consultation Assessment[207] to add another First Nation, with later advice from the MPMO to add an additional 13 First Nations.[208]

Government advice may also be deficient. For example, in the EA of Little Bow, discussed below, two Alberta government departments and the Agency had missed two Aboriginal groups to consult, only discovering them at the time of drafting the CSR.[209] Even when you get correct advice from governments that advice can conflict, for example, in the EA of Trans Mountain, after the Proponent received direction from INAC, ACO, the relevant BC Ministry and BC Treaty Process, to compile the Proponent's Consultation List of 103 Indigenous Nations,[210] that list missed the BC Métis Federation (BCMF) and the Métis Nation of BC (MNBC) identified by the NEB, requiring additional groups to be consulted by the Proponent.[211] Thereafter the MPMO sent out 131 Notification letters in August 2013 under a different list with requiring the Proponent to consult with previously unengaged groups.[212]

Other Approaches

In the EA of Northern Gateway, the Proponent identified 171 Aboriginal groups and organizations during feasibility studies in 2002, and once the Project corridor was defined in 2005 it focussed its engagement activities "on Aboriginal groups and Métis regions located within 80 kilometres of either side of the project corridor and the Kitimat Terminal … [and] communities beyond these boundaries who identified themselves as having an interest because their traditional territory traversed the project corridor."[213] These groups were consulted based on:

- formal recognition as a "Band" as defined in the *Indian Act* and recognized by [Canada];
- constitutionally protected Aboriginal rights, lands, and land uses as defined by section 35 of the *Constitution Act*, 1982;
- proximity of a reserve or other protected land base to the project right-of-way; and
- proximity of traditional lands and territories to the project right-of-way.

Northern Gateway said that it included coastal Aboriginal groups in its Aboriginal engagement program. This included groups with interests in the Confined Channel

[207] Laidlaw, *Handbook Update*, *supra* note 2 at page 88 provides a Flow Chart with a discussion at pages 39 to 46.
[208] 2017 NGTL Application (March 31, 2015) page 13-3 to 13-5 available at <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90550/554112/2671288/2758964/2786592/2748154/B1-01_2017_NGTL_-_Application_-_A4K1J4.pdf?nodeid=2748598&vernum=-2>
[209] Little Bow CSR (December 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p49421/85193E.pdf> at 9.
[210] Trans Mountain Project Description NEB (May 25, 2013) at 44-45 available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/956916>.
[211] Trans Mountain Application (December 16, 2013) Volume 3B at 3B-6 available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2385938>. It is document B1-39 - V3B_1.0_TO_3.0_ABOR_ENGAG - A3S0U5.
[212] NRC Notification (August 12, 2013) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/995067> [MPMO Notification August 2013]
[213] *Considerations Report of the Joint Review Panel Report for the Enbridge Northern Gateway Project : Volume 2* (December 19, 2013) [*Considerations*] at 29 < http://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_21799/97178/Considerations_-_Report_of_the_Joint_Review_Panel_for_the_Enbridge_Northern_Gateway_Project_(Volume_2).pdf>

> Assessment Area and groups with interests in the Open Water Area that are in proximity to tanker shipping routes calling on the Kitimat Terminal.[214]

The number of Aboriginal and Metis groups consulted on this basis was 81.[215] In November 2009 the Agency issued a formal letter to 108 Aboriginal groups,[216] the additional groups were subsequently engaged by the Proponent.

Consulting with an Indigenous Group on the basis of that group's accepted land claim by Governments for negotiation can be complicated. For example, in the EA of the *Labrador-Island Transmission Link Project* (#51746) for electricity transmission from Churchill Falls in Labrador to Newfoundland. The Proponent, Nalcor Energy [Nalcor], a provincial Crown corporation, consulted primarily with the Innu Nation of 2,200 members, as their claims were recognized for negotiation by Canada and Newfoundland and Labrador [NFL].[217] Nalcor's EIS[218] asserted that the Innu Nation "is the only such claim in the region that has been accepted for negotiation by the governments of Canada and Newfoundland and Labrador." This is partially true, the land claims of the Innu in Quebec have not been accepted for negotiation by the NFL government,[219] but, for example the Ekuanitshi Innu, a semi-nomadic Indigenous people living in Quebec have been negotiating with Canada since 1979 and claim Aboriginal title on a territorial basis in the Project Area.[220] The Ekuanitshi Innu were not consulted deeply whereas the Taku River Tlingit First Nation, whose land claims had been accepted by the British Columbia Treaty Process, resulted in a duty to consult deeply on that basis alone.[221] The Federal Court upheld Crown consultation in that case—in part based on potential future regulatory consultation, and the Panel findings that their use was sporadic—even though the Ekuanitshi Innu, unable to come to terms with Nalcor, were unable to conduct traditional land use studies that may have established Aboriginal title in the project area.[222]

Special Concerns

One special concern arises if an Indigenous Group either self-identifies or is identified in the Proponent's investigation—what happens if government officials do not consider them eligible to be consulted or not to have Aboriginal or treaty rights?

This was the case in the EA of *Maritime Link Transmission Project* (#65713) where the Proponent was advised by Newfoundland and Labrador officials that the Qalipu Mi'kmaq First Nation Band

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[214] *Ibid.*
[215] Northern Gateway EIS (May 27, 2010) available at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=43426>. Volume 5A at 2-6 to 2-8 at < http://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_21799/43499/Volume_5A_-_Aboriginal_Engagement.pdf>
[216] Form Letter (November 5, 2009) at <http://www.ceaa-acee.gc.ca/050/documents/40863/40863E.pdf>,
[217] Nalcor EIS, Chapter 7 at <http://www.ceaa-acee.gc.ca/050/documents/55063/55063E.pdf> at 7-2.
[218] *Ibid.*
[219] *Ibid* at 7-9.
[220] *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189 at 89; leave denied 2015 CanLII 10578 (SCC) [*Ekuanitshit*]
[221] *Taku River, supra* note 16 at para 30.
[222] *Ekuanitshit, supra* note 220 at 107 to 110 and 114 to 118.

[Qalipu] did not have any recognized Aboriginal or treaty rights.[223] In that case, the Proponent continued to engage the Qalipu to assess the project's effects on Qalipu members current use of lands for traditional purposes in the project area as required by CEEA-1992, s 2(1).[224] A similar situation arose in the EAs of Enbridge Line 3 and of Trans Mountain with the Michel First Nation where Canada, despite their members being status Indians, refused recognition of Aboriginal rights claimed by them. However, the Proponents continued to engage with them pursuant to CEEA-2012 section 5(1)(c).[225]

In the EA of 2017 NGTL System and the EA of Trans Mountain where the Asini Wachi Nehiyawak Traditional Band [AWNTB][226] were not recognized by the ACO or the MPMO although they self-identified as Aboriginal and gained status in the NEB proceedings. Non-recognition may be justified, as the AWNTB claim to be descendants of the Bob-Tail Band, which the Courts have ruled ceased to exist in 1887.[227] The Alberta Utilities Commission in 2017 denied standing for the AWNTB, given the lack of "any information relating to the AWNTB's membership, leadership, nature of the organization, or whether the AWNTB is a band as defined in the *Indian Act*, or recognized by the provincial ACO or [Canada]."[228] However, this may be changing with the Alberta Ministry of Indigenous Affairs Annual Report (2018-2019) acknowledging the Aseniwuche Winewak Nation (AWN) that was formed in 1994 to represent descendants of Indigenous groups that moved west with the fur trade in the 1800s and integrated with tribes in the eastern slopes of the Rocky Mountain.[229] In any case it would be prudent for Proponents to engage with those Indigenous groups on the basis of CEEA-2012 requirements as described above.

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[223] The Qalipu are a federally recognized Indian Band pursuant to an *Agreement for the Recognition of the Qalipu Mi'kmaq Band* (2008) at <http://qalipu.ca/site/wp-content/uploads/2011/07/2011sept-Agreement-In-Principle.pdf > that does not have a Reserve rather the 23,000 current members are spread out in a number of communities. The matter of enrolment is an ongoing controversy as ~100,000 people applied to become members, see: *History of the Qalipu Mi'kmaq First Nation enrolment process* at<https://www.aadnc-aandc.gc.ca/eng/1372946085822/1372946126667>.

[224] This was informed by the *Federation of Newfoundland Indians Traditional Use Study Final Report Phase Three* (AMEC 2002) commissioned by the predecessor organization in 1999, involving 1800 interviews with members from ten Mi'kmaq bands in three regions of Newfoundland.

[225] See: Brandi Morin, *Last ones standing: Michel Band seeks to regain status as a band under Indian Act*, CBC News August, 4, 2017 at <https://www.cbc.ca/news/indigenous/michel-first-nation-recognition-1.4234214>. Colleen Underwood, *Why my grandfather dissolved the Michel First Nation and renounced his Indian status*, CBC News May 28, 2108 at < https://www.cbc.ca/radio/docproject/disbanded-why-my-grandfather-dissolved-our-reserve-1.4643764/why-my-grandfather-dissolved-the-michel-first-nation-and-renounced-his-indian-status-1.4643782>

[226] Asini Wachi Nehiyawak Traditional Band website at <http://www.inewhistory.com/mtn.html>

[227] *Montana Band v Canada*, 2006 FC 261 at para 522; affirmed *Montana First Nation v Canada*, 2007 FCA 218.

[228] ATCO Gas and Pipelines Ltd. (South) Southwest Calgary Connector Pipeline Project Proceeding 22634 (July 12, 2017) at <https://www.trackenergyregs.ca/cga/abuc/en/item/233683/index.do>

[229] Indigenous Affairs Annual Report (2018-2019) [*Alberta Indigenous Affairs Report 2018-2019*] at <http://www.assembly.ab.ca/lao/library/egovdocs/2018/alir/220009_18.pdf> at 18. "Aseniwuche Winewak" (pronounced A-sen-i-wu-chee We-ni-wuk) is Cree for "Rocky Mountain People." As an umbrella organization, the AWN supports the Cooperatives and Enterprises with capacity, housing and corporate responsibilities. In 2018-19, the [Indigenous Affairs] ministry provided $125,000 in funding to support their goal of community self-reliance amongst the Grande Cache Enterprises and Cooperatives." They represent "Grande Cache Cooperatives and Enterprises, and consist of Susa Creek Cooperative, Muskeg Seepee Cooperative, Wanyandie Cooperative, Victor Lake Cooperative, Joachim Enterprise and Grande Cache Lake Enterprise."

The BC government does not recognize an obligation to consult with Métis peoples, as it is of the view that there is no historical Métis community in BC.[230] Nonetheless, all of the Proponents in this paper have consulted with Métis groups in BC where necessary.

Tribal Groupings, Regional and National Representatives

Some notifications are directed to Umbrella Groups such as Tribal Groups, Regional and National Representatives, for example the Treaty 8 Tribal Association (BC)[231] or Treaty 8 First Nations of Alberta[232] who are merely advisory and may or may not distribute that material to member nations while other groups such as the Stó:lō Nation[233] can represent some or all of the member nations from time to time. Out of an abundance of caution, Proponents will usually provide statutorily required information to these Umbrella Groups.

All projects in this paper have had some problems with identification of Aboriginal groups:

Table 2: Aboriginal Group Identification

Project	**Proponent List**	**Issues**	**Proponent Start**
Infill CFB Suffield	Blood Nation, Piikani (Peigan) Nation, and Siksika Nation[234]	Siksika Nation	Oct 2005
Little Bow	Blood Tribe, Piikani Nation, Siksika Nation and Métis Nation of Alberta - Region 3[235]	Tsuu T'ina Nation and Stoney (Nakoda) First Nation	N/A
Jackpine Mine	Fort McKay First Nation; Athabasca Chipewyan First Nation; Mikisew Cree First Nation; Fort McMurray #468 First Nation; Chipewyan Prairie First Nation; Métis Nation of Alberta – Zone 1[236]	Non-status Fort McMurray and Fort McKay First Nation and Clearwater River Paul Cree Band #175 added February 23, 2011[237]	Jan 2007 Feb 2011

[230] *R v Willison*, 2006 BCSC 985. The British Columbia Supreme Court was unable to conclude there was an historic Métis community in existence along the fur brigade trail in the southern part of the province. There has not been a judicial determination regarding the existence of a Métis community in northern BC.
[231] Treaty 8 Tribal Association (BC) website at <http://treaty8.bc.ca>. This includes Doig River First Nation, Fort Nelson First Nation, Halfway River First Nation, Prophet River First Nation, Saulteau First Nation and West Moberly First Nation – however this is covered by agreements with the British Columbia Oil and Gas Commission, see Handbook, *supra* note 2 at page 58.
[232] Treaty 8 First Nations of Alberta website at <http://www.treaty8.ca>
[233] Stó:lō Nation website at <http://www.stolonation.bc.ca>
[234] Infill CFB Suffield EIS Vol 1 at 6-8 at < http://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_15620/131.pdf>; See 6-1 to 6-3 for identification process.
[235] Little Bow CSR (December 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p49421/85193E.pdf>, 9 to 10.
[236] Jackpine Application Vol 1 at 15-7 at <http://www.ceaa-acee.gc.ca/050/documents_staticpost/59539/46923/volume_1.pdf>
[237] Jackpine JRP Report (July 9, 2013) at par 79 page 17 at <http://www.ceaa-acee.gc.ca/050/documents/p59540/90873E.pdf> and Errata #1 (August 9, 2013) at < http://www.ceaa-acee.gc.ca/050/documents/p59540/92893E.pdf>. See also the AER's same Report at <https://www.aer.ca/documents/decisions/2013/2013-ABAER-011.pdf> [Jackpine Report JRP]

Project	Proponent List	Issues	Proponent Start
Northern Gateway	Project engagement 81 Aboriginal groups[238]	Agency 108 Aboriginal groups (November 2009)[239]	April 2002 Oct 2005 Nov 2009
Trans Mountain	103 Aboriginal Groups[240]	NEB 2 BC Metis;[241] MPMO Letters to 131[242]	May 2012 June 2014
Wolverine Loop	Cadotte Lake Métis Local 1994; Duncan's First Nation; Gift Lake Métis Settlement; Horse Lake First Nation; Loon River First Nation; Lubicon Lake Band; Métis Nation of Alberta; Métis Nation of Alberta – Region 5 and Region 6; Peavine Métis Settlement; Whitefish Lake First Nation; Woodland Cree First Nation[243]	NEB added Beaver First Nation; Kapawe'no First Nation (January 30, 2014) + Sawridge FN[244]	Sept 2013 Jan 2014
Enbridge Line 3	57 Aboriginal Groups + 17 organizations[245]	NEB - 102 Aboriginal groups; ultimately 145[246]	July 2013
2017 NGTL System	54 Aboriginal Groups[247]	ACO (October 29, 2014) added Sucker Creek FN; MPMO (February 11, 2015) added 13 FN[248]	July 2014, Nov 2014, Feb 2015
Towerbirch Expansion	24 Aboriginal Groups[249]	NEB - to 3 additional FN (July 2015)[250]	July 2014 July 2015

For Indigenous groups, there are policy reasons to identify their Traditional Territories on an expansive historical basis – as Aboriginal rights and title are defined by historical contact or legal

[238] *Considerations*. *supra* note 213 at 29.
[239] *Supra* notes 192 and 193.
[240] Trans Mountain Project Description NEB (May 25, 2013) at 44 to 45 available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/956916>.
[241] Trans Mountain Application (December 16, 2013) Volume 3B at 3B-6 available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2385938>. It is document B1-39 - V3B_1.0_TO_3.0_ABOR_ENGAG - A3S0U5.
[242] NRC Notification (August 12, 2013) available at < https://apps.neb-one.gc.ca/REGDOCS/Item/View/995067>
[243] Wolverine Loop Application (March 25, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2483878>. It is "B1-7 - Carmon Creek Application - Sec 09 to 11 - Pt 07 of 09 - A3V4K5.pdf" at 10-2.
[244] Wolverine Loop NEB Report (March 5, 2015) [Wolverine Loop NEB Report] at 28 available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2697319>
[245] Enbridge Line 3 Project Description (July 2014) 44 to 45. Available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2487792>
[246] NEB Report Enbridge Line 3 Project (April 2016) Detailed Assessment at 96 to 98 at < https://apps.neb-one.gc.ca/REGDOCS/Item/View/2949686>
[247] 2017 NGTL Application (March 31, 2015) page 13-3 to 13-5 available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2748154>.
[248] *Ibid.*
[249] Project Description (May 29, 2015) at 46 available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2786389>
[250] NEB Letter Aboriginal Groups (July 24, 2015-August 17, 2015) available at < https://apps.neb-one.gc.ca/REGDOCS/Item/View/2804341>, <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2810705> and <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2811068>. These were identified by MPMO on July 15, 2015.

control for Métis rights. Canadian law will generally limit those rights to areas where Aboriginal rights outside of Reserves are *currently exercised*. The downside is the increasing number of notifications for projects that may infringe upon those Aboriginal rights that many Indigenous Groups lack the social and financial capacity to review appropriately and negotiate accommodation measures.

5.2 ABORIGINAL MANDATE IN EA DESIGN

Aboriginal groups have limited input into EA design, as they are governed by legislation, originally CEAA-1992 and now CEAA-2012 and government consultation policies, with the premise being that an EA Tribunal cannot decide aboriginal rights and title.[251] Both pieces of legislation define environmental effect as changes in the environment affecting "*the current use of lands and resources for traditional purposes*" [CULTP].[252] Under CEAA-1992, the *Establishing Timelines for Comprehensive Studies Regulations*[253] required the Proponent's Project Description to include information as to consultation with aboriginal groups and "the project's proximity to Indian reserves, traditional territory and lands and resources currently used for traditional purposes by Aboriginal persons."[254] Similarly, under CEAA-2012 the *Prescribed Information for the Description of a Designated Project Regulations*[255] required the same information but also included the statutorily mandated

> [i]nformation on the effects on Aboriginal peoples of any changes to the environment that may be caused as a result of carrying out the project, including effects on health and socio-economic conditions, physical and cultural heritage, *the current use of lands and resources for traditional purposes* or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.[256] [CULTP+]

The Agency would conduct an assessment as to the choice of procedure based on these Project Description with an Agency EA as the default process based on this information. The Agency's Minister may refer the EA to a Panel in which case a Panel Agreement will be required, or if there are Federal and other EA processes where possible a Joint Panel Agreement, each with attached Terms of Reference defining aboriginal interests considered but also Scoping Documents that *limit that consideration.*

In NEB Hearings, there is no independent basis – outside of the "public interest" in the NEB Act, for consideration of aboriginal interests and that consideration will be under CEAA-1992 or now CEAA-2012. This is reflected in the Hearing Order's attached Issues list which will be phrased in general language, such as "Potential impacts of the Project on Aboriginal interests" [PIA]. The

[251] See e.g., *Ekuanitshit, supra* note 220 at 97 to 98.
[252] CEAA-1992, *supra* note 140, s 2(1)(b)(iii) and CEAA-2012, *supra* note 141, s 5(1)(c)(iii).
[253] Establishing Timelines for Comprehensive Studies Regulations, SOR/2011-139.
[254] *Ibid* at 3 and 10(e) respectively [Agency CSR Guidelines].
[255] Prescribed Information for the Description of a Designated Project Regulations, SOR/2012-148
[256] *Ibid* at 3, 12(e) and 19 respectively. CEAA-2012, *supra* note 141, s 5(1)(c)(i) health and socio-economic conditions, (ii) physical and cultural heritage, (iii) the current use of lands and resources for traditional purposes, or (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

Proponent's required project information is reflected in the NEB Filing Manual,[257] which is updated periodically.[258]

For the Projects in this Report, consideration of aboriginal interests flows from the specific EA Tribunal Mandate as set out below:

Table 3: Aboriginal Interest Consideration

Project	Mandate	Basis	Notes on Mandate
Infill CFB Suffield	JRP Agreement (November 16, 2006)[259]	CULTP[260]	No change Draft JRP[261]
Little Bow	Draft Project Specific Guidelines and CSR Scoping (November 2, 2010)[262]	CULTP, Navigable water[263]	Agency conducted
Jackpine Mine	JRP Agreement (September 16, 2011)[264]	CULTP; Section 6; Appendix,[265] III,[266]	No change Draft JRP, [267] Section 6.3 express limitation on aboriginal rights determination

[257] National Energy Board Filing Manual online at <https://www.neb-one.gc.ca/bts/ctrg/gnnb/flngmnl/index-eng.html> [NEB Filing Manual] Reference will be to the most recent update as of 2017-01.
[258] History of Filing Manual Updates at <https://www.neb-one.gc.ca/bts/ctrg/gnnb/flngmnl/hstr-eng.html>
[259] Infill CFB Suffield JRP Agreement (November 2006) at <https://www.ceaa-acee.gc.ca/050/evaluations/document/18059?culture=en-CA>.
[260] *Ibid,* section 5.33 at 23 and 6.23 at 29.
[261] No change from Draft Joint-Panel Agreement (July 31, 2006) at <https://www.ceaa-acee.gc.ca/050/evaluations/document/16076?culture=en-CA>. Final Guidelines for EIS (December 20, 2006) at <https://www.ceaa-acee.gc.ca/050/documents/18428/18428E.pdf> did not modify the mandate.
[262] Draft Project Specific Guidelines and CSR Scoping (Nov 2010) at <https://www.ceaa-acee.gc.ca/050/documents/46111/46111E.pdf> at 14 to 16, 24 and 30. Public Input was solicited on July 19, 20 with comments to close on August 20, 201 at <https://www.ceaa-acee.gc.ca/050/evaluations/document/44159?culture=en-CA>. There are no internet available comments.
[263] *Ibid,* Defined at page 24 in 6.4.1 Land and Resource Use as: "Domestic harvesting of resources including fishing, hunting, trapping and gathering medicinal and other plants and berries by Aboriginal groups; Traditional land uses such as trails, portages, campsites, etc.; and Commercial use of resources by Aboriginal and other groups, including commercial fishing, sport fishing and hunting, etc." See also 7.2.6 Navigable Waters at 30
[264] Joint Review Panel Agreement (September 16, 2011) at <https://www.ceaa-acee.gc.ca/050/documents/52084/52084E.pdf> [Jackpine Mine JRP]
[265] *Ibid* at 11 "3 (c) effects of the project on asserted or established Aboriginal and treaty rights, to the extent the Joint Review Panel receives such information as provided in article 6 of the Agreement."
[266] *Ibid* at 12 "The Joint Review Panel shall consider: Evidence concerning any potential project effects to asserted or established Aboriginal and treaty rights presented by participants, such as: Any potential effects on uses of lands and resources by Aboriginal groups for traditional purposes; Any effects (including the effects related to increased access and fragmentation of habitat) on hunting, fishing, trapping, cultural and other traditional uses of the land (e.g. collection of medicinal plants, use of sacred sites), as well as related effects on lifestyle, culture, health and quality of life of Aboriginal persons; Any effects of alterations to access into areas used by Aboriginal persons for traditional uses; Any adverse effects of the project on the ability of future generations to pursue traditional activities or lifestyle; Any effects of the project on heritage and archaeological resources in the project area that are of importance or concern to Aboriginal groups."
[267] Draft Agreement to Establish a Joint Panel for the Jackpine Mine Expansion Project (March 7, 2011) at <https://www.ceaa-acee.gc.ca/050/documents/48347/48347E.pdf>. The Draft JRP did not include the aboriginal components of the Appendices Part II in *supra* note 264.

Project	Mandate	Basis	Notes on Mandate
Northern Gateway	JRP Agreement (December 4, 2009)[268]	CULTP; Sections 6.5,[269] 8,[270] Scope of Factors[271]	*Consideration of Aboriginal Group Comments on the Draft Joint Review Panel Agreement* (October 22, 2009)[272]
Trans Mountain	Hearing Order (April 2, 2014)[273] and Direction on CEAA-2012 EA Issues (April 2, 2014)[274]	Issue No. 9	PIA, maritime components cumulative effects only, CULTP+[275]
Trans Mountain Reconsideration	OIC (2018-1179)[276]	*Reasons for Process Issue Decisions* (October 29, 2018)[277]	PIA, maritime components in Project, CULTP+[278]
Wolverine Loop	Hearing Order (July 17, 2014)[279]	Issue No. 7	PIA, CULTP+

[268] Northern Gateway Final JRP Agreement (December 4, 2009) at <http://www.ceaa-acee.gc.ca/050/documents/40851/40851E.pdf>

[269] *Ibid* at page Part II at 6 "6.5 In order that the Panel may be fully informed about the potential impacts of the project on Aboriginal rights and interests, the Panel will require the proponent to provide evidence regarding the concerns of Aboriginal groups and will also carefully consider all evidence provided in this regard by Aboriginal peoples, other participants, federal authorities and provincial departments."

[270] *Ibid,* "8.1 In addition to Subsection 6.5, the Panel will receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the project and the impacts or infringements that the project may have on potential or established Aboriginal and treaty rights. The Panel may include in its report recommendations for appropriate measures to avoid or mitigate potential adverse impacts or infringements on Aboriginal and treaty rights and interests."

[271] *Scope of the Factors – Northern Gateway Pipeline Project: Guidance for the assessment of the environmental effects of the Northern Gateway Pipeline Project* (August 2009) at <http://www.ceaa-acee.gc.ca/050/documents/44033/44033E.pdf>

[272] *Consideration of Aboriginal Group Comments on the Draft Joint Review Panel Agreement* (October 22, 2009) at <http://www.ceaa-acee.gc.ca/050/documents/40862/40862E.pdf> [Northern Gateway Consideration of Aboriginal Comments] with the Agency's response to changes, if any, to the Draft JPR Agreement (February 9, 2009) at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=31297>. It should be noted that aboriginal groups in their evidence consistently challenged the validity of the Panel's mandate in the Northern Gateway EA see Patricia Burke Wood and David A. Rossiter, "The politics of refusal: Aboriginal sovereignty and the Northern Gateway pipeline" (2017), 61(2) The Canadian Geographer / Le Géographe canadien 165. See also: Sarah Panofsky, *Lessons from the Canyon: Aboriginal Engagement in the Enbridge Northern Gateway Environmental Assessment* (Masters Thesis in Geography, Vancouver: UBC, 2011) [Panofsky, *Lessons from the Canyon*] at <https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0105159#downloadfiles>

[273] Trans Mountain NEB Hearing Order OH-001-2014 (April 3, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2445930>

[274] NEB Direction on CEAA-2012 Environmental Assessment Issues (April 2, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2445374>

[275] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*].

[276] OIC (2018-1179) with Explanatory Note at <http://www.gazette.gc.ca/rp-pr/p1/2018/2018-09-29/html/order-decret-eng.html>.

[277] NEB *Reasons for Process Issue Decisions of October 12, 2018* (October 29, 2018) [Reasons for Process], available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3646400>.

[278] *Ibid.*

[279] Wolverine Loop NEB Hearing Order GH-003-2014 (July 17, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A61861>

Project	Mandate	Basis	Notes on Mandate
Enbridge Line 3	Hearing Order (May 4, 2015)[280]	Issue No. 7	PIA, CULTP+
2017 NGTL System	Hearing Order (July 31, 2015)[281]	Issue No. 7	PIA, CULTP+
Towerbirch	Hearing Order (December 22, 2015)[282]	Issue No. 7	PIA, CULTP+

The mandated process of requiring public and aboriginal input on the Draft List of Issues for NEB hearings will rarely give rise to any changes in that list, in part because they are expressed in general language and have been standardized over the years.[283]

De-Facto Determination of Aboriginal Rights and Title?

The aboriginal mandate of other EA Tribunals and in JRP Agreements [284] have become fixed with either the consideration of aboriginal submissions is restricted to information: related to the nature and scope of asserted or established Aboriginal and Treaty Rights and the potential adverse environmental effects that the Project may have on them; or in Agency CSR Guidelines;[285] or Agency variants of CULTP e.g. changes in the environment affecting "the current use of lands and resources for traditional purposes."

Challenging the aboriginal mandate, or the EA Tribunal's interpretation of that mandate during or after the EA process in Court poses difficulties for aboriginal groups. Not only on Canadian administrative law principles where Courts defer to the expertise of administrative bodies, but also uniquely in the aboriginal context where:

- crown consultation *will be informed* by the EA Tribunal's recommendations;
- additional crown consultation *will extend until* Crown approval; and
- additional crown consultation *may be deferred* in the regulatory process.

[280] Enbridge Line 3 NEB Hearing Order OH-002-2015 (May 4, 2015) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2774785>
[281] 2017 NGTL System NEB Hearing Order GH-002-2015 (July 31, 2015) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/Filing/A71576>
[282] Towerbirch NEB Hearing Order GH-003-2015 (December 22, 2015) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2902415>
[283] In the Applications to Participate in NEB Hearings for the Trans Mountain Project, a general community interest not sufficient, when an applicant raised an issue outside the List of Issues, the obligation was on the applicant to show why this issue was a specific and detailed interest that was directly affected NEB Ruling on Participation (April 3, 2014) at 5, available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2445932>.
[284] See e.g.: # 44811 Prosperity Gold-Copper Mine Project : Review Panel Terms of Reference (January 16, 2009) at <https://www.ceaa-acee.gc.ca/050/documents/30840/30840E.pdf> at 2; #58081 Inuvik to Tuktoyaktuk Highway Project: Agreement to Establish a Substituted Panel for the Inuvik to Tuktoyaktuk Highway Project (2011) at <http://www.ceaa-acee.gc.ca/050/documents/48341/48341E.pdf > at 2 DEE; and # 63919 Site C Clean Energy Project : Agreement to Conduct a Cooperative Environmental Assessment, Including the Establishment of a Joint Review Panel, of the Site C Clean Energy Project (February 13, 2012) at <https://www.ceaa-acee.gc.ca/050/documents/54272/54272E.pdf> at 15. See *contra* Northern Gateway Consideration of Aboriginal Comments, *supra* note 272.
[285] Agency CSR Guidelines, *supra* note 254. See for example *Ekuanitshit, supra* note 222.

This provides significant latitude for strict interpretations by EA Tribunal as their recommendations were only part of the decision-making process that could be "fixed" in subsequent Crown processes.[286]

Inasmuch as the EA Tribunal's decisions are assessed on a reasonableness standard, the practical compulsory participation by aboriginal groups in EA pose difficulties for aboriginal groups. While legally, EA Tribunals cannot determine the existence of aboriginal rights and title, their decisions on the underlying claim(s) will carry weight in decision making *and* future decision making, negotiations – and potentially Court decisions. Assembling evidence for the EA to establish *historical usage claims* is expensive[287] and given the limited funding that evidence will usually be deficient. In the face of an adverse decision by an EA Tribunal it would take a determined and well-funded aboriginal group to undertake the historical enquiries required for proving aboriginal rights and title in Court in the Project area.[288]

In this way, from a practical point of view, EA Tribunal decisions *de facto* determine constitutional aboriginal rights and title of aboriginal groups *on a reasonableness standard.* This is not the *legal standard* deployed by Courts on the balance of probabilities.

5.3 ACCOMMODATION FOR INDIGENOUS ARTIFACTS

In the EA of Infill CFB Suffield, the Siksika Nation identified the presence of Indigenous Artifacts, from the Proponent's EIS and presumably received accommodation measure in their agreement with the Proponent.[289] The presence of Indigenous Artifacts is a common concern as Projects across Canada have the potential to impact these even in long settled areas.[290] For example, the *Ambassador Bridge Enhancement Project Windsor (Ontario)* (*#21100*)[291] involving the construction of second bridge over the Detroit River from Windsor to Detroit – in a highly urbanized setting. Local aboriginal groups were consulted and the Proponent had committed to continued consultation with interested aboriginal groups throughout the Archaeological process.[292] Another example is Project *#53746 Ottawa Light Rail Transit: Light rail transit from Tunney's*

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[286] See e.g.: *Métis Nation of Alberta Region 1 v Joint Review Panel*, 2012 ABCA 352 [*Métis Nation v JRP*].
[287] In part due to the "packaging" by experts in various fields, necessary to present aboriginal evidence, See: David Laidlaw, "Challenges in using Aboriginal Traditional Knowledge in the Courts" in Allan Ingleson ed., *Environment in the Courtroom* (Calgary: University of Calgary Press, 2019) [Laidlaw, "ATK in Courts"] at 606. At <https://prism.ucalgary.ca/bitstream/handle/1880/109483/9781552389867_chapter45.pdf?sequence=47&isAllowed=y>
[288] *Van der Peet*, *supra* note 23, defined aboriginal rights, and therefore title, as "an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right," being practised in a current form that relates to the original practice prior to European contact in paragraphs 46 and 60-65. See also: Arthur Ray, *Telling it to the Judge Taking Native History to Court* (Montreal: McGill-Queen's University Press, 2011).
[289] TLU Studies were not conducted as CFB Suffield had been expropriated from settlers in 1941 per Proponent's EIS (May 24, 2007) Vol 4 at 4-7 at <http://www.ceaa-acee.gc.ca/050/documents/21321/21321E.pdf>.
[290] This is reflected in the CEEA-2012, *supra* note 141, s 5(1)(c)(iv). CEEA-1992, *supra* note 140 had a similar provision in the definition of environmental effects in section 2(1)(b)(iv).
[291] 21100 - Ambassador Bridge Enhancement Project Windsor (Ontario) homepage at <http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=21100>
[292] Draft Environmental Assessment Screening Report Ambassador Bridge Enhancement Project Windsor, Ontario (April 2013) at <http://www.ceaa-acee.gc.ca/050/documents/p21100/88410E.pdf> at 27, 39 and 50.

Pasture to Blair Station, which included a downtown tunnel in Ottawa.[293] A Proponent Consultation Agreement included continued consultation over new discoveries of Indigenous Artifacts and designating one station with traditional Algonquin imagery and art.[294]

Alberta has a *Historical Resources Act* section 37(2) which requires that any person who conducts operations that may affect a historical resource,[295] such as an Indigenous artifact, to prepare a Historical Resources Impact Assessment [HRIA] under a permit and undertake all salvage, preservative or protective measures the Minister may require. There are provisions for accidental discovery during operations.[296] These requirements now apply to Alberta's Indigenous Traditional Use Sites, and while First Nation Consultation is mentioned there is no requirement to undertake consultation in the course of an HRIA.[297] Saskatchewan has *The Heritage Property Act*, with similar protections and processes including HRIA, there is a Fortuitous discovery provision but no mention of consultation with Indigenous Groups. [298] Manitoba has *The Heritage Resources Act*, with similar protections and processes including HRIA, but no mention of consultation with Indigenous Groups. [299] British Columbia has the *Heritage Conservation Act*,[300] with similar protections and processes, although they term this as Archaeological Impact Assessment (AIA), and consultation with the affected Indigenous Groups is contemplated.[301] Written agreements may be entered into with a First Nation respecting the conservation and protection of the cultural heritage.[302] There is no explicit direction on accidental discoveries other than the general ban. Federal heritage protections are only implemented in the National Parks, although CEEA-2012 requires identification of "any structure, site or thing that is of historical, archaeological,

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[293] Ottawa Light Rail Transit: Light rail transit from Tunney's Pasture to Blair Station, including a downtown tunnel Ottawa (Ontario) homepage at <http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=53746>. Notably the Project fell within the Algonquins of Ontario Comprehensive Land Claim Area.

[294] Ottawa Light Rail Transit Environmental Assessment Screening Report (2012) at <https://app06.ottawa.ca/calendar/ottawa/citycouncil/occ/2012/06-27/trc/01%20-%20ACS2012-PAI-PGM-0132%20Western%20LRT%20Corridor%20EA.pdf>> SR at 6-22, 9-2 to 9-3.

[295] *Historical Resources Act*, RSA 2000, c H-9 [HRA], s 37(2). Section 1(e) "historic resource" means any work of nature or of humans that is primarily of value for its palaeontological, archaeological, prehistoric, historic, cultural, natural, scientific or esthetic interest including, but not limited to, a palaeontological, archaeological, prehistoric, historic or natural site, structure or object; Permit under Archaeological and Palaeontological Research Permit Regulation, Alta Reg 254/2002. See: Historic Resource Impact Assessment at <https://www.alberta.ca/historic-resource-impact-assessment.aspx>.

[296] *Ibid* ss 31, 49, The Alberta Crown is bound under s 53.

[297] Aboriginal Heritage Section Information Bulletin: Update for First Nations and Métis Settlement Consultation (November 2017) at <https://open.alberta.ca/dataset/586fda7b-07db-4fe6-aaf1-08b5879c0188/resource/d0c16901-bbd2-426d-88eb-20167c13efc9/download/info-bulletin-aboriginal-consultation-nov2017.pdf>. Standard conditions under the *Historical Resources Act* (January 15, 2018) at 5 <https://open.alberta.ca/publications/standard-conditions-under-the-historical-resources-act>. Historic cabin remains; Historic cabins (unoccupied); Cultural or historical community camp sites; Ceremonial sites/Spiritual sites; Gravesites; Historic settlements/Homesteads; Historic sites; Oral history sites; Ceremonial plant or mineral gathering sites; Historical Trail Features; and, Sweat/Thirst/Fasting Lodge sites.

[298] *The Heritage Property Act*, SS 1979-80, c H-2.2, ss 63 to 65, 67, Fortuitous Discovery s 71.

[299] *The Heritage Resources Act*, CCSM c H39.1, s 12 to 14,

[300] *Heritage Conservation Act*, RSBC 1996, c 187, s 12.1

[301] *Ibid* s 12.1(4) Archaeological sites predating AD 1846 are administered separately but the same protections for tangible artifacts would apply.

[302] *Ibid* s 4, including permitting for a heritage inspection.

paleontological or architectural significance."[303] The Agency provides Technical Guidance for Indigenous Artifacts in an EIA.[304]

Proponents will look to government Heritage Offices for information and present that in proponent consultation to local Indigenous groups for confirmation and additional information. All of the Projects in this repot, with Conditions of Approval look only to government Heritage Offices for heritage clearances, often by way of an Officer's Certificate [OC] from the Proponent testifying as to compliance before certain stages, primarily Prior to Construction [PTC]. They may, and increasingly will provide plans for a Historical Resources Contingency Plan [HRCP] for accidental discoveries.

The focus for Proponents is on the legal process of obtaining HRIA and AIA clearances.[305] This is part of the licencing and permitting process referred to in *Taku River* – for which there is little or no public information on aboriginal consultation. It should be noted that, until the recent amendments in Alberta and BC, provincial protection was limited to indigenous artifacts; it now extends to culturally important sites and trails. Accommodation measures for Indigenous Artifacts are at the discretion of the relevant Provincial Heritage Ministers. Aboriginal heritage accommodation measures, can include relocation of habitation sites, Project route revisions, excavation of sites, and tunnelling under these sites.[306]
Indigenous groups have community members who may remember locations, in some Indigenous Groups, particular cultural practices or locations may be confidential to community sub-groups mandating a wider investigation. Other confidentiality concerns include the specific location of sites given vandalism – although this disclosure may be overcome by Proponent Confidentiality Agreements or confidentiality Orders from EA Tribunals.

All of the Projects in this Paper included undertakings or conditions to accommodate the presence of Indigenous artifacts in various manners.

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[303] *Canada National Parks Act*, SC 2000, c 32, section 16 (1)(b) regulatory powers and National Historical Sites in s 42, CEEAA-2012, s 5 (1)(c)(iv).
[304] *Technical Guidance for Assessing Physical and Cultural Heritage or any Structure, Site or Thing that is of Historical, Archeological, Paleontological or Architectural Significance under the Canadian Environmental Assessment Act, 2012* at <https://www.canada.ca/content/dam/ceaa-acee/documents/policy-guidance/technical-guidance-assessing-physical-cultural-heritage-or-structure-site-or-thing/technical-guidance-assessing-physical-cultural-heritage-structure-site-thing-historical-archeological->. This replaces the *Reference Guide on Physical and Cultural Heritage Resources, 1996* that continue to be applicable for EAs initiated under CEAA-1992 at <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/reference-guide-physical-cultural-heritage-resources.html>.
[305] Claire Charlotte Poirier, Hunting Buffalo Under the Ground: Encounters in Heritage Management (Phd Thesis, Memorial University, 2018) at <https://research.library.mun.ca/13577/1/thesis.pdf>
[306] This summarized list of aboriginal accommodation measures in the historical context was given in the Towerbirch EA by NGTL in its Response to Saulteau First Nations IR No. 2.5 (February 16, 2016) at 2 to 3, available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2839287>. Heritage Ministers have extensive discretionary powers, and this is not a complete list of options. See *supra* note 297 Ottawa

Table 4: Indigenous Artifacts

Project	Proponent Information	Aboriginal Information	Contingency Plans	EA Condition
Infill CFB Suffield	EIS Volume 5[307]	Siksika Nation[308]	EIS[309]	None
Little Bow	CSR[310]	Blood Tribe and Siksika Nation requested funding[311]		54[312]
	EIS Volume 5[313]	Ft McKay Field Studies[314]	2'nd HRIA Report[315]	None
Northern Gateway	EIS Volume 6C[316]	Aboriginal assistants in the field program. [317]	Archeology / HRCP[318]	115-116: Provincial clearance 60 days PTC [319]
Trans Mountain	ESA Volume 5B[320]	Alberta;[321] BC[322]	HRCP with consultation[323]	100: OC 2 months PTC of components;

[307] Infill CFB Suffield EIS Volume 5 (May 2007) at <https://iaac-aeic.gc.ca/050/documents/21321/21321E.pdf>. There are 412 known historical resource sites in the NWA including 19 new historical resource sites found as part of this HRIA. There are 361 known historical resource sites in the south NWA and 51 in the north NWA.
[308] *Supra* note 232.
[309] *Supra* note 240 at 2-2 "If relocation of project elements is not possible and damage or destruction of historical resources could occur, mitigation will be undertaken according to the requirements *set out by the Alberta government*." [*Emphasis* added] see also 2-14
[310] *Supra* note 187, at 46 [Littlebow CSR]
[311] *Ibid* at 11
[312] *Ibid* at 75. This was a restatement of an existing obligation under the HRA, *supra* note 249.
[313] Jackpine Mine EIS Volume 5 (December 2007) 8-165 to 8-198 at <https://iaac-aeic.gc.ca/050/documents_staticpost/59539/46923/volume_5.pdf>. PHR-1: What effects will the Project and other regional developments have on historical resources? (8-169) This question cannot be answered adequately as it is not known what historical resources might be located or identified with other planned developments. The Application Case in Section 8.6.6 identifies the effects of existing developments on regional historical resources. (8-197).
[314] *Ibid* at 8-175
[315] Jackpine Mine JRP Report, (July 9, 2013) at <http://www.ceaa-acee.gc.ca/050/documents/p59540/90873E.pdf> at 1076. See also 1083.
[316] Northern Gateway EIS (May 27, 2010) at 630 available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=43426>. Volume 6C at 6-1 to 6-44 is at <https://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_21799/43499/Volume_6C_-_ESA_Human_Environment.pdf>.
[317] *Ibid* at 6-24.
[318] Northern Gateway Application (May 27, 2010) Volume 7A, Appendix A: Archaeology Discovery Contingency Plan (Section A.2.5.1); Heritage Resources Protection and Management Plan (Section A.3.31) at <https://iaac-aeic.gc.ca/050/documents_staticpost/cearref_21799/43499/Volume_7A_-_Construction_EPMP.pdf>
[319] *Considerations, supra* note 213, at 382.
[320] Trans Mountain ESA (December 2013) Volume 5B at 5-1 to 5-22 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2392699> Relevant Document: "B5-31 - V5B_ESA_06of16_SOCIOEC - A3S1S0.pdf".
[321] Saddle Lake Cree Nation, Alexander First Nation, Samson Cree Nation, Ermineskin Cree Nation, Montana First Nation, Louis Bull Tribe, Alexis Nakota Sioux First Nation, Paul First Nation, Nakcowinewak Nation of Canada and Sunchild First Nation
[322] Lower Nicola Indian Band, the Nicola Tribal Association and Chawathil First Nation. Nooaitch Indian Band, Nicomen Indian and Shackan Indian Band
[323] Trans Mountain Application (December 2013) Volume 6B, Pipeline EPP Appendix B: Contingency Plans 6.0 Heritage Resources Discovery Contingency Plan B-15 to B-16 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2393567>

Project	Proponent Information	Aboriginal Information	Contingency Plans	EA Condition
				77: Lightening Rock Sumas 3 months PTC[324]
Wolverine Loop	Surveys July 2014[325]	LLB burial sites;[326] DFN trails;[327]	HRCP[328]	none
Enbridge Line 3	ESA[329]	None	HRCP[330]	18: OC 14-day PTC[331]
2017 NGTL System	ESA[332]	groups invited to participate	HRCP [333]	10: OC 30 days PTC[334]
Towerbirch	ESA[335]	9 invited, 8 participated[336]	HRCP [337]	11: OC 30 days PTC[338]

5.4 FUNDING FOR EA PARTICIPATION FOR ABORIGINAL GROUPS

Given the limited funding for Indigenous communities and multiple consultation demands, funding Aboriginal participation in a project EA is a constant issue. Indigenous groups may levy consultation fees on a cost-recovery basis for projects, but Alberta's Consultation Policy overrides First Nation Consultation Protocols under which these are levied.[339] Prudent long-term developers will often pay those levies to maintain social licence and speed approvals.

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[324] NEB Report Trans Mountain Expansion (May 20, 2010) [Trans Mountain Report] at 467 and 457 available at <https://www.ceaa-acee.gc.ca/050/documents/p80061/114562E.pdf>

[325] Wolverine Loop Aboriginal Update No. 2 at page C-2. Nothing found.

[326] *Ibid.*

[327] *Ibid* at B-5.

[328] Wolverine Loop ESA (March 2014) Appendix A Environmental Protection Plan, Annex E 10.0 Heritage Resource Discovery Contingency Plan at E-21 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2483878>. Note it is only Sacred TLU sites that will engage a higher level of mitigation.

[329] Enbridge Line 3 Application (November 2014) ESA Appendix 6 at 5-200 to 5-205, 6-212 to 6-218 at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2545652>

[330] *Ibid,* ESA Appendix 6 Environmental Protection Plan Appendix D5 - Heritage Resource Discovery Contingency Plan at D-7 to D-8 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2545652>

[331] NEB Report Enbridge Line 3 (April 2016), *supra* note 246 at 222

[332] 2017 NGTL System ESA (March 2015) at 6-161 to 6-166 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2748481> as "B2-13_ESA_Main_Sec_6_Part1of1 - A4K2R8"

[333] 2017 NGTL System ESA (March 2015) Heritage Resource Discovery Contingency Plan [Section 7.1 of Appendices 1A to 1G] at 1E-22 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2748481>

[334] 2017 NGTL Report, *supra* note 186, at 112, Condition 10 at 172-173, Condition 8 at 186.

[335] Towerbirch Expansion ESA (September 2015) at 5-186 to 5-196 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2748481> and <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2748828>

[336] *Ibid* at 5-201, These were Blueberry River First Nations; Doig River First Nation; Duncan's First Nation; Horse Lake First Nation; Kelly Lake Cree Nation; McLeod Lake Indian Band; Prophet River First Nation; Saulteau First Nations and West Moberly First Nations.

[337] Towerbirch Expansion EPP (September 2015) Annex E Contingency Plans, Heritage Resource Discovery Plan 10 at E -22 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2813813>

[338] Towerbirch NEB Report (October 2016) [Towerbirch NEB Report] at 173 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3065005>

[339] Laidlaw, Handbook, *supra* note 2 at 19.

Government as Proponent

Some consultation policies, like Alberta's current policy, contemplate governments as proponents for government purposes. In the EA of Little Bow, the Proponent was Alberta Transportation, and they denied funding to Aboriginal groups to conduct site visits or conduct their own studies in the EA process.[340]

In the proponent engagement, they identified the Blood Tribe, Piikani Nation, Siksika Nation and Métis Nation of Alberta - Region 3 [Consulted Groups] as having a potential interest in the project and provided a "Project Specific Guidelines & Scoping Document, the Project overview presentation, and historical resource. Communication also included direct phone and email contact, letters, and face-to-face meetings."[341] The scope, nature and timing of these communications or any changes made to the project as a result is not disclosed.

This EA was not a major resource project subject to management by the MPMO. A Public Notice of EA was issued on August 5, 2009, the DFO and TC may take action under CEAA-1992,[342] as a result of amendments in CEEA-2012, the Agency became responsible for the EA, and a Notice was issued on July 19, 2010, soliciting comments and need for a CSR, closing August 20, 2010.[343] There were no comments received from the Consulted Groups who had received a piece of project information directly from the Agency. On November 2, 2010, the Agency released Draft Project Specific Guidelines and CSR Scoping,[344] together with Public Comment Notice to close on December 2, 2010.[345] There is no EIS, no records of public or Aboriginal comments in the Registry. A CSR (December 2012) was released on January 25, 2013,[346] together with Public Comment Notice with comments to close on February 24, 2013.[347] The CSR recommended approval,[348] and a Decision Statement was released on May 10, 2013, approving the project.[349]

In terms of aboriginal accommodation, as noted in the CSR, "[t]o meet the Crown's duty to consult, the Agency conducted focused consultations with Aboriginal people in proximity to the Project area, in addition to the public consultation process." [350] There were no submissions from the Consulted Groups in both public consultations. Following the second public consultation opportunity, the Agency sent the EIS to the Consulted Groups and conducted direct consultation

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[340] Littlebow CSR (December 2012) was released on January 25, 2013 [Littlebow CSR] at 11 at < http://www.ceaa-acee.gc.ca/050/documents/p49421/85193E.pdf>.
[341] *Ibid* at 10 to 11.
[342] Public Notice EA (August 5, 2009) at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=80047> DFO "may take action in relation to section 32 of the *Fisheries Act* and to subsection 35(2) of the *Fisheries Act* and because [TC] may take action in relation to section 5 of the *Navigable Waters Protection Act*."
[343] Public Comment Notice (July 19, 2010) at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=44159>.
[344] Draft Project Specific Guidelines and CSR Scoping (Nov 2010) at < http://www.ceaa-acee.gc.ca/050/documents/46111/46111E.pdf>
[345] Public Notice (November 2, 210) at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=46112>
[346] Littlebow CSR, *supra* note 235.
[347] Public Comment Notice (January 25, 2013) at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=84925>
[348] Littlebow CSR, *supra* note 235 at 57.
[349] Decision Statement (May 10, 2013) at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=89029>
[350] Littlebow CSR, *supra* note 235 at 11.

with the Blood Tribe, Piikani (Peigan) Nation, and Siksika Nation individually. They were invited to submit comments, but no comments were received. The Consulted Groups were provided with the draft CSR for comment over four weeks ending November 13, 2012. During the drafting of the CSR, it came to the Agency's attention that the Project may fall within the asserted traditional territory of the Tsuu T'ina Nation and Stoney (Nakoda) First Nations and they were also invited to comment on the draft CSR. No Aboriginal comments were received.

The Agency contacted Aboriginal groups on several occasions to clarify issues, solicit comments and feedback, and exchange information through phone calls, email, letters, and meetings, although no details are given.[351] The Agency had, through the course of its Aboriginal consultation identified several issues and forwarded them to the Proponent - the principal concern was for capacity funding with all of the Consulted Groups saying that capacity funding was required to fulfill the Proponent's request for ATK and TLU studies in the Project area but Alberta Transportation ignored these.[352] The CSR incorporated the Proponent's 57 commitments in the approval. However, there were no Proponent practical accommodation measures, and the CSR included only one accommodation condition, No. 54 that was no more than a re-statement of an existing reporting obligation in the Alberta *Historical Resources Act*. [353]

Alberta's funding policy for government projects appears to have changed; for example, in the ongoing EA of the Springbank Off-Stream Reservoir Project (#80123), dry dam west of Calgary Alberta Transportation has entered into funding agreements with First Nations for TLU and ATK studies in 2016.[354] Other provincial governments will often enter into Funding Agreements with Indigenous groups to obtain ATK and TLU Studies for the EA of government projects.

Private Proponent Funding

Most private proponents will provide funding for Aboriginal groups, but they do so only if an agreement is reached with that Aboriginal group on workplans and budgets.[355] Private proponent funding is discretionary and directed mainly towards acquisition of information on Traditional Land or Marine Resource Use [TLU] and ATK for use in project design and Community Socio-Economic Studies as mandated in the EA regulations. Proponent funding takes place under a variety of private agreements and are invariably confidential. These agreements carry a variety of names but invariably operate to provide consultation capacity funding for Aboriginal groups to collect, collate, and analyze information on potential project impacts on their rights and interests. [Capacity Funding].

The projects in this paper have only generalized their funding arrangement for Aboriginal groups and, in some cases aggregating the totals, for example, in the EA of Trans Mountain the Proponent

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[351] *Ibid.*
[352] *Ibid* at 12.
[353] *Historical Resources Act*, RSA 2000, c H-9, s 31.
[354] Alberta Transportation Response to Agency IR (April 2018) at <https://iaac-aeic.gc.ca/050/documents/p80123/124335E.pdf>. Springbank Off-Stream Reservoir Project (#80123) Registry website at <https://iaac-aeic.gc.ca/050/evaluations/proj/80123>. Project website <https://www.alberta.ca/springbank-off-stream-reservoir.aspx>
[355] For example, the Newfoundland and Labrador Policy requires the Proponent to fund all consultation activities. See Laidlaw, Handbook, *supra* note 2 at 36 footnote 187. See Nalcor's dispute with *Ekuanitshi*, *supra* note 220.

said it "has provided more than $13 million in capacity funding" for conducting traditional land or maritime studies. [356] In Northern Gateway, the Proponent said, "in aggregate, it provided $10.8 million to Aboriginal groups."[357]

The Alberta government said in 2014 "the current estimates of corporate funding for Aboriginal consultation is in the order of $150-200 million", but the source of this estimate is unknown.[358]

Provincial Funding

With the immediate repeal of the *Aboriginal Consultation Levy Act (2013)*, intended to fund aboriginal consultation (a replacement was promised but has yet to appear) Aboriginal groups in Alberta have had to rely on mixture of proponent funding and provincial funding.[359] Provincial core funding is limited and generally provided on a case-by-case basis.[360] As of 2014, Alberta had allocated only $6.6 Million of funding for aboriginal consultation with no details provided as to whether the Proponents were government or private organizations.[361] As noted in the *Alberta Indigenous Affairs Report 208-2019*, this was budgeted at $7.3 million in 2017 and in response to requests, an additional $6.66 million was provided in 2018-2019, although details are not publicly available.[362]

British Columbia has the BC Oil and Gas Commission [OGC] that imposes levies on oil and gas companies and has entered into *Consultation Process Agreements* with various First Nations in the Treaty 8 area that bar First Nation consultation fees and provide that OGC will make payment(s) to a First Nation to facilitate consultation with specific funding amounts in a Confidential Appendix.[363] These arrangements are controversial as the OGC has only turned down one Project.[364] The BC EAO has offered 48 aboriginal groups funding in the Trans Mountain, but little additional information is available.[365]

Federal Funding

Federal funding is delivered through the Agency and NEB who administer separate Public Participation Funds [PFP] that allow proposed EA participants to apply for funding.[366] For funding,

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[356] Trans Mountain website at < https://www.transmountain.com/news/2015/working-with-aboriginal-communities>
[357] *Considerations, supra* note 213 at 29. "with $5.6 million of that amount provided to Aboriginal groups in British Columbia, including coastal Aboriginal groups."
[358] Laidlaw, *Handbook, supra* note 2 at 49. The source of this information is a mystery, however.
[359] *Aboriginal Consultation Levy Act*, SA 2013, c A-1.2, see: Laidlaw, *Handbook Update, supra* note 2 at 5 to 6.
[360] Alberta's current program is the First Nations Consultation Capacity Investment Program (FNCCIP) at < https://open.alberta.ca/publications/first-nations-consultation-capacity-investment-program >.
[361] *Ibid*, at 50.
[362] *Alberta Indigenous Affairs Report 208-2019*, *supra* note 229 at 27.
[363] Laidlaw, *Handbook supra* note 2 at 58 to 59.
[364] *Ibid* at 58.
[365] Trans Mountain CAR at 54.
[366] Agency Public Participation Fund webpage at < https://www.canada.ca/en/environmental-assessment-agency/services/public-participation/participant-funding-application-environmental-assessment.html> and the most recent Agency *Participant Funding Program - National Program Guidelines* (2015) provide guidance. NEB Public Participant Funding webpage at <https://www.neb-one.gc.ca/prtcptn/hrng/pfp/prtcpntfndngprgrm-eng.html> and the most recent Participant Funding Guide is at < https://www.neb-one.gc.ca/prtcptn/hrng/pfp/prgrmgd-eng.html>.

participants must qualify as an "interested party" under CEEA-2012 or as an Intervenor at the NEB and participate in the EA process. [367] Funding for Crown consultation is discretionary.

There can be separate participant funding pools set by the Agency and NEB for Aboriginal groups and the public. Major projects may have multiple pools for various stages of the EA. The Agency and NEB administer the granting process separate from the relevant EA Tribunal, with Funding Review Committees [FRC] that meet to consider applications and issue public Reports granting some or all of the applicants some or all of the requested funding.

Those grants are conditioned on signing a standard form Contribution Agreement that requires participation in the EA process. For example, in the EA of Wolverine Loop, NEB allocated PFP funding on January 15, 2014, and two PFP applications were received, but no Contribution Agreements were signed by October 24, 2014, when the EA proceeding changed to a written hearing, making the Project ineligible for PFP. [368]

For some of the projects discussed in this paper, a summary of the Federal government's funding is as follows:

Table 5: Federal Funding Aboriginal Participation in EA

Project	Funding	Date(s)	Requested	Provided	Notes
Infill CFB Suffield[369]	150,000	01/08/06	215,630	140,430	3 Public
Little Bow[370]	15,000	27/07/10	4,000	4,000	1 Métis
Jackpine Mine[371]	516,500	14/03/11 06/06/11 21/10/11	3,408,831	399,045	6 Aboriginal and 4 Public
Northern Gateway					
Phase I Preliminary Phase[372]	1,500,000	09/03/09 to 09/06/11	+1,096,402.89	446,903	16 of 18 Indigenous

[367] CEEA-2012, *supra* note 141, s. 2(2) and NEB s. 55.2
[368] NEB Report Wolverine Loop (March 5, 2015) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2697319> at 6.
[369] PFP Funding $40K (November 25, 2005) at <http://www.ceaa-acee.gc.ca/050/evaluations/document/12106>; PFP Funding $150K (August 1, 2006) at < http://www.ceaa-acee.gc.ca/050/evaluations/document/16291>; FRC Report (September 18, 2006) at < http://www.ceaa-acee.gc.ca/050/evaluations/document/17085>.
[370] Federal PFP Funding of $15,000 was made available on July 27, 2010 at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=44256>. FRC met in September on one application from Métis Nation of Alberta Association Region 3 requesting a total of $4,000 which it granted, October 5, 2010. at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=45925>.
[371] The Agency issued a Public Funding Notice (March 14, 2011) with a budget of $300,000 split equally between Jackpine Mine Expansion and Pierre River Mine Projects with applications to close on April 15, 2011 at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=48568>. FRC Report Public June 9, 2011 on five applications for $431,553 and allocated $239,940 of which $83,990 was directed to an Indigenous Group <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=50634>. FRC Report Aboriginal June 9, 2011 funding of $633,000 for both Projects on four applications request a total $2,867,306 with $636,500 allocated at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=50633>. FRC Report October 21, 2011 on additional $100,000 for both Projects with Fort McMurray First Nation applying for $110,025 and received $77,600.
[372] FRC Report (March 9, 2009) at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=35047>; FRC Report (April 29, 2009) at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=34369>; FRC Report

Project	Funding	Date(s)	Requested	Provided	Notes
Phase II Pre-Hearing Phase III Hearing[373]	2,400,000	25/03/10 25/11/12	17,150,195.98	3,021,000	38 of 43 Aboriginal
Phase IV – Crown Consultation[374]	NI	20/01/14	N/A	433,330.55	30 Aboriginal

Government Funding Inadequate

Government funding for Aboriginal participation in EA is inadequate. Particularly given that those governments will, in making project approval decisions, benefit from those decisions in additional revenue, from among other things, taxes and royalties.

The NEB's Participant Funding Program Report (February 23, 2018)[375] said, completed EAs were allocated $7,520,000 in public and Aboriginal funding. They received funding requests totalling ~450% ($33,648,171), of which 19% ($6,529,289) were provided.

While it is probable some requests were overstated,[376] in context one Project alone, the Trans Mountain Expansion would see some $46.7 billion in additional government revenue over the next 20 years.[377] Likewise, the Jackpine Mine would see some $38 billion in government revenue over 42 years,[378] was allocated $516,500 in PFP funding to be faced with funding requests of 660% ($3,408,831) of which 28% ($954,040) were provided.

Increased funding for Aboriginal participation in EA is a recommendation of the 2017 Expert Panel Review of Environmental Assessment Processes Report, *Building Common Ground: A New Vision for Impact Assessment in Canada The Final Report of the Expert Panel for the Review of Environmental Assessment Processes* [Expert Panel EA Report].[379]

Court Remedies in Funding?

The Supreme Court of Canada, in the recent case of *Clyde River (Hamlet) v Petroleum Geo-Services Inc,* noted the lack of participant funding, saying "…they may be required for

(June 25, 2009) at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=37361>; and FRC Report (June 9, 2011) at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=50627>

[373] FRC Aboriginal Report (March 25, 2010) at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=41644> and FRC Aboriginal Report (January 25, 2012) at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=54049>

[374] Public Notice (January 20, 2014) at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=97936>

[375] NEB's Participant Funding Program Report (February 23, 2018) at < http://www.neb-one.gc.ca/prtcptn/hrng/pfp/llctnfnd/index-eng.html#nta>

[376] As discussed in the Northern Gateway FRC Aboriginal Report (March 25, 2010) at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=41644>.

[377] Kinder Morgan Trans Mountain Expansion web page at <https://www.transmountain.com/benefits>.

[378] Application Jackpine Mine Expansion Project Volume 1: Project Description at <http://www.ceaa-acee.gc.ca/050/documents_staticpost/59539/46923/volume_1.pdf> at 18-24.

[379] *Building Common Ground : A New Vision for Impact Assessment in Canada The Final Report of the Expert Panel for the Review of Environmental Assessment Processes* (2017) [Expert Panel EA Report] at 32 at <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>.

meaningful consultation." [380] It contrasted the process in that case with the one in used in the companion case of *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*[381] and *Taku River,*[382] saying of participant funding, "[w]hile these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation."[383] The PFP, while statutorily authorized, are voluntary grants on the part of the federal government and are separately administered from the EA Tribunal.[384]

The 2016 case of *Gitxaala Nation v Canada* said "[w]ithout doubt, the funding level provided constrained participation. However, the affidavits do not explain how the amounts sought were calculated or detail any financial resources available to the First Nations outside of that provided by Canada. As such, the evidence fails to demonstrate that the funding available was so inadequate as to render the consultation process unreasonable." [385] Similarly, in *Tsleil-Waututh Nation v Canada (Attorney General)*, the Court said funding was available from the PFP, MPMO (Canada) and Trans Mountain [the Proponent], but were generally considered inadequate with delays in funding from the PFP, meaning that funding could only be addressed to "to work conducted after the funding was approved and a funding agreement was executed."[386] Further, to the extent, "some Indigenous applicants assert that Trans Mountain's engagement efforts were inadequate. Evidence of Trans Mountain's engagement, including its provision of capacity funding, is relevant to this allegation and to the issue of the adequacy of available funding."[387] In the end, the inadequacy of funding argument failed, in part because the Court said, "it is difficult to see the level of participant funding *as being problematic in a systematic fashion* when only two applicants address this issue." However, this was 1/3 of the Indigenous applicants.[388]

Potential evidence to make this argument would include:

- detailed budgets for funding requests are required as blanket descriptions will not be adequate,[389] with details as to what the money would be used for;[390]

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[380] *Clyde River, supra* note 73 at 47.
[381] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, [2017] 1 SCR 1099, 2017 SCC 41 [*Chippewas*]. Paragraph 57 references participant funding.
[382] *Taku River, supra* note 16, Paragraph 37 references funding.
[383] *Clyde River*, *supra* note 73 at 49.
[384] *NEB Act*, *supra* note 156, s 16.3 "may establish"; CEAA-2012, *supra* note 141, ss 57 and 58 "must establish a participant funding program." *Bigstone Cree Nation v Nova Gas Transmission Ltd*, 2018 FCA 89 [*Bigstone Cree Nation*]at para 45. See also: David V Wright, "Duty to Consult in the Bigstone Pipeline Case: A Northern Gateway Sequel and TMX Prequel?" (Ablawg.ca, June 6, 2018) at <https://ablawg.ca/2018/06/06/duty-to-consult-in-the-bigstone-pipeline-case-a-northern-gateway-sequel-and-tmx-prequel/>.
[385] *Gitxaala*, *supra* note 131 at para 210.
[386] *Tsleil-Waututh, supra* note 275 at 100
[387] *Ibid* at 162. From 160 "Trans Mountain's Aboriginal Engagement Program was noted to have provided approximately $12 million in capacity funding to potentially affected groups. As well, Trans Mountain provided funding to conduct traditional land and resource use and traditional marine resource use studies."
[388] *Ibid* at 538. [*Emphasis added*] However that is 2 of 6 Indigenous Applicants, the balance being the Cities of Vancouver and Burnaby and two environmental NGOs, Raincoast Conservation Foundation and Living Oceans Society.
[389] *Ibid* at 540.
[390] *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763 at 128. The Court found crown consultation deficient on a separate ground at 124.

- specific requirements and proper comparators, the fact that another aboriginal group has received funding for a specific task, does not without more justify a similar request;[391]
- participation, however constrained must take place in the EA process, and not in the post-EA consultations;[392]
- apply for and obtain all available funding, even if it is inadequate, as refusal may be seen as "frustrating consultation";[393] and
- detailed accounting as to other available resources and depositions of them.

While an interlocutory application to challenge the EA Tribunal's process is the most likely to obtain useful funding, interlocutory applications will typically fail, absent extraordinary circumstances.[394]

5.5 ABORIGINAL ACCOMMODATION IN THE OILSANDS

> The Panel finds that regional effects are significant to Aboriginal TLU. It is apparent to the Panel that the mitigations proposed by individual project proponents to mitigate effects on TLU are not entirely effective. Currently, the primary mitigation measure used in oil sands development is reclamation which is proposed to mitigate most effects on the environment. While this measure has yet to be proven to mitigate environmental effects, it is clear that it does not mitigate most effects on TLU as these effects go beyond environmental effects.
>
> [1810] It is unclear whether a reclaimed landscape will ever be suitable for TLU as evidence brought forward in this review suggests. Reclamation success is uncertain and there is a significant time lag (measured in generations) between disturbance and completion of reclamation. Also, the reclaimed landscape will be fundamentally different from predisturbance conditions.[395]

This is the Joint Review Panel Report (2013) finding for the Jackpine Mine Project near Fort McKay, Alberta. How is aboriginal accommodation possible?

Oilsands Development an Alberta Priority

The largest reserve of petroleum in Canada is in the oil sands of northern Alberta, which comprise the 3rd largest in the world having 165.4 billion barrels (bbl) of proven unconventional reserves.[396] Oil sands have been a focus of development since the early 1970s and currently produce 2.8 million barrels of synthetic diluted bitumen equivalent barrel per day (epd) in 2017. Oil sands are produced

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[391] *Tsleil-Waututh, supra* note 275 at 537 to 541, *Fort Chipewyan Métis Nation of Alberta Local #125 v Alberta*, 2016 ABQB 713 [*Fort Chipewyan Métis*] at 42, and *Conseil des innus de Ekuanitshit c. Canada (Procureur général)*, 2013 FC 418 at 123 to 125. [*Ekuanitshit* Trial].
[392] *Katlodeeche First Nation v Canada (Attorney General)*, 2013 FC 458 para 166 to 184
[393] *Ekuanitshit* Trial, *supra* note 391.
[394] *Fort Chipewyan Métis*, *supra* note 391 at 128 to 129 provides examples in Alberta, this is discussed below.
[395] Jackpine Mine JRP Report, *supra* note 237 and Errata #1 (August 9, 2013) at <http://www.ceaa-acee.gc.ca/050/documents/p59540/92893E.pdf>. See also the AER's same Report at <https://www.aer.ca/documents/decisions/2013/2013-ABAER-011.pdf>. [Jackpine JRP Report] at 2.
[396] Alberta Oil sands facts and statistics <https://www.alberta.ca/oil-sands-facts-and-statistics.aspx>

from large surface mines and underground using steam-assisted recovery wells. Alberta has made it a policy priority to increase oil sands production, projecting a rise to 4 million epd by 2024.[397]

The Alberta Energy Regulator [AER] was established in 2012 in part as a response to industry's concerns over the regulatory burden on development. It is the independent corporate single up-stream[398] regulator funded by industry under the *Responsible Energy Development Act* [REDA][399] responsible for environmental oversite of energy projects in Alberta.

Developing oil sands has significant impacts on the environment and aboriginal rights. Alberta is covered by historical land surrender treaties, and it interprets them narrowly. Alberta amended its Consultation Policy in 2013, as part of the establishment of the AER, and centralized consultation in the provincial Aboriginal Consultation Office [ACO] to provide advice to Project Proponents, supervise their engagement with Indigenous groups and rule on the adequacy of Crown consultation to give direction to the AER.[400]

It should be noted that Alberta's conduct of Crown consultation, despite many challenges, has only been overturned in one case, the 2013 decision of *Cold Lake First Nations v Alberta (Tourism, Parks & Recreation)* dealing with improper termination of consultation on a Provincial Park's campsite construction intended to accommodate Indigenous artifacts.[401]

Jackpine Mine EA

Shell Canada Limited [Proponent], now Canadian Natural Upgrading Limited, proposed to expand the existing Jackpine Oilsands Mine, approved by a Joint Review Panel in 2004,[402] to include additional mining areas and associated infrastructure. The Proponent filed a long-term development plan for expansion of the Jackpine surface mine in December 2007 with Alberta Environment, and Alberta responded on March 6, 2007, requiring a Provincial EA Report; this letter was copied to the Agency.[403] The Jackpine Mine was deemed a significant resource project and assigned to the MPMO on July 16, 2007.

The Proponent advanced two oilsands projects simultaneously, the Jackpine Mine Expansion and

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[397] See generally: Laurie E Adkin ed, *First World Petro-Politics: The Political Ecology and Governance of Alberta* (University of Toronto Press: Toronto, 2016). *The Provincial Energy Strategy* (2008) at: <https://open.alberta.ca/publications/9780778563419>. *Responsible Actions: A Plan for Alberta Oil Sands* (2009) "Alberta's long-term vision for the oil sands forms the foundation for this strategic plan and is directly linked to the *Provincial Energy Strategy*" at 8. at:<https://open.alberta.ca/publications/9780778563419>.

[398] Replacing the Energy Resources Conservation Board [ERCB] under the *Energy Resources Conservation Act*, RSA 2000, c E-10 [ERCA]. The phrase "up-stream" captures the exploration and production sector, while downstream usually connotes the refining and retail sectors.

[399] *Responsible Energy Development Act*, SA 2012, c R-17.3 [REDA]. The AER's mandate is in section 2 and eliminates the public interest mandate of the ERCB in section 3 in the predecessor ERCB, other energy enactments retain the same standard. Cecilia A. Low, *The "Public Interest" in Section 3 of Alberta's Energy Resources Conservation Act: Where Do We Stand and Where Do We Go From Here?* (Calgary, Canadian Institute of Resources Law, 2011) (Cecilia Low, *Public Interest*) at 1.

[400] See: Laidlaw and Ross, *Handbook* and Laidlaw, *Handbook Update, supra* note 2 for a critique.

[401] *Cold Lake, supra* note 130.

[402] Jackpine Mine Joint Review Panel (2004) at < https://open.alberta.ca/publications/9780778563419>

[403] Alberta Direction to EA (March 6, 2007) at <http://www.ceaa-acee.gc.ca/050/documents/46917/46917E.pdf>.

the new Pierre River Mining Area [PRMA]. The inclusion of the PRMA in the Project EA would have consequences by dividing opposition efforts and funding between them throughout the Jackpine Mine EA.[404] The EA of the PRMA was abandoned long after the Jackpine Mine approval, on February 23, 2015, at the Proponent's request.[405]

Terms of Reference were prepared by Alberta Environment and issued on November 28, 2007, for the provincial Environmental Impact Assessment Report [EIA] on the Jackpine Mine and PRMA.[406] The Proponent submitted a multi-volume EIA Report (December 20, 2007) for both the Jackpine Mine (Volume 1) and the PRMA (Volume 2) for multiple applications to Alberta regulatory authorities, including the ERCB.[407] That EIA Report only referenced "[i]ndirect benefits from the projects will be created by using local suppliers, including First Nations and Métis companies, provided that they are competitive and meet the project and operations requirements."[408]

The Proponent brought an application for Project approval before ERCB on June 17, 2008, and Statements of Concern were filed by several Indigenous communities and industries.[409] An Agency letter dated March 26, 2009, to the parties, indicated an interest in an early referral to a Joint Panel with the ERCB.[410] The Proponent provided Supplemental Information to ERCB IR, in

[404] The EA was split into the two Projects on May 30, 2008 by way of an EIA Update (May 2008), available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=46926> with Proponent proposing sequential hearings on both the Project and PRMA by way of a letter dated October 29, 2010 < http://www.ceaa-acee.gc.ca/050/documents/47104/47104E.pdf>. An Amended JRP Agreement (June 8, 2012) at < http://www.ceaa-acee.gc.ca/050/documents/56974/56974E.pdf> was entered into to allow for coordination of the EA Review of Project and the PRMA, however the Panel, on June 12, 2012 considered the Project EA to be further along and felt there was limited opportunity for coordination and issued a direction to that effect at < http://www.ceaa-acee.gc.ca/050/documents/57119/57119E.pdf>.

[405] PRMA Abandonment (February 23, 2015) at <http://www.ceaa-acee.gc.ca/050/documents/p59539/101144E.pdf>. The Proponent had requested a one-year delay of the EA process on February 11, 2014, which was granted by the Panel on February 13, 2014, they continued to work and engaged with Aboriginal groups until abandonment.

[406] Final Terms of Reference EIA Report for The Shell Canada Limited Jackpine Expansion & Pierre River Mining Areas (November 28, 2007) at <http://www.ceaa-acee.gc.ca/050/documents/46919/46919E.pdf>. Draft Terms of Reference were filed for comment in May 2007 at <http://www.ceaa-acee.gc.ca/050/documents/46918/46918E.pdf>.

[407] Jackpine Mine and PRMA EIA Report (December 20, 2007) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=46924>

[408] *Ibid* at Vol 1, at 1-9 to 1-10. The potential Oil Sand Lease negotiations with Fort McKay First Nation was also mentioned.

[409] ERCB Application (June 17, 2008) at <http://www.ceaa-acee.gc.ca/050/documents/46931/46931E.pdf> Wood Buffalo Metis Corporation; Athabasca Chipewyan First Nation [ACFN]; Chipewyan Prairie First Nation; Metis Nation of Alberta Local 1935; Fort McMurray #468 First Nation Industry Relations Corporation (From Fort McMurray First Nation); Mikisew Cree First Nation [MCFN] and three industry intervenors: Syncrude Canada Ltd; Petro-Canada Oil Sands Inc. and Imperial Oil with one NGO the Oil Sands Environmental Coalition (OSEC).

[410] Agency Letter (March 26, 2009) at <http://www.ceaa-acee.gc.ca/050/documents/46996/46996E.pdf>.

Proponent's Response on December 9, 2009,[411] June 1, 2010,[412] and IR No. 3 on August 3, 2010,[413] also containing information for Federal authorities to assess under CEAA-1992.

The Alberta Environment Department by way of a letter dated October 14, 2010, having reviewed the EIA Report received on December 20, 2007, and Proponent Responses received on June 3, 2009, December 21, 2009, April 19, 2010, June 4, 2010, and August 9, 2010, deemed the EIA Report complete.[414] Additional approvals would be deferred until the EA process was completed. Transport Canada's letter of September 1, 2010[415] indicated concerns over impacts to navigation and the DFO's letter of October 1, 2010, indicated concerns over disruption and effect on 1,650,000 m^2 of fish habitat concerns requiring a permit under the *Fisheries Act*[416] these imparted a Federal regulatory aspect requiring an EA under CEEAA-1992.

Joint Panel Agreement

The Agency issued a Notice of Commencement of EA (December 13, 2010)[417] and Notice of Referral to a Joint Panel (December 13, 2010) between the Agency and the ERCB.[418] In accordance with Agency practice, a Draft Joint Panel Agreement (March 7, 2011)[419] was prepared, and a Public Notice (March 17, 2011) was issued inviting public comments on that before April 6, 2011.[420] A Joint Review Panel Agreement (September 16, 2011)[421] was entered into between the ERCB and the Agency that was the same as the Draft JRP Agreement.[422] The Jackpine JRP Agreement referenced Aboriginal groups in several sections, primarily in Section 6, as follows:

> 6.0 Aboriginal Rights and Interests
> 6.1 The Joint Review Panel may receive information from Aboriginal groups related to the nature and scope of asserted or established Aboriginal and treaty rights in the area of the project, as well as information on the potential adverse environmental effects that the project may have on

[411] Supplemental Information (December 9, 2009) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=47059>
[412] Proponent's Reply IR No. 2 (June 1, 2010) at <http://www.ceaa-acee.gc.ca/050/documents/47067/47067E.pdf>
[413] Proponent's Response to IR No. 3 (August 3, 2010) at <http://www.ceaa-acee.gc.ca/050/documents/47069/47069E.pdf> and Proponent's Supplemental to IR No. 3 (August 9, 2010) at <http://www.ceaa-acee.gc.ca/050/documents/47070/47070E.pdf>
[414] Alberta Environment (October 14, 2010) at <http://www.ceaa-acee.gc.ca/050/documents/47101/47101E.pdf>
[415] Transport Canada's Letter (September 1, 2010) at <http://www.ceaa-acee.gc.ca/050/documents/47097/47097E.pdf>
[416] DFO's Letter (October 1, 2010) at <http://www.ceaa-acee.gc.ca/050/documents/47100/47100E.pdf>
[417] Notice of Commencement of EA (December 13, 2010) at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=80018>
[418] Notice of Referral to a Joint Panel (December 13, 2010) at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=80019>
[419] Draft Joint Panel Agreement (March 7, 2011) at <http://www.ceaa-acee.gc.ca/050/documents/48347/48347E.pdf>
[420] Public Notice (March 17, 2011) at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=48349>.
[421] Joint Panel Agreement (September 16, 2011) [Jackpine JRP Agreement] at <http://www.ceaa-acee.gc.ca/050/documents/52084/52084E.pdf>.
[422] The Jackpine JRP Agreement was amended to accommodate the coordination of the EA of the Project and the PRMA on (June 8, 2012) *supra* note 237, and further amended to reflect the passage of CEAA-2012 on August 3, 2012 in Amended Jackpine JRP Agreement (August 3, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/57119/57119E.pdf> The Amending Agreement (August 3, 2012) is at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=80694>

asserted or established Aboriginal and treaty rights. The Joint Review Panel may also receive information provided in this regard by other participants, federal authorities or government, and provincial departments or government.

6.2 The Joint Review Panel shall reference in its report:
   a. the information provided by participants regarding the manner in which the project may adversely affect asserted or established Aboriginal and treaty rights; and
   b. the information provided by participants regarding the strength of claim in respect of Aboriginal and treaty rights asserted by a participant, including information about the location, extent, bases and exercise of those asserted Aboriginal and treaty rights in the area of the project.

For the purposes of its report, the Joint Review Panel shall document claims of Aboriginal and treaty rights as presented by participants and consider the effects of the project on the Aboriginal and treaty rights so presented. The Joint Review Panel may use this information to make recommendations that relate to the manner in which the project may adversely affect the Aboriginal and treaty rights asserted by participants.

6.3 Notwithstanding articles 6.1 and 6.2, the Joint Review Panel is not required by this agreement to make any determinations as to:
   a. the validity of Aboriginal or treaty rights asserted by a participant or the strength of such claims;
   b. the scope of the Crown's duty to consult an Aboriginal group; or
   c. whether the Crown has met its respective duties to consult or accommodate in respect of rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.[423]

The Jackpine JRP Agreement was amended to accommodate the coordination of the EA of the Project, and the PRMA on June 8, 2012[424] and amended to reflect the passage of CEAA-2012 on August 3, 2012.[425]

[423] *Ibid* at page 4 to 5. See also: 4.4 The Joint Review Panel hearing shall be public, and the review will provide opportunities for timely and meaningful participation by the public, including Aboriginal persons and groups. Hearing participants will not be required to satisfy the test under subsection 26(2) of the ERCA - the "directly and adversely affected" test. The Terms of Reference attached as an Appendix to the Jackpine JRP Agreement, including The Final Terms of Reference Environmental Impact Assessment (EIA) Report for The Shell Canada Limited Jackpine Expansion & Pierre River Mining Areas (November 28, 2007) at < http://www.ceaa-acee.gc.ca/050/documents/46919/46919E.pdf> were included in the Terms of Reference for the Jackpine JRP Agreement. in Part II contained Scope of the Environmental Assessment, which included consideration of: comments of the public; Aboriginal groups on the effects of the project on asserted or established Aboriginal and treaty rights; and ATK and TLU studies. Part III of the Appendix had the Scope of the Factors to be considered by the JRP at pages 12 to 16, Cumulative Effects assessment would be guided by Agency's Cumulative Effects Assessment Practitioners Guide (1999) at <https://www.ceaa-acee.gc.ca/default.asp?lang=En&n=43952694-1>. The current Operational Policy can be found at <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance.html#ceaa2012>

[424] Amended Jackpine JRP Agreement (June 8, 2012) at http://www.ceaa-acee.gc.ca/050/documents/57119/57119E.pdf>

[425] The Amending Agreement (August 3, 2012) at http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=80694>

Alberta Participation

The Alberta government declined to participate in the Panel Hearings *as a matter of policy* on October 3, 2011, but it would respond to specific concerns from the Panel.[426] The Panel accepted Alberta's position on March 20, 2012, subject to re-consideration which never happened.[427]

Adequacy Assessment EIA Report

The Panel issued a Public Comment Notice (October 2, 2011) on the adequacy of the Proponent's EIA Report with comments to close December 16, 2011.[428] As the EIA report was prepared for Alberta Regulators, the Proponent faced information requests from Federal Departments[429] and public. These Information requests were addressed by the Proponent in two rounds. [430] In response to a Panel Request (January 30,2012)[431] the Proponent provided a Supplemental Information Package (March 1, 2012)[432] with a cover letter dated May 15, 2012, requesting a public hearing in October 2012. The Panel invited public comments on the request to hold public hearings and received many responses.[433] The Proponent argued that the bulk of the comments were disputes over methodology, best addressed in public hearings,[434] and the Panel accepted this and issued a Notice of Hearing on August 17, 2012,[435] for public Hearings to start on October 29, 2012 with all submissions filed by October 1, 2012.

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[426] Alberta Letter (October 3, 2011) at <https://iaac-aeic.gc.ca/050/documents/53609/53609E.pdf>. The Panel having received public concerns over the lack of Alberta's queried Alberta and who remained firm in this position, and refusing to respond to public comments. See: Alberta Email, refusing to respond to public comments (March 8, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/54688/54688E.pdf>

[427] Panel Acceptance Alberta Position (March 20, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/54892/54892E.pdf>

[428] Public Comment Notice (October 2, 2011) at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=52447>

[429] Health Canada, Transport Canada, Parks Canada, Environment Canada, Fisheries and Oceans Canada, Transport Canada, Natural Resources Canada and Aboriginal Affairs and Northern Development Canada. It is arguable that this gap demonstrates the inadequacy of the EA process in Alberta to address Aboriginal concerns particularly in the EA of oilsands, see Laidlaw and Ross, *Handbook, supra* note 2 for arguments as to this inadequacy.

[430] Eg. Proponents Response #3 to Federal Information Requests (September 2, 2011) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=52090>; Proponent Response OSEC (December 22, 2011) at < http://www.ceaa-acee.gc.ca/050/documents/57119/57119E.pdf>.

[431] Panel Supplemental Information Request (January 30, 2012) at < http://www.ceaa-acee.gc.ca/050/documents/54122/54122E.pdf>;

[432] Supplemental Information Package (March 1, 2012) available at <http://www.ceaa-acee.gc.ca/050/evaluations/document/56367?culture=en-CA> That Supplemental Information Package contained, an updated EIA and an updated Cumulative Effects Assessment with new information on the Pre-Industrial Case sought by the NEB and other parties, and notification that the original plan for diverting the Muskeg River into a tunnel had been changed to an open-cut diversion to maintain navigation.

[433] Public Comment Notice (June 4, 2012) at < http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=56815>. The ACFN and Mikisew Cree had sought a 90-day comment period (May 22, 2012) saying they were overstretched with evaluating 2 other major oil sands projects. at <http://www.ceaa-acee.gc.ca/050/documents/56891/56891E.pdf>.

[434] Proponent Letter (August 13, 2012) < http://www.ceaa-acee.gc.ca/050/documents/p59540/80881E.pdf>

[435] Notice of Hearing (August 17, 2012) at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=80896>

Panel Rulings – Standing

There were approximately 1,500 members of the public that filed Applications to Participate [ATP] in the EA hearings by October 1, 2012, not including an Environmental group that provided ~15,000 form e-mails. The Proponent, concerned and wrote to the Panel on October 4, 2012[436] arguing that most of the proposed participants did not have standing under CEEA-2012's definition in section 2 (2) arguing that case-law indicated that governing legislation, on proclamation applied to the process unless there was a vested interest in participation rights, thus since CEEA-2012 came into effect on July 6, 2012, the public wishing to attend that had not given notice to attend prior to July 6, 2012, were required to prove standing.

The Panel ruled on October 17, 2012, that vested rights were inapplicable, and that the JRP Agreement continued to apply with the CEAA-2012 definition being read in harmony with the JRP Agreement. [437] Based on the ATP process, the Panel deemed "interested parties" were limited to 16 parties, including all 5 aboriginal groups, 2 governments, 2 industry, 4 members of the public and 2 environmental groups. [438]

Panel Rulings – Duty to Consult

The Proponents' failure to adequately consult and accommodate aboriginal peoples had long been a complaint in the EA of Jackpine,[439] and 3 aboriginal groups filed Notice of Questions of Constitutional Law (NQCL) under the *Administrative Procedures and Jurisdiction Act* (APJA)[440] in October 1, 2012.[441] The Panel wrote to the Proponent, Alberta and Canada and the three groups that filed NQCL on October 12, 2012 to allow submissions by October 15, 2012 and rebuttals by October 17, 2012 on three questions: (1) the adequacy of the NQCL; (2) whether the Panel has jurisdiction to rule on the adequacy of Crown consultation; or (3) whether that question should be referred to the Court.[442] After reviewing the submissions, the Panel advised that oral argument would be required beginning October 23, 2012.[443] Oral arguments were heard on the morning of October 23, 2012,[444] and the Panel issued its ruling October 26, 2012, saying:

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[436] Proponent Public Standing (October 4, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p59540/82081E.pdf>

[437] Panel Ruling #3 Public Standing (October 17, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p59540/82626E.pdf>

[438] *Ibid,* AFCN; Fort McKay First Nation; Métis Nation of Alberta Region 1; Fort McMurray #468 First Nation; and MCFN; Canada and the Regional Municipality of Wood Buffalo; Syncrude Canada Ltd and TOTAL E&P Canada Ltd.; Clint Westman, Isaac Osume Osuoka, Keith Stewart, Anna Zalik and Donna Deranger; Sierra Club Prairie and OSEC.

[439] As demonstrated by the Fort McMurray #468 First Nation's letter of October 2, 2008 at <http://www.ceaa-acee.gc.ca/050/documents/46952/46952E.pdf>

[440] *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3, sections 10 to 14 [APJA]

[441] The Fort McMurray #468 First Nation NQCL (October 1, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p59540/81971E.pdf>. ACFN NQCL (October 1, 2012) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=81951>, and Métis Nation of Alberta Region 1.

[442] Panel NCQL Direction (October 12, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p59540/82289E.pdf>

[443] Panel Advice – Oral Argument (October 17, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p59540/82886E.pdf>. Fort McMurray #468 First Nation had withdrawn its NCQL.

[444] Hearing Transcript - October 23, 2012, at <http://www.ceaa-acee.gc.ca/050/documents/p59540/82961E.pdf>

1. The Panel did not have an express grant of statutory authority to consider the adequacy of Crown consultation, while APJA empowered the Panel to consider questions of constitutional law, but the questions presented in the NQCLs did not qualify.[445]
2. Even if the Panel had jurisdiction, it would be premature to make a finding on the adequacy of Crown consultation and make a decision in reliance on that finding, *in part given that Crown consultation would continue after receiving the recommendations in the Panel Report*.
3. The Panel would consider all the evidence and argument relating to the potential effects of the Project on Aboriginal groups and individuals in accordance with the JRP Agreement.[446]

The ACFN and Métis Nation applied for leave to appeal on an interlocutory basis to the Alberta Court of Appeal and applied to the Panel for an adjournment of the public hearings until their appeal was determined.[447] At the scheduled opening of the Public hearings on October 29, 2012, the Panel invited counsel for the parties to speak to the adjournment application.[448] The Panel denied the application on October 30, 2012,[449] using the tripartite standard in *RJR - MacDonald Inc v Canada (Attorney General)*[450] and clarified the Panel's mandate saying,

> In short, although the Panel cannot assess the adequacy of Crown consultation for the purpose of a remedy for a breach of that duty, that does not mean the Panel will not hear any evidence on the question of Crown consultation. The Panel has a mandate to receive such information and to report what it hears to government.[451]

The Alberta Court of Appeal rejected the application for leave to appeal on November 26, 2012, in *Métis Nation of Alberta Region 1 v Joint Review Panel* saying,

> [20] While the jurisdictional issues raised by the applicants are interesting in the abstract, it is not appropriate to grant leave to appeal as the answers to those questions would not affect the outcome of this hearing. The Joint Review Panel ". . . is not required . . . to make any determination as to . . . whether the Crown has met its respective duties to consult . . .". The Joint Review Panel has clearly decided not to engage this issue, at least at this stage of its proceedings. It is entitled to do that. [452]

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[445] The standard interpretation of a NCQL in Alberta was that the challenge is limited to legislation. This is a common tactic in Alberta, see for example the treatment of the Prosper/Brion decision by Alberta at Laidlaw, *supra* note 2, at 55 to 56. We are given to understand from personal conversations that governments challenges as to the adequacy of NQCL are becoming increasingly common, however the AER, as a regulatory tribunal may not require that, see *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 at 41 to 43.

[446] Panel Ruling October 26, 2012, at <http://www.ceaa-acee.gc.ca/050/documents/p59540/83073E.pdf> at 1-2.

[447] Panel Adjournment Application (October 26, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p59540/83112E.pdf>

[448] Hearing Transcript – October 29, 2012, at <http://www.ceaa-acee.gc.ca/050/documents/p59540/83122E.pdf>

[449] Panel Decision Adjournment Application (October 30, 2012) <http://www.ceaa-acee.gc.ca/050/documents/p59540/83115E.pdf>

[450] *RJR - MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311. The Panel said there was a serious question; on the irreparable harm test it found that the ACFN claimed harm that this was the only forum that the duty to consult would be considered to be flawed *as there would be additional opportunities in further processes* with recourse to the Courts in any event; and on the balance of convenience adjourning the hearings indefinitely would be an insupportable burden on the other parties.

[451] Panel Decision Adjournment Application (October 30, 2012) <http://www.ceaa-acee.gc.ca/050/documents/p59540/83115E.pdf> at 5.

[452] *Métis Nation v JRP*, *supra* note 286 at para 20.

Leave to appeal to the Supreme Court of Canada was denied April 11, 2013.[453]

Public Hearings

The Chipewyan Prairie First Nation withdrew their objection to the Project on November 2, 2011.[454] MCFN advised by letter dated October 2, 2012 that the Proponent had addressed their a Project specific concerns and would limit their participation to issues related to cumulative effects of development in the Athabasca region and issues related to Crown consultation.[455] The Fort McKay First Nation on October 26, 2012,[456] and the Fort McKay Métis Community Association on October 29, 2012[457] sent similar letters. One can assume that their specific concerns were addressed in Impact Benefit Agreements [IBA].

The Panel held Public Hearings and received oral arguments for 16 days between October 23, 2012, and November 21, 2012.

Jackpine Mine Panel Report

The Panel issued its Report on July 9, 2013, with minor Errata on August 9, 2013, [458] and said,

> … the Project is in an area that is nearly surrounded by other oil sands mines and in which the government of Alberta has identified bitumen extraction as a priority use … Shell's application is for an expansion of an existing oil sands mine project [and] would provide significant economic benefits for the region, Alberta, and Canada. Although … there would be significant adverse project effects on certain wildlife and vegetation, under its authority as the AER, the Panel considers these effects to be justified and that the Project is in the public interest.[459]

It went on to note,

> .. the Project would likely have significant adverse environmental effects on wetlands, traditional plant potential areas, wetland-reliant species at risk, migratory birds that are wetland-reliant or species at risk, and biodiversity. There is also a lack of proposed mitigation measures that have been proven to be effective.[460]

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[453] *Athabasca Chipewyan First Nation v Energy Resources Conservation Board acting in its capacity as part of the Joint Review Panel, Joint Review Panel, et al,* 2013 CanLII 18847 (SCC).
[454] Chipewyan Prairie First Nation (CPFN) Withdrawal (November 2, 2011) at <http://www.ceaa-acee.gc.ca/050/documents/53524/53524E.pdf>.
[455] MCFN Withdrawal Statement of Concern (October 2, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p59540/81960E.pdf>.
[456] Fort McKay First Nation (October 26, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p59540/83117E.pdf>
[457] Fort McKay Métis Community Association (October 29, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p59540/83111E.pdf>
[458] Jackpine Mine JRP Report, *supra* note 264 and Errata #1 (August 9, 2013) at <http://www.ceaa-acee.gc.ca/050/documents/p59540/92893E.pdf>. See AER's same Report at <https://www.aer.ca/documents/decisions/2013/2013-ABAER-011.pdf> [Jackpine JRP Report].
[459] *Ibid* at 2.
[460] *Ibid.*

> ….
> [10] The Panel understands that the provincial and federal governments will need to make separate decisions about the Project, taking into account the Panel's report. The Panel acknowledges that Shell is planning to reclaim the Project footprint *to equivalent land capability*. The Panel believes that reclamation is useful but that it will not mitigate all of the significant effects because some habitat types cannot be reclaimed (e.g., peatlands), and reclamation will not occur or be complete for many years.
> [11] Minimizing adverse effects may be difficult or impractical in a large mine because it generally *requires sterilizing bitumen resources*, or it may impose constraints that affect the ability to operate the mine in a safe, efficient, and economical manner. However, the Panel is concerned about the lack of mitigation that has proven to be effective for the loss of these habitats and believes that without additional mitigation, significant adverse effects will occur.[461]

As to additional mitigation,

> [12] The Panel believes that *conservation offsets are one of the few available mitigation measures that could be used to mitigate these effects*. The Panel is also of the view that offsets used to help mitigate project effects would also help mitigate cumulative effects. However, Shell did not propose or support the use of conservation offsets, and none of the other participants in the hearing provided any evidence on the possible location of such offsets that would allow the Panel to assess the potential for the offsets to further mitigate the effects of the Project. [462]

It recommended that,

> … before other provincial and federal approvals are issued, the governments of Canada and Alberta cooperatively consider the need for conservation offsets to address some of the likely significant adverse effects of the Project. The Panel also recommends that if the governments of Canada and Alberta identify offsets as necessary, the selection and implementation of conservation offsets should *consider the effects of the offsets on existing Aboriginal TLU and consider the need to maintain areas for traditional use by Aboriginal peoples, including areas containing traditional plants and other culturally important resources*.[463]

As to cumulative effects, it noted that the Project contributed incrementally to those effects and "that most of these effects result from projects and disturbances that either currently exist or have already been approved."[464] The Panel said the Project, would likely have significant adverse cumulative environmental effects,

> …. on wetlands; traditional plant potential areas; old-growth forests; wetland-reliant species at risk and migratory birds; old-growth forest- reliant species at risk and migratory birds; caribou; biodiversity; and *Aboriginal traditional land use (TLU), rights, and culture*.

[461] *Ibid* at 2 to 3 [*Emphasis* added].
[462] *Ibid* at 3 [*Emphasis* added].
[463] *Ibid.*
[464] *Ibid* at 3.

> Further, there is a lack of proposed mitigation measures that have proven to be effective with respect to identified significant adverse cumulative environmental effects.[465]

The Panel also said, "the Lower Athabasca Regional Plan (LARP), although still a work in progress, is an appropriate mechanism for identifying and managing regional cumulative effects, including the proposed biodiversity management framework and new Alberta wetlands policy (both in development)."[466]

In total, the Panel made 88 recommendations to the federal and provincial governments saying those recommendations were important for the successful implementation of the Project and the future development of the oilsands area. The Panel Report also sets out 22 conditions for Proponent dealing with technical matters unrelated to aboriginal accommodation.

The federal Minister of the Environment, having received the Panel Report issued a Decision Statement on December 6, 2013[467] approving the Project with some but not all of the Panel's recommended conditions. The Decision Statement recited the receipt of the Panel Report and her conclusion that the Project is likely to cause significant adverse environmental effects, but upon the mandatory referral to the GIC, it was determined those adverse effects "are justified in the circumstances."

EA Tribunal Recommendations

When EA Tribunals make "recommendations" to governments for improving the process or EA generally, those recommendations have usually been ignored. They may be formally addressed by government responses but those are unlikely to be substantive. This was the case in Jackpine Mine where Canada's *Response to Panel Recommendations* (December 6, 2013), did not adopt the recommendations rather merely stating Canada's commitments to work cooperatively with the "Government of Alberta, Aboriginal groups and other stakeholders."[468] This is not unusual, indeed the Review Panel for the EA of #58081 Inuvik to Tuktoyaktuk Highway Project made a number of recommendations for a specialized administrative tribunal[469] that was rejected in Canada's Decision Document of April 4, 2013 in favour of an existing arrangement with lesser powers.[470]

Additional Crown Consultation

The ACFN applied to the Federal Court to set aside the Decision approving the Jackpine Mine Expansion in *Adam v Canada (Environment)*.[471] The Court said,

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[465] *Ibid* at 2.
[466] *Ibid* at 3.
[467] Decision Statement (December 6, 2013) at <http://www.ceaa-acee.gc.ca/050/documents/p59540/96773E.pdf>.
[468] Canada *Response to Panel Recommendations* (December 6, 2013) at <http://www.ceaa-acee.gc.ca/050/evaluations/document/96784>. There is an Update to June 2016 at <http://www.ceaa-acee.gc.ca/050/documents/p59540/115491E.pdf>. There does not appear to be a similar statement from Alberta.
[469] Final Report of the Panel for the Substituted Environmental Impact Review of the Hamlet of Tuktoyaktuk, Town of Inuvik and GNWT - Proposal to Construct the Inuvik to Tuktoyaktuk Highway (January 25, 2013) at <http://www.ceaa-acee.gc.ca/050/documents/p58081/85369E.pdf> at 65 to 69.
[470] The Government of Canada Panel Response, April 4, 2013, at <http://eirb.ca/wp-content/uploads/2015/06/355-1-Government-response-to-EIR-Panel-Report.pdf> at 9.
[471] *Adam v Canada (Environment)*, 2014 FC 1185 [*Adam*].

> [13] After the Panel's report, the Crown continued consultation in what the ACFN calls Phase IV of the consultation process. Again, the Crown allocated funds for the ACFN's participation.
>
> [14] The ACFN presented not only its substantive concerns but also a number of procedural concerns, including a desire for the Crown to share its own views during Phase IV, the inadequacy of the Crown's draft report on the consultation process, a request that the Crown's representatives at meetings be given a mandate to negotiate on accommodation, a desire for direct consultations with other actors, and several proposed ways to accommodate the ACFN's rights.
>
> [15] Representatives of the Crown met with the ACFN on August 13 and 16, 2013 to discuss the report and on October 15, 2013, to discuss the federal government's potential responses to the report. A subsequent draft report mentions, without resolving them, some of the ACFN's concerns about the adequacy of consultation and accommodation.
> [16] On October 25, 2013, the Minister fulfilled his obligation under ss 52(1) of the CEAA by determining that the Project was likely to cause significant adverse environmental effects.
>
> [17] On November 13, 2013, officials from Environment Canada [EC] met with representatives of the ACFN to discuss matters within EC's mandate on which the ACFN had expressed concerns, including the development of a recovery strategy for wood bison and of range plans for woodland caribou, the ACFN's request for emergency orders for each species under the *Species at Risk Act*, the possible use of conservation offsets, and Canada's use of the Alberta government's Lower Athabasca Regional Plan [LARP].
>
> [18] On December 5, 2013, the Governor in Council decided that the Project's likely adverse environmental effects were "justified in the circumstances". The Governor in Council gave no reasons for this decision, and the Crown asserts privilege over records that might shed light on the reasons. [472]

Noting that the ACFN's issues were within *provincial jurisdiction*, the Federal Court was "…satisfied that Canada has reasonably fulfilled its duties to consult and accommodate the ACFN in order to minimize the Project's adverse environmental effects."[473] This is the only publicly accessible information on Canada's additional Crown consultation and accommodation. There is no publicly available information on Alberta's fulfilment of the duty to consult.

Missing Justification

The GIC's decision that the Project "is likely to cause significant adverse environmental effects" but was justified in the circumstances, came under immediate criticism, from environmental groups[474] and academics who criticized the Panel Report and Canada's approval for the lack of

[472] *Ibid* at 13 to 14. The Trial Court determined that the AFCN had been consulted since 2007 and that would continue at 77 to 78.
[473] *Ibid* at 106.
[474] See: Pembina Institute News Release (July 9, 2013) at <http://www.pembina.org/media-release/2462>.

justification.[475] Aboriginal groups were concerned over the approval, as evidenced by the ACFN launching the *Adam* case. The loss in that case led the Consultation Coordinator of the ACFN Industry Relations Corporation to say "[b]y approving Canada's hollow consultation process in this case, the Federal Court has undermined, rather than fostered, reconciliation with its Indigenous peoples."[476]

"Sterilizing" Resource Extraction

The Panel's finding that "[m]inimizing adverse effects may be difficult or impractical in a large mine because it generally requires sterilizing bitumen resources" exemplifies the arguments of "resource sterilization" which as Professor Zalik explains "explicitly pits the firm and State's economic returns from production, its market value, against the 'use value' of the ecological zone that is disturbed."[477]

This assertion is not confined to the oilsands mining context. For example, in the EA of #46277 Star-Orion South Diamond Mine Project in the Fort à la Corne Provincial Forest in Saskatchewan, Bingo Hill was identified as a traditional hunting area by the James Smith Cree First Nation and was located within one of the proposed open-pit mines. Modifying the pit to retain Bingo Hill would require a 12 month delay, $1.5 M in extra engineering as well as reduced recovery and profit from the mine – in effect "sterilizing the resources" under a larger area.[478] The Star-Orion Mine CSR (June 2014) was issued on the basis, among other things, that Bingo Hill would be removed and mitigated "…by sponsoring cultural and community activities and programs that would preserve and transfer traditional knowledge, and by sponsoring potential replacement initiatives, in consultation with directly affected Aboriginal groups." [479] A Decision Statement was issued December 3, 2014 granting federal approval for the Star-Orion Mine.[480]

Similar assertions underlie the arguments for "pipelines to tidewater" for export, namely that petroleum and natural gas producing provinces such as Alberta, Saskatchewan and British

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[475] Martin Olszynski post December 12, 2013 "Shell Jackpine Mine Expansion Project: The Mysterious Case of the Missing Justification" at <https://ablawg.ca/2013/12/12/shell-jackpine-mine-expansion-project-the-mysterious-case-of-the-missing-justification/>. As to the *Adam, supra* note 471, case see: December 23, 2014, "All I Want for Christmas is the Justification for Shell Jackpine" at <https://ablawg.ca/2014/12/23/all-i-want-for-christmas-is-the-justification-for-shell-jackpine/>. This lack of reasons was also contrary to Craik's transparent decision making, *supra* note 74.

[476] Vancouver Observer, Jan 8th, 2015, "Recent Federal Court Decision on Jackpine Mine fires up First Nation" at <https://www.vancouverobserver.com/news/recent-federal-court-decision-jackpine-mine-fires-first-nation>.

[477] Anna Zalik, "Resource sterilization: reserve replacement, financial risk, and environmental review in Canada's tar sands" (2015), 47 Environment and Planning A: Economy and Space 2446 [Zalik, "Resource Sterilization"] at 2448.

[478] EIS Additional Documents (August 2013) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=89420> at 5.5 at page 9 of 10. The larger area was required for slope stability.

[479] Star-Orion South Diamond Mine CSR (June 2014) at <http://www.ceaa-acee.gc.ca/050/documents/p46277/99476E.pdf> at 50. The extant artifacts would be relocated.

[480] Star-Orion South Diamond Mine Decision Statement (December 4, 2014) at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=100584>. Project has yet to received provincial EA approval, in part because of James Smith Cree Nation concerns *per* Alex Macpherson, "James Smith Cree Nation chief wants meeting with Shore Gold executives" June 9, 2017, Saskatoon StarPheonix at <http://thestarphoenix.com/business/mining/james-smith-cree-nation-chief-wants-meeting-with-shore-gold-executives>.

Columbia have limited access to export markets. The United States is Canada's principal customer, and the combination of increased unconventional domestic production in the United States has resulted in Canadian oil being exported at a discount.[481] The possibility of oil sands becoming "stranded assets"[482] due to concerns over anthropogenic climate change, which have been globally acknowledged,[483] and implementation of decarbonisation technologies,[484] also feeds into the extractive narrative of "developing oil sands before it is too late". Concerns over the pace and cumulative effects of resource development is a central issue for Alberta's aboriginal communities as witnessed, for example by the First Nations such as the MCFN's focus on cumulative effects in the Jackpine Mine EA.

Aboriginal Accommodation in Oil Sands Projects

The principal accommodation measures in the Federal Consultation Policy, included: *project modification* but unlike linear projects, mines are primarily point source disruptions of the environment, albeit a large one for the Jackpine Mine with a total of "10 000 ha loss of wetlands, 85 per cent of which are peatlands that cannot be reclaimed,"[485] impacts on 1,650,000 m^2 of fish habitat and the cumulative impacts of oil sands development. The *project modification* of re-routing the diversion of the Muskeg River into an open cut to allow navigation rather than a culvert as originally proposed and the purchase of the 740 ha "The Shell True North Forest" some 500 km west of the Project, is not adequate or reasonable aboriginal accommodation given the size of the mine.[486]

The compensation lakes proposed by the Proponent included several End of Pit Lakes [EPL] located in the rehabilitated mines to be established after 40 years of mining that will contain:

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[481] See Tsvetana Paraskova, "Why Canadian Crude Trades at Such A Steep Discount" (Nov 14, 2017) Oilprice.com at <https://oilprice.com/Energy/Energy-General/Why-Canadian-Crude-Trades-At-Such-A-Steep-Discount.html>. See also Alberta Government Economic Dashboard Oil Prices at <http://economicdashboard.alberta.ca/OilPrice>.

[482] See: *World Energy Outlook Special Report : Redrawing the Energy-Climate Map* (Paris: International Energy Agency, 2013) at < https://www.iea.org/reports/redrawing-the-energy-climate-map > at 109 where "Upstream oil and gas sector assets can become stranded for a range of reasons, of which new climate policies is just one, but our analysis suggests that a companies or countries vulnerability to this specific risk may be greater if their asset base is more heavily weighted towards those that are not yet developed and towards those that have the highest marginal production cost (unless its development is driven by broader factors, such as energy security)."

[483] See: *Paris Accords* (2015) online at <http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf> and IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 pp. [IPCC-5 Assessment Report (2014)] at <http://www.ipcc.ch/report/ar5/syr/>

[484] Johan Rockström and Owen Gaffney *et al*, "A roadmap for rapid decarbonization" (2017), 355 Science 1269 at <http://pure.iiasa.ac.at/id/eprint/14498/1/RockströmEtAl_2017_Science_A%20roadmap%20for%20rapid%20decarbonization.pdf>

[485] Jackpine JRP report, *supra* note 264 at para 652. The Panel had criticized the Proponent's methodology in the EIS noting the disparity in extend and methodology in the Local Study Area (LSA) and the Regional Study Area (RSA) citing a dilution effect, boundary effects where impacts overlapped other Projects not included in the LSA and other concerns, for example Shell's estimates of "available wetland habitat in the RSA are subject to uncertainty (±20 per cent), making it difficult to rely solely on Shell's predictions." at paragraph 672. See also paragraphs 648.

[486] Shell Canada Conservation webpage at <https://www.shell.ca/en_ca/sustainability/environment/land-conservation.html>. See: Ryan Hacket, "'Shell games', displacement and the reordering of boreal landscapes in Alberta, Canada" (2016), 48(2) Area 153 [Hacket, "Shell Games"].

"consolidated tailings, mature fine tailings (MFT), overburden, lean oil sands and operational release waters in varying quantities,"[487] but EPL are unproven technology and cannot be adequate aboriginal accommodation due to timing alone. As the Panel found, viable *mitigation measures* to reduce or eliminate adverse impacts were not available – aside from conservation offsets. Conservation offsets are complex issues with "availability, location, effectiveness, and cost of offsets are all matters that need to be considered."[488] The Proponent did not advocate for them, noting it was not required by Alberta.[489]

Alberta did not participate in Public Hearings, and this appears to be strategic as Alberta holds Crown mineral title in the oilsands region. Alberta's policy of non-participation appears to have originated in the Public Hearings for the #37519 Joslyn North Mine Project (January 27, 2011).[490] Like Jackpine in the Joslyn EA, several Aboriginal groups filed NQCL, but they withdrew their opposition after entering into confidential IBA with TOTAL E&P Joslyn Ltd.[491] Joslyn was withdrawn in 2015 for economic reasons.[492]

Given the Panel's findings on the "benefits" of the Project, *project cancellation* by the GIC was never a possibility. This leaves *compensation*, however the economic measures promised by the Proponent were conditional on competitiveness and would not ameliorate the permanent loss to traditional livelihoods. Habitat replacement as compensation was not ordered – nor was it practical without Alberta's participation.

An argument can be made – particularly where treaty rights to a livelihood are threatened, that provincial governments have, consistent with *Mikisew logic,* to uphold the honour of the Crown by providing replacement habitat to maintain the treaty livelihood promises. Alberta's non-participation frustrated this potential.

Recent Court decisions may mandate this, as *Tsilhqot'in Nation* confirmed that the honour of the Crown applies to both the federal and provincial governments. Thus, in the Jackpine Mine, where Alberta took up lands under a land surrender treaty for mining purposes, combined with the Panel findings that the only appropriate mitigation measures would be conservation offsets, ought to have required Alberta, in fulfilling the honour of the Crown, providing conservation offsets under the logic of *Mikisew.*[493] This may affect future oil sands projects.

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[487] Jennifer Grant, Simon Dyer, Dan Woynillowicz, Fact or Fiction Oil Sands Reclamation (2008) (Drayton Valley: The Pembina Institute, 2008) [Grant, Fact or Fiction] at 31. <http://www.pembina.org/reports/fact-or-fiction-report-rev-dec08.pdf> see also Oil Sands Tailings Technology Roadmap: Report to Alberta Innovates (2012) this is described as water cap lakes at <http://www.cosia.ca/uploads/documents/id10/Tailings%20Roadmap%20Volume%202%20June%202012.pdf>

[488] *Ibid* at 659.

[489] *Ibid* at 657. Unlike Canada's requirements for Fisheries Compensation Plans at 656.

[490] Joslyn North Mine JRP Report (January 27, 2011) for the #37519 Joslyn North Mine Project at <http://ceaa-acee.gc.ca/050/documents/48613/48613E.pdf> [Joslyn North Mine JRP Report]. Notably that Report included recommendations for governments, which were ignored.

[491] *Ibid* at 6-7. Chief Adams of the ACFN deeply regretted that contract and vowed not to enter into similar agreements with other oilsands developers including Shell for the Jackpine Mine. Personal communication at CIRL's Roundtable referred to in Laidlaw, *Handbook, supra* note 2 at 22 and ix.

[492] Dan Healing, March 9, 201, Calgary Herald, "Total pulls Joslyn North oilsands mine amendment application" at <http://calgaryherald.com/business/energy/total-pulls-joslyn-north-oilsands-mine-amendment-application>

[493] *Mikisew, supra* note 17.

Impact Benefit Agreements in Oilsands

As noted above, it appears that private confidential Impact Benefit Agreements [IBA] had been reached between the Proponents and aboriginal groups for both the Jackpine Mine and the Joslyn North Mine Project prior to the commencement of Public hearings. [494]

IBA are confidential Proponent access agreements with local Indigenous Nations, described by Steven A Kennett, in his often cited *Guide to Impact and Benefits Agreements,* as a response to a complex set of economic and social issues where development takes place within traditional aboriginal territories and have a dual purpose, "firstly to address the impacts of development on aboriginal communities and secondly to obtain both short and long term benefits of that development."[495] As described by Clint Westman, IBAs provide certain benefits for communities – such as capacity funding for cultural events, and employment opportunities intended to secure community support as a kind of social licence – for oil companies' projects.[496] IBA can carry various names, have various durations (normally for the project life) include a wide variety of terms but perform the same basic function – that of providing uncontested access to traditional lands in return for compensation for impacts and a share of the benefits. [497]

In 1999, Kennett recommended negotiating IBAs considering the matters listed in the Nunavut Agreement's Schedule 26-1 and these matters have become standard.[498] Over the past two decades, IBAs have become more complex, and there is increasing information from number of publications containing recommendations for matters to consider in negotiating IBAs that give a sense of scope, complexity and utility of IBAs.[499]

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[494] *Supra* notes 456 to 458 and 493. In this timing, they maximized their information on the Project, particularly the anticipated impacts and their capacity to delay approval absent an IBA see Brad Gilmour and Bruce Mellett, "The Role of Impact and Benefits Agreements in the Resolution of Project Issues With First Nations" (2013), 51(2) Alberta Law Review 385.

[495] Steven Kennett, *A Guide to Impact and Benefits Agreements,* (Calgary:1999) [Kennett, *Guide to IBA*] at 1 and 7. Older CIRL publications are not online but can be Ordered from CIRL.

[496] Clinton Westman and Tara Joly, Taking Research Off the Shelf: Impacts, Benefits, and Participatory Processes around the Oil Sands Industry in Northern Alberta (2017), Final Report for the SSHRC Imagining Canada's Future Initiative, [Westman, "Taking Research off the Shelf"] at 24 to 25. Online: <http://artsandscience.usask.ca/news/files/205/Taking_Research_off_the_Shelf_Joly_and_Westman_KSG_report.pdf>.

[497] These names include Community Agreements, Cooperation Agreements, Mutual Benefit Agreements, Access Agreement and other variations, and can include a whole suite of agreements progressing from Memorandum of Understanding (MOU) that are typically non-binding, to Exploration Stage Agreements that are binding and contemplate additional agreements, to Production Stage Agreements typically after EA approvals which contain detailed the Impact Benefit Agreements, Socio-Economic Agreements, and Participation Agreements with detailed targets and dispute resolution procedures, that can be revised periodically.

[498] *Agreement between The Inuit of The Nunavut Settlement Area and Her Majesty The Queen in Right of Canada* (1993) Article 8 and 26 [Nunavut Agreement] at 210: http://publications.gc.ca/site/eng/9.644783/publication.html Article 26 required the negotiation of an IBA for a Major Project.

[499] Cathleen Knotsch and Jacek Warda, *Impact Benefit Agreements: A Tool for Healthy Inuit Communities?* (Ottawa: National Aboriginal Health Organization, 2009)[Knotsch, *IBA Inuit*] at <http://archives.algomau.ca/main/sites/default/files/2012-25_004_005.pdf>, Ginger Gibson and Ciaran O'Faircheallaigh, *IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements* (Toronto: The Gordan Foundation, 2015) at < https://namati.org/resources/iba-community-toolkit-negotiation-and-implementation-of-impact-and-benefit-agreements/ >, Michael Lewis and Sara-Jane Brocklehurst, Aboriginal

IBA have been deployed primarily in Northern Canada. The discovery of petroleum reserves in Alaska and Canada's Mackenzie Delta in the 1970s, led to proposals to develop a pipeline along the Mackenzie River valley to Alberta connecting existing pipelines for export to the United States. These proposals faced the unsettled nature of Indigenous land claims and led to Justice Thomas Berger's *Mackenzie Valley Pipeline Inquiry* (1977) that heard from a number of groups, including Indigenous peoples whose traditional territory the pipeline would traverse leading to his recommendations for a 10 year pipeline postponement to allow resolution of those claims.[500]
In the mining sector, other natural resource projects continued to be developed, with the uncertainty around Indigenous land claims being resolved by IBA. Early project IBA negotiations involved governments – the first IBA in 1974 was between the government and the mining company, however this changed with direct Proponent and aboriginal groups negotiations, but government support extended into the late 1990's.[501] Negotiation of IBAs coincided with the settlement of Indigenous claims in Modern Treaties where Indigenous Nations included a requirement to negotiate IBAs *in addition* to settlement of land issues in all of the Inuit Treaties.[502] Other examples include Treaties in the Yukon after the Yukon Umbrella Agreement (1993) where section 68 of the Yukon *Oil and Gas Act* required IBAs on First Nation Settlement Lands, and requirements to negotiate IBAs with Canada as part of continuing or creating protected areas such as National Parks in most Modern Treaties. [503] Some Modern Treaties do not explicitly require IBA but their use has become standard, driven in part by core territory selection with developable resources in the Modern Treaty negotiations.[504]

IBAs are now prevalent in the mining industry and becoming more common in oil and gas sector, with estimates by Natural Resources Canada [NRCAN] that since 1974, 335 IBAs have been

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Mining Guide : How to negotiate lasting benefits for your community (Port Alberni: CCCR, 2009) at <http://www.communityrenewal.ca/sites/all/files/resource/Aboriginal_Mining_Guide.pdf>, Woodward and Company, Benefit Sharing Agreements in British Columbia: A Guide For First Nations, Businesses, and Governments prepared for Ecosystem-Based Management Working Group (EBM WG) at <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/great-bear-rainforest/hw03b_benefit_sharing_final_report.pdf>.

[500] Thomas Berger. *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry: Volume One*. (1977) (Ottawa: Minister of Supply and Services Canada, 1977) at 196. There are two volumes.

[501] Janet Keeping, *Local Benefits from Mineral Development,* (Calgary: Canadian Institute of Resources Law, 1999). [Keeping, *Local Benefits*]. Despite concerns in governments about the legal basis to require them, one government tactic was to announce sufficient progress in negotiating an IBA would be pre-conditions of water use and mineral development approvals. Informally, the federal government made "satisfactory progress" on negotiation of IBAs a precondition of project approval. CIRL, *Independent Review of the BHP Diamond Mine Process* (Calgary: 1997).

[502] Nunavut Agreement, *supra* note 498, Knotsch, *Inuit IBA, supra* note 518, lists the Nunavut Agreement, Inuvialuit Final Agreement (1984), Nunavik Inuit Land Claims Agreement (2008) and Labrador Inuit Land Claims Agreement (2005) and their IBA requirements in Table 1 at pages 46 to 48,

[503] The *Champagne & Aishihik First Nations Final Agreement* (1993) requirement is in Article 22.3.3.5 referring to Schedule A, Section 2 at <https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/al_ldc_ccl_fagr_ykn_chama_cham_1330355378500_eng.pdf>, The Tłı̨chǫ Agreement (2005) in section 23.4.1, online at <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/ccl_fagr_nwts_tliagr_tliagr_1302089608774_eng.pdf> in section 23.4.1, and *Oil and Gas Act*, RSY 2002, c 162.

[504] Nunavut Agreement, *supra* note 498, for example in Article 17 describes the purpose of Inuit Owned Lands [core lands] as 17.1.2 (b) areas of value principally for reasons related to the development of non-renewable resources. During core land selection negotiations Canada shared its geological information.

signed for 198 mining projects, and their use is accelerating – in the first 5 years of the 2000's, 23 IBAS were signed and between 2006 and 2010 rose to 102, "representing a fourfold increase."[505] Official estimates in 2016 said there were 480 IBA negotiated since 1974 covering 300 projects, with 374 being been signed in the last 10 years, with Exploration Stage Agreements steadily rising, from 23.1% of all agreements signed prior to 2006 to 65.5% of all agreements in 2015.[506] An Interactive Map by NRC, locates these IBA in all regions of Canada.[507] Petroleum development in the North with IBAs include, the Norman Wells oilfield, Norman Wells Pipeline Project (1985),[508] and the revived McKenzie Gas Project (2004) approved on December 16, 2010 but cancelled because of a drop in natural gas prices.[509]

There is a limited set, of academic cross-disciplinary and business literature on IBAs, hampered by the confidential nature of IBAs, that are cautiously supportive of their implementation. They have some concerns about their implementation– primarily the confidential aspect and the lack of government oversight.[510] In the mining literature, a paper by Guillaume Peterson St-Laurent and Philippe Le Billon, referred to IBA's as a "technology of governance." [511] Resource development has significant social and environmental impacts on aboriginal communities holding territorial and usage claims over affected areas and,

> Extractivism – a (neo) colonial mode of resource plunder and appropriation – relies on a number of technologies of government to address resource ownership, socio-environmental impacts, and benefits sharing (Acosta, 2013). The three technologies discussed here are: (i) technologies governing access to mineral deposits, with the free entry principle being the dominant approach for hard minerals; [oil sand lease for Oilsands]

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[505] Norah Kielland, *Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements* (Ottawa: Parliamentary Information and Research Service, 2015) [Kielland, *Supporting Aboriginal Participation*] at 2 at <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/InBriefs/PDF/2015-29-e.pdf>.

[506] Intergovernmental Working Group on the Mineral Industry *Mining Sector Performance Report 2006 to 2015* (20016), Conference Presentation for Energy and Mines Ministers Conference in August 2016 in Winnipeg Manitoba, 35 to 38 at <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/emmc/pdf/MSP_report_access_en.pdf>

[507] Interactive Map of Indigenous Mining Agreements can be accessed from Natural Resources Canada [NRC] Indigenous Participation in Mining Information Products web page at <https://www.nrcan.gc.ca/our-natural-resources/indigenous-natural-resources/indigenous-participation-mining-activities/indigenous-participation-mining-information-products/7817>

[508] IBA negotiations are ongoing. Pipeline Profiles: Enbridge Norman Wells Pipeline at <https://www.cer-rec.gc.ca/nrg/ntgrtd/pplnprtl/pplnprfls/crdl/nbrdnrmwlls-eng.html>

[509] Mackenzie Gas Pipeline (2004) at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/338661>. The Aboriginal Pipeline Group would own 33 per cent of the project, and IBA with the Inuvialuit Settlement Region, the Gwich'in and Sahtu Settlement Areas but not the Dehcho region, see Carly A. Dokis, "Where the Rivers Meet: Pipelines, Participatory Resource Management, and Aboriginal-State Relations in the Northwest Territories" (Vancouver: University of British Columbia Press, 2016), This was an example of a robust EA described in Lambrecht, *Aboriginal Consultation, Environmental Assessment, supra* note 68.

[510] Westman, *Taking Research Off the Shelf, supra* note 498, "Because [IBAs] are often confidential, even from Indigenous community members themselves, the literature on these agreements in northern Alberta is scarce." There is Draft Bibliography at Ben Bradshaw and Adam Wright, *Review of IBA Literature and Analysis of Gaps in Knowledge* (2013), (ReSDA Draft Gap Analysis Report #9) [Bradshaw, *of IBA Literature*] at <http://yukonresearch.yukoncollege.yk.ca/wpmu/wp-content/uploads/sites/2/2013/09/9-Bradshaw-and-Wright-draft-paper1.pdf>.

[511] Guillaume Peterson St-Laurent and Philippe Le Billon, "Staking claims and shaking hands: Impact and benefit agreements as a technology of government in the mining sector" (2015), 2 The Extractive Industries and Society 590 [St-Laurent, "IBA as technology of government"] at 592. *Emphasis* added.

> (ii) technologies governing conditions of exploitation, especially environmental impact assessments generally including 'technical expert' assessments and community-level hearings; and (iii) technologies governing relations with local communities, and generally consisting of corporate social responsibility (CSR) *and also increasingly of IBAs – the focus of our study*.[512]

The inability of communities to oppose these activities through existing institutions leads to conflicts between aboriginal communities, extractive companies, and government authorities,

> Conflicts are particularly frequent when structures of power are unequally distributed and local communities' rights over development paths are limited; when distrust is rife between local communities, extractive corporations and government authorities; and when local communities can scale-up their struggles through outside alliances and mobilize legitimate indigenous rights and environmental discourses.[513]

Seeking to avoid such conflicts, Proponents directly negotiate with aboriginal communities to compensate for impacts, sharing the benefits and obtaining "social licence" for activities. For many academics, the principal significance of using IBAs is the government's withdrawal from responsibilities to govern,

> … this selective absence is largely explained by a rationale of state disengagement and shift to private forms of governance that help to accelerate and secure resource development through absolving the state from many of its responsibilities but the enforcement of private contract law guaranteeing the implementation of IBAs. Thus, IBAs allow governments to reconcile both the pressure to ensure more ecologically and socially 'sustainable' practices in the mining sector while maintaining economic development and competitiveness.[514]

Governments, in their aboriginal consultation policies by delegating procedural aspects of consultation to industry and deferring direct Crown consultation with aboriginal groups until after an EA Tribunal Report is complete – exemplify these concerns. Some of the literature locates the rise of these agreements with the implementation of neo-liberalism as the prominent political discourse internationally and in Canada.[515] In many Indigenous communities that are favourably situated, the transition to neo-liberalism conceptions offers opportunities to improve at least their material conditions.[516]

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[512] *Ibid* at 592.
[513] *Ibid* at 591.
[514] *Ibid*.
[515] *Ibid.,* Emilie Cameron and Tyler Levitan, "Impact and Benefit Agreements and The Neoliberalization of Resource Governance and Indigenous-State Relations in Northern Canada" (2014), 93(1) Studies in Political Economy 25 [Cameron, Neoliberalization of Resource Governance] at 27. Tyler Levitan and Emilie Cameron, "Privatizing Consent? Impact and Benefit Agreements and the Neoliberalization of Mineral Development in the Canadian North" at 259 in Arn Keeling and John Sandlos, eds, *Mining and Communities in Northern Canada: History, Politics, and Memory* (Calgary: University of Calgary Press, 2015)
[516] For example, Gabrielle Slowey, *Navigating Neoliberalism: Self-Determination and the Mikisew Cree First Nation* (Vancouver, UBC Press, 2008).

There have been calls for government to regulate the use of IBAs [517] these have been resisted:

- Indigenous groups, prefer to negotiate IBA with Proponents rather than governments, firstly because they are aware of circumstances in their community, their distinct needs and the urgency of them, and secondly, direct negotiation with a Proponent provides the flexibility to address their needs rather than government's concerns over precedents;
- proponents, concerned about access certainty and timely project development, can obtain both in an IBA;
- for Governments, this selective withdrawal defers resolution of difficult matters of land use, resource allocations and accords with the current neo-liberal extractive discourse;
- confidentiality concerns for aboriginal groups are significant, because IBAs are privately negotiated attempts to provide for their needs in the absence of adequate government funding and they will be sensitive to disclosure. Particularly given the potential inclusion of IBA benefits for self-governing groups in Canada's Own Source Revenue Policies that would deduct a portion of IBA benefits from normal funding.[518] Proponents share the same concerns, as OSR policies would be an indirect development tax raising the cost of access.

Indigenous Nations can make rules for the distribution of benefits within themselves. [519] Recent studies show a 12.7 per cent improvement on Community Wellbeing scores for Indigenous Nations with an IBA.[520]

In reaching an IBA, in the oil sands context particularly, the negotiating power imbalance is notable - industry can choose to engage aboriginal communities on their own terms while the ability to frustrate or delay approvals are the only methods for aboriginal groups to resist development. Likewise, as noted above, private project proponents are unable to deliver government only remedies such as Crown lands as habitat replacement or new wildlife reserves to directly satisfy aboriginal community concerns. However, from an Indigenous perspective if a project is likely to be approved, which is the case in Alberta – then the perception is that a "bad deal is better than no deal" governs.[521]

Accommodating Cumulative Impacts: LARP, CEA, AMERA and JOSM

As noted in the Jackpine Panel Report, cumulative effects of development were to be addressed principally by The Lower Athabasca Regional Plan [LARP] but also regional monitoring

[517] Steven A. Kennett, *Issues and Options for a Policy on Impact and Benefits Agreements* (1999) (Calgary: CIRL, 1999), and Gordon Shanks and Sandra Lopes, *Sharing in the Benefits of Resource Developments: A Study of First Nations-Industry Impact Benefits Agreements* (Ottawa: Public Policy Forum, 2006).
[518] Own-source revenue for self-governing groups [OSR]. These are currently suspended until 2020 to negotiate implementation see <https://www.rcaanc-cirnac.gc.ca/eng/1354117773784/1539869378991>.
[519] Thierry Rodon, Isabel Lemus-Lauzon and Stephan Schott, "Impact and Benefit Agreement (IBA) Revenue Allocation Strategies for Indigenous Community Development" (2018) 47 The Northern Review 9.
[520] Drew Meerveld, *Assessing Value: A Comprehensive Study of Impact Benefit Agreements on Indigenous Communities of Canada* (MA, U Ottawa, 2016) <https://ruor.uottawa.ca/bitstream/10393/34816/4/Meerveld%2C%20Drew%2020161.pdf>.
[521] Shawn McCarthy, *First Nation chief who opposed oil sands signs deal with Teck sharing benefits of bitumen extraction*, The Globe and Mail-Sep. 23, 2018

initiatives.[522] Established under the *Alberta Land Stewardship Act* [ALSA],[523] LARP is a Regional Plan covering the oilsands area which saw flawed and limited aboriginal consultation in its formulation. [524] Regional Plans are cabinet level regional planning document, insulated from public disclosure by the doctrines of cabinet secrecy, and structured under ALSA to restrict legislative interference in the final Regional Plan. Regional Plans require provincial decision makers to comply with it, regardless of the completeness of them.[525] LARP has been previously described as a blueprint for the oil sands industry with many of the purported governing frameworks still incomplete.[526] LARP was the first plan, in effect since September 1, 2012, it is still working on the proposed biodiversity management framework.[527] A TLU Management Framework, as recommended in the non-binding LARP Review in 2015 as Issue No. 2 has yet to be undertaken. [528]

The Panel also made reference to the *Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring* (JOSM) as a mechanism to promote a better understanding of cumulative effects in the Lower Athabasca region – but that agreement expired in 2015.[529] JOSM was revived only on December 21, 2017, but again funded partially by oil companies.[530] Funding by oil companies presents problems as to stability and on the basis of perceived bias – lessening aboriginal confidence in those initiatives.

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[522] Panel recommendations that the Government of Alberta continue to work toward timely completion of the LARP biodiversity management framework are included in: Recommendations 29 and 30; old growth forests; 34 traditional plant potential; 37 wildlife habitat loss; 47 work with Aboriginal groups regarding caribou; 49 moose; 58 monitoring and compliance; 64 TLU Management Framework as part of LARP; 74 and Aboriginal TLU assessment. The Panel specifically noted the recommendation 75 for progressive reclamation standards of equivalent land uses may not ensure biodiversity.

[523] *Alberta Land Stewardship Act*, SA 2009, c A-26.8 [ALSA]

[524] Non-binding *Review Panel Report* (2015) [LARP Review] at < https://open.alberta.ca/dataset/5c910acf-9e8c-46b5-b52d-60fc8bd2bbbd/resource/d9a6bff5-f9b5-45fe-81ed-a8de3492e271/download/2016-review-panel-report-2015-lower-athabasca-regional-plan-2016-06-22.pdf >

[525] *ALSA, supra* note 523, s 2(1)(v).

[526] 2013 ABAER 017: Teck Resources Limited, Application for Oil Sands Evaluation Well Licences Undefined Field, October 21, 2013, at 63: "The AER accepts that LARP reflects government policy on land development as set out in the plan and that bitumen resource development is a priority use for the Lower Athabasca region" at <https://www.aer.ca/documents/decisions/2013/2013-ABAER-017.pdf>

[527] Panel recommendation #40 and #77 recommends that until LARP's biodiversity framework is in place guidance on cumulative effects should include the existing Fort McMurray IRP and Terrestrial ecosystem management framework [TEMF]. Alberta had proposed a completion date in 2013, see paragraph 657 in the Jackpine Mine Report JRP.

[528] LARP Review, *supra* note 524, at 62 to 65

[529] Some Indigenous groups withdrew in 2015, the JOSM was found to be lacking measurable policy goals and undermining scientific rigour in the Expert Panel Review Report *Assessing The Scientific Integrity Of The Canada-Alberta Joint Oil Sands Monitoring (2012-2015)* (February 18, 2016) at <http://aemera.org/wp-content/uploads/2016/02/JOSM-3-Yr-Review-Full-Report-Feb-19-2016.pdf>.

[530] Alberta Press Release (December 17, 2017) at <https://www.alberta.ca/release.cfm?xID=51208CDB7F109-EEBD-B031-30B7D3AE61C14F68>

5.6 ABORIGINAL ACCOMMODATION IN PIPELINES

The balance of the case studies involve the National Energy Board [NEB]. Established under the *National Energy Board Act*[531] [NEB Act], the NEB is a permanent quasi-judicial administrative tribunal having jurisdiction over, among other things, inter-provincial pipelines that are designated projects under the *Regulations Designating Physical Activities* or intra-provincial pipelines.[532] The NEB's core mandate is the safe and efficient construction, operation and abandonment of pipelines or other energy transmission infrastructure in the public interest. It operates under the *National Energy Board Rules of Practice and Procedure*, 1995 [NEB Procedure][533] with an *NEB Filing Manual*[534] to govern applications.

The NEB is also the designated EA Tribunal for major energy projects and that requires the NEB to fulfill EA requirements.[535] The Registry contains all public documents for ongoing assessments.[536]

NEB Application

Proponents will, after filing the Project Description normally make pipeline applications in two stages: Application for Approval of a pipeline corridor and following approval, a Detailed Alignment Application to determine the final alignment of the pipeline within the approved corridor. Approving Pipeline corridors involve at two applications under the NEB Act: a Certificate of Convenience and Necessity [COC] under section 52; and an Exemption Order under section 58 for associated pipeline infrastructure to allow early construction.[537] The NEB runs a separate PFP to support participation in its hearings that will be triggered by the filing of a Project Description.[538]

NEB Proponent Consultation

In project approval applications, the NEB *Filing Manual* requires, among other things, that the Proponent *consult* with affected Indigenous Communities ideally early in the design phase. [539] These engagement processes are usually termed "consultation" but for our purposes a distinction

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[531] NEB Act, *supra* note 156.
[532] *Regulations Designating Physical Activities*, SOR/2012-147. This is promulgated under CEAA-2012. An annotated reference to the National Energy Board legislation, regulations, and decisions is CIRL's *Canada Energy Law Service* online at <http://store.thomsonreuters.ca/product-detail/canada-energy-law-service-full-service/>.
[533] *National Energy Board Rules of Practice and Procedure*, 1995, SOR/95-208 Consolidated online at <https://laws-lois.justice.gc.ca/PDF/SOR-95-208.pdf >.
[534] NEB Filing Manual, *supra* note 257
[535] See Table 5.
[536] The NEB on application may impose confidentiality requirements by Order on an application by participants in the Hearing Process, restricting public access to protect confidential information such as location of Indigenous Artifacts, TLU sites, sacred areas, in addition to redacted TLU Studies, see: Filing Manual 4A-59, *supra* note 257.
[537] NEB Act, *supra* note 156, s 58 (1) The Board may make orders exempting (a) pipelines or branches of or extensions to pipelines, not exceeding in any case forty kilometres in length, and (b) any tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio, and real and personal property, or immovable and movable, and works connected to them, that the Board considers proper, from any or all of the provisions of sections 29 to 33 and 47.
[538] See Table 4.
[539] NEB Filing Manual, *supra* note 257 at 3.4.2 and 3.4.3.

is made between *proponent consultation* and *Crown consultation*. These efforts would be described in the NEB Application and updated throughout the EA process.

Applications require information on, among other things, for each Indigenous Community the impact of the Project under EA requirements and the Proponent's proposed mitigation efforts.[540] Complete Project descriptions, containing detailed project information and plans addressing a host of concerns, are massive documents – the Trans Mountain Application was 15,000 pages.[541]

Proponents will give a Notice to potentially impacted Aboriginal Communities, as identified by the Proponent, including a brief description of the Project, anticipated impacts on requesting a response. [542] Communities will review the Complete Project description to provide suggested changes, and provide requested information in Field Studies [ATK], and Traditional Land or Marine Use Studies [TLU].[543]

These engagements are iterative, the Proponent will assess suggested changes (in part based on their assessment of the strength of the claims) and information provided by communities and may adjust the project by way of *practical accommodations* changing the Project's design or location and communicate back to the community the results, triggering another round of discussion.[544] Practical accommodations *are not benefits, they are lessened impacts*.

The Proponent may offer Capacity agreements to Indigenous Communities to facilitate proponent consultation and collection of information, and if an agreement is reached, funding will be provided. These Capacity Agreements are not properly speaking compensation for impacts on aboriginal rights, that is the role of Impact Benefit Agreements with Indigenous Communities that provide benefits in return for their support of the Project, as discussed above.

The NEB does not require Capacity Agreements or Impact Benefit Agreements. It will assess the adequacy of Proponent consultation, throughout the process including at the hearing, and if inadequate *may* impose conditions on Proponents to generate plans for classes of impacts with input from Indigenous groups, and Report back to the NEB. The Proponent's commitments in the proponent consultation and the EA Hearing process are translated by a specific condition of project approval requiring Proponents comply with them, post updates their Commitment Tables on the Proponent Project websites and construction sites as well as filing with Reports with the NEB for information and compliance purposes. Reporting conditions from the NEB come in two flavours:

a) Reports for Approval: which requires the proponent to wait for explicit approval from the NEB – prior to undertaking the specified project component; and

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[540] See Table 5.
[541] Trans Mountain Application (December 16, 2013) available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2385938>.
[542] See Table 2.
[543] Tara L Jolya, Hereward Longleyb, Carmen Wellsc, and Jenny Gerbrandtd, "Ethnographic refusal in traditional land use mapping: Consultation, impact assessment, and sovereignty in the Athabasca oil sands region" (2018), 5 The Extractive Industries and Society 335–343, provides an example of how that information does not accord with Indigenous understanding however.
[544] Lambrecht, *supra* note 68 makes this useful definition at page 108 and 109.

b) Reports for Information: which requires the proponent to provide information on specific aspects of the project, prior to undertaking a project component and may include periodic reporting and service requirements for interested parties.

[The Reports for Information, in the aboriginal context, are more common and in this paper "Report" will refer to this type, used unless otherwise noted.]

Interested parties can monitor the Registry for these Reports, or be served, and if aggrieved may bring application to the NEB as it retains jurisdiction over the entire lifecycle of a project.

Proponent *practical accommodation* measures are found in several documents:

- Project Application, as updated, that generally lists them under aboriginal concerns;
- NEB Reports which may refer to them; and
- Proponents' Commitment Table, that summarize proponent commitments throughout the EA process, that may include specific commitments to aboriginal groups in the proponent consultation which will carry through and beyond the EA process. Commitment Tables are tools for Proponents to track the satisfaction of their commitments through the EA process and after approval. They are constantly being updated, in part because those commitments will be supervened by NEB approval Conditions, we reference the earliest post-approval Commitment Table as that would form the basis of any approval decision.

NEB Hearing Process

The NEB will, after receiving a completed Application will issue a Hearing Order setting the process and schedule for the EA. This will include a decision on who can participate and how in the EA. Public Notice is given as for participants to apply to participate [ATP] in the EA. Indigenous Communities, including those engaged by the Proponent are required to apply but they automatically get their requested status. Public Hearings, since the CEEA-2012 amendments, imposed time constraints are now usually held in writing and involve one or more rounds of evidence exchanges. One exception is the receipt of option oral evidence from aboriginal participants, entitled "Aboriginal Traditional Oral Evidence" [ATOE].

Once the NEB is satisfied that the evidence before it is adequate, it will prepare Draft NEB Conditions and call for oral or written arguments addressing the Draft Conditions. NEB will consider the evidence and arguments and prepare an NEB Report with conditions of approval and a recommendation to the government. The NEB Report must be completed as directed, or within a maximum of 15 months, although that deadline can be suspended by the NEB for participants to acquire information and extended by request to the government. The government of Canada will make a decision 90 days of receiving the NEB Report, but they can extend it.

Crown Consultation

Canada incorporates the NEB EA into fulfilling the Crown's duty to consult, by encouraging aboriginal participation in the NEB process, during hearings Canada will record aboriginal issues raised during the EA that were outside of the NEB's EA Mandate – this is a difficult distinction to draw. It was only after the NEB Report was delivered, that Canada would engage in direct

consultation with each aboriginal group separately, all within self-imposed timelines to make approval decision. This has posed difficulties as witnessed in recent court cases.

NEB Standard Aboriginal Package

The NEB has, over time, altered both its practices and requirements respecting aboriginal accommodations. The primary changes have included a standard *aboriginal package* of:

1. Reception of Aboriginal Traditional Oral Evidence [ATOE];
2. Aboriginal Environmental Monitors for various phases of Projects;
3. Enhanced Reporting for Project Benefits from Aboriginal Employment, Training and Community benefits; and
4. Continual engagement with Aboriginal groups throughout the life cycle of a Project.

These will be discussed below.

5.6.1 Proponent Consultation in Export Pipelines

Two export pipelines from Alberta through British Columbia have dominated the recent EA landscape: Enbridge's Northern Gateway Project and Kinder Morgan's Trans Mountain Expansion Project. The proponents' aboriginal consultation is summarized, as follow.

Table 6: Proponent Consultation: Northern Gateway and Trans Mountain

NEB Stage	Northern Gateway	Trans Mountain
Consultation Start	April 2002[545]	May 2012[546]
Project Description	November 1, 2005[547]	May 25, 2013[548]
Application Date	September 29, 2006[549]	December 16, 2013[550]
Consultation	Vol 5 EIS[551]	Volume 3B Application[552]

[545] Northern Gateway EIS (May 27, 2010) [Northern Gateway EIS] EIS Volume 5 at page 1-1, available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=43426>.
[546] Trans Mountain NEB Application (December 16, 2013) Volume 3B [Trans Mountain Aboriginal Engagement] available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2385938>. It is document B1-39 - V3B_1.0_TO_3.0_ABOR_ENGAG - A3S0U5.>
[547] Northern Gate Preliminary Information Package (October 2005) [Northern Gateway PIP] at <http://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_21799/2075.pdf>. Citing economic concerns, they suspended the formal EA on November 27, 2006: Northern Gateway Withdrawal Letter (November 27, 2006) at <http://www.ceaa-acee.gc.ca/050/documents/30175/30175E.pdf> only to revive the process on June 18, 2008: Northern Gateway Resumption Letter (June 18, 2008) at <http://www.ceaa-acee.gc.ca/050/documents/29968/29968E.pdf>
[548] Trans Mountain Project Description (May 23, 2013) [Trans Mountain Project Description] available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/956916> with Project Description Errata (May 24, 2013) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/957139>
[549] Northern Gateway Notice of Referral to a Review Panel (September 26, 2006) at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=80035>.
[550] Trans Mountain Application (December 16, 2013) [Trans Mountain Application].
[551] Northern Gateway EIS, *supra* note 545.
[552] Trans Mountain Aboriginal Engagement, *supra* note 546.

NEB Stage	Northern Gateway	Trans Mountain
Updates	August 18, 2010;[553] December 17, 2010;[554] and March 31, 2011,[555] June 2011,[556] and February 2013.[557]	March 20, 2014;[558] August 1, 2014;[559] December 1, 2014; [560] and February 3, 2015.[561]
Commitment Table	Commitment Table Updated, September 19, 2014[562]	Commitment Table Version 4, March 1, 2017[563]

Another export pipeline, was applied for by TransCanada Keystone Pipeline GP Ltd. application for the Keystone XL Pipeline [Keystone XL] on February 27, 2009[564] but did not involve more that 75 km of new ROW in Canada and was subject to a screening level of environmental assessment under the CEA-1992.[565] The Keystone XL Application, included in Section 12 Aboriginal Engagement.[566] The NEB Report recommended approval subject to 22 conditions, one of which one referenced Indigenous concerns that required filing with the NEB for information, an update on aboriginal consultation and the Proponent's "monitoring procedures for the protection of Aboriginal heritage and traditional resources during construction."[567] The GIC

[553] Northern Gateway Update to the EIS (August 18, 2010) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=44742>
[554] Northern Gateway Update to EIS (December 17, 2010) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=47139>
[555] Northern Gateway Update to EIS (March 31, 1011) General Oil Spill Response Plan at <http://www.ceaa-acee.gc.ca/050/documents/49401/49401E.pdf> and Volume 4 (Public Consultation) Update available at <http://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_21799/2478/v4update.pdf>
[556] Northern Gateway Additional Evidence - Updates to Volume 5A - Aboriginal Engagement and Volume 5B - Aboriginal Traditional Knowledge (June 8, 2011) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=50854>. The accuracy of that information was contested by Office of the Wet'suwet'en (June 20, 2011) at <http://www.ceaa-acee.gc.ca/050/documents/51682/51682E.pdf>.
[557] Northern Gateway Additional Evidence - Northern Gateway Pipelines Limited Partnership - Aboriginal Engagement and Public Consultation Update (A50587) at <http://www.ceaa-acee.gc.ca/050/documents-eng.cfm?evaluation=21799&page=4&type=0&sequence=0>
[558] Trans Mountain Consultation Update #1 and Miscellaneous Errata (March 20, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2434443> which the NEB ordered to maintain the pagination in the original Application (April 23, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2451300>.
[559] Trans Mountain Technical Update No. 1 and Consultation Report #2 (August 1, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2490918>, <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2491129>
[560] Trans Mountain Technical Update No. 4 (December 1, 2014) Part Two available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2578721>
[561] Trans Mountain Response to NEB IR#3 (February 3, 2015) at 44 available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2671531> and <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2671988>
[562] Northern Gateway Commitment Table Updated September 19, 2014 available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2523537> [Northern Gateway Commitment Table]
[563] Trans Mountain Commitment Tracking Table Version 4.0 (March 1, 2017) at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3200964> [Trans Mountain Commitment Table]
[564] Keystone XL Pipeline Application (February 27, 2009) [Keystone XL Application] is available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/556487>.
[565] NEB Keystone XL Report (March 11, 2010) available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/604441>. See Comprehensive Study List Regulations, SOR/94-638, section 14 (a)
[566] Keystone XL Application, *supra* note 564, Aboriginal Engagement is in "B-1w - Aboriginal Engagement (Tab 12) incl. Appendix 12.1 - A1I9T4"
[567] *Ibid,* at 148. This was Condition No. 16 in the Section 52 Certificate available at < https://apps.cer-rec.gc.ca/REGDOCS/Item/View/614188>.

approved Keystone XL on the 22nd day of April 2010,[568] but construction has been delayed until final approval for the American segment is received.[569] The Proponents' most recent Commitment Table does not, aside from Updates on Aboriginal Consultation mandated by Condition No. 16,[570] appear to contain any practical accommodation measures.[571]

5.6.1.1 Export Pipeline Similarities

The Northern Gateway and Trans Mountain have some significant similarities:

1. Timing – the EA for both projects originated in the late 2000s and were recommended for approval in the mid-2010s.
2. Environmental footprint – both projects were approximately the same length (~1,000 km) and increase transport capacity in similar amounts with Northern Gateway transporting 400,000 barrels of diluted bitumen per day (bpd) and Trans Mountain pipeline, transporting 300,000 bpd of oil, would be expanded to 890,000 bpd.[572]
3. Tanker Shipping – both projects involve marine terminals and shipping routes.
4. Aboriginal Consultation – both projects engaged with 100+ aboriginal groups.[573]
5. Aboriginal Funding – both projects received ~$4M in federal aboriginal funding.[574]
6. Phased Crown Consultation Process relying upon findings of their respective EA Tribunals.[575]
7. Upstream and downstream use were not considered – both projects had project descriptions limited to inland and maritime terminals. The Northern Gateway Panel scoping decision confirmed this approach[576] and the Trans Mountain NEB Hearing Order (April 2, 2014) said "[t]he Board does not intend to consider the environmental and socio-

[568] Governor in Council by Order in Council No. P.C. 2010-489 dated the 22nd day of April 2010.
[569] CBC from The Associated Press (May 04, 2019) at < https://www.cbc.ca/news/canada/calgary/keystone-delays-1.5123603>
[570] Keystone XL Aboriginal Updates (June 16, 2010) available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/622712> and <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/622990>, July 7, 2010 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/625387>, May 25, 2011 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/689425>, December 12, 2018 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3723895>
[571] Keystone Commitment Table (January 11, 2019) available at < https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3746244>
[572] Northern Gateway Project Description at the project homepage, *supra* note 182 and Enbridge Trans Mountain Project Descript at the project homepage, *supra* note 183. The Trans Mountain Expansion Project *may* include heavy oil or diluted bitumen.
[573] See Table 2.
[574] See Table 4 and *supra* note 262.
[575] Northern Gateway *Updated Federal Aboriginal Consultation Framework* (November 6, 2009) at <http://www.ceaa-acee.gc.ca/050/documents/40861/40861E.pdf> and Trans Mountain's Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project (November 2016) [Trans Mountain CAR] at 39. <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/TMX_Final_report_en.pdf> and NRC Notification (August 12, 2013) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/995067>.
[576] The Northern Gateway JR Panel issued a document entitled *Response to Panel Sessions Enbridge Northern Gateway Project* (January 19, 2011) at <http://www.ceaa-acee.gc.ca/050/documents/47510/47510E.pdf> with a revised List of Issues in light of the submissions to the Panel.

economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline."[577]

5.6.1.2 Different Outcomes

The two projects have significantly different outcomes, with Northern Gateway being cancelled and Trans Mountain, proceeding. What is the source of these different outcomes?

1. Greenfield versus Brownfield:

Northern Gateway was a "greenfield project" that involved, for the most part, consultation on *new impacts* on the environment and aboriginal interests along the route and Trans Mountain was a "brownfield project" limiting aboriginal consultation by design, although it should be noted that both projects were recommended for approval.

2. Potential for Oil Tanker Spills?

The greenfield/brownfield distinction carried through in the consideration of the maritime aspect. Tanker oil spills are perceived to represent the largest single source of pollution with extensive consequential environmental, economic and social damage. The Northern Gateway pipeline terminated in Kitimat, a relatively un-trafficked harbour where project related tanker traffic would be a significant source of maritime traffic. Trans Mountain terminated at the existing Westridge Marine Terminal in Burnaby in the very busy Vancouver Harbour where the existing project related tankers had no spills in the past 60 years and additional project related traffic was a smaller contribution to existing traffic.

Exxon Valdez Comparison

On the Pacific Coast, there was an overarching recent comparator: the Exxon Valdez disaster, which was used on both sides in the EA of Northern Gateway and Trans Mountain. The Exxon Valdez disaster occurred on March 24, 1989, at 12:09 am where an unpiloted and unescorted Very Large Crude Carrier (VLCC) single hull tanker ran aground on Prince William Sound's Bligh Reef [578] and spilled 10.8 million US gallons (41,000 m^3) of crude oil,[579] most of which was lost in the

[577] Trans Mountain NEB Hearing Order (April 2, 2014) at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2445930>.

[578] The Alaska Oil Spill Commission Final Report (1990), *SPILL : The Wreck of the Exxon Valdez* (Anchorage: Alaska Oil Spill Commission, 1990) at http://www.arlis.org/docs/vol1/B/33339870.pdf : "This disaster could have been prevented by simple adherence to the original rules. Human beings do make errors. The precautions originally in place took cognizance of human frailty and built safeguards into the system to account for it. This state-led oversight and regulatory system worked for the first two years, until the state was pre-empted from enforcing the rules by legal action brought by the oil industry. After that, the shippers simply stopped following the rules, and the Coast Guard stopped enforcing them" at iv.

[579] National Transportation Safety Board, Marine Accident Report, *Grounding of the U.S. Tankship Exxon Valdez on Bligh Reef, Prince William Sound Near Valdez, Alaska, March 24, 1989* (Washington: National Transportation Safety Board, 1991) at Executive Summary at v at <https://www.hsdl.org/?view&did=746707> [NTSB Report]. This Report attributed the accident to human error attributable to impairment by alcohol, exhaustion from overwork, inexperience and under manning related to Exxon's policies and lax supervision.

first eight hours.[580] Spilled oil contaminated at least 2,100 km of coastline, 28,000 km^2 of ocean and spread over 750 kms from the point of impact.

The cleanup response was chaotic[581] with untested dispersant' dropped by a helicopter on March 24 being unsatisfactory, lightering was commended the next day,[582] mechanical cleanup was started shortly afterwards using booms and skimmers, but the skimmers were not readily available during the first 24 hours following the spill,[583] and thick oil and kelp tended to clog the equipment. High pressure hot water was later applied to the many rocky surfaces in Prince William Sound displacing many micro-organisms essential to the food-chains and capable of bio-degrading the oil spill.[584] Less that 10% of the oil spill was recovered, and as of 2010 there was an estimated 23,000 US gallons (87 m^3) of crude oil still in Alaska's sand and soil, breaking down at a rate estimated at less than 4% per year.[585]

Immediate environmental effects included the deaths of 100,000 to 300,000 seabirds, at least 2,800 sea otters, 300 harbour seals, 247 bald eagles, 22 orcas, and an unknown number of salmon and herring. Long term environmental damage was extensive with some species recovering such as the bald eagle but others including the herring have not recovered to this day. The Exxon Valdez oil spill extensively studied by government scientists but also by Exxon funded scientists for use in the extensive litigation that remained unresolved as the EA of Northern Gateway was underway.[586]

Coastal Opposition

With the experience of the Exxon Valdez disaster coastal communities including aboriginal communities were at the forefront of opposition to both Northern Gateway and Trans Mountain. Broadly speaking the arguments before the EA Tribunals for both Projects was that the relevant terrain, navigational constraints, weather conditions, environmental and social aspects were similar or larger to those in Prince William Sound and consequences of the Exxon Valdez disaster would be similar or larger. The JRP Report for Northern Gateway mentions Exxon Valdez 92 times and 30 times in the NEB Report on Trans Mountain. [587]

[580] *Ibid* at 25 to 26.
[581] *Ibid* at 86 to 93.
[582] *Ibid* at 92. Lightering is the process of off-loading the oil to another vessel.
[583] *Ibid* at 89 to 90. By 4:35 am Exxon ordered oil spill response equipment from stockpiles in San Francisco, California, and in Southampton, England, and oil containment booms were ordered from the USSR, Norway, Denmark, France, Canada, and the United Kingdom. The 30 tons of immediate availability of oil response equipment was those on Alyeska barge which had been removed for repairs – the barge was reloaded and underway 11 hours after grounding arriving later that day.
[584] See for example, the National Oceanic and Atmospheric Administration webpage at <https://response.restoration.noaa.gov/oil-and-chemical-spills/significant-incidents/exxon-valdez-oil-spill/high-pressure-hot-water-washing.html>
[585] See for example: Is the Oil Gone? at <https://response.restoration.noaa.gov/oil-and-chemical-spills/significant-incidents/exxon-valdez-oil-spill/oil-gone.html>
[586] Stanley Rice, "Persistence, Toxicity, and Long-Term Environmental Impact of the Exxon Valdez Oil Spill" (2009), 7 U St. Thomas LJ 55 at <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1213&context=ustlj>.
[587] *Considerations, supra* note 213 and NEB Report on Trans Mountain, the Exxon Valdez is referenced 30 times.

3. TERMPOL Review Process Reports

Maritime shipping, including oil tankers is subject to Federal jurisdiction in the *Constitution Act, 1867,* section 91 (10) Navigation and Shipping, [588] and is regulated under a number of statutes such as the *Canada Shipping Act*, *Canada Marine Act, Oceans Act* and *Fisheries Act*[589] administered by a variety of government ministries, agencies and authorities.

The EA of both projects included consideration of TERMPOL Review Process Reports, TERMPOL stands for "Technical Review Process of Marine Terminal Systems and Transshipment Sites" and originated in 1977 with the first edition of the TERMPOL Code[590] which has gone through four editions.[591] TERMPOL 3.0 (January, 2001), used in the EA of both projects, "focuses on a dedicated design ship's selected route in waters under Canadian jurisdiction to its berth at a proposed marine terminal or transshipment site and, specifically, to the process of cargo handling between vessels, or off-loading from ship to shore or vice-versa.[592]

The purpose of TERMPOL was to "objectively appraise operational ship safety, route safety, management and environmental concerns associated with the location, construction and subsequent operation of a marine terminal system for the bulk handling of oil, chemicals, liquefied gases or other [dangerous cargoes] … which may pose a risk to public safety or the environment."[593] TERMPOL applied to the design of marine elements and the operation of maritime facilities.[594] TERMPOL is not a regulatory instrument and its requirements are not mandatory[595] and it *does not extend to the potential environmental effects of a project or address*

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[588] *The Constitution Act, 1867* (UK), 30 & 31 Vict c 3, reprinted in RSC 1985, App II, No. 5 (formerly the *British North America Act*) [*Constitution Act,* 1867].

[589] *Canada Shipping Act*, 2001, SC 2001, c 26, *Canada Marine Act*, SC 1998, c 10, *Oceans Act*, SC 1996, c 31 and *Fisheries Act*, *supra* note 123, others include *Navigation Protection Act*, RSC 1985, c N-22, *Arctic Waters Pollution Prevention Act*, RSC 1985, c A-12, *Canadian Environmental Protection Act*, 1999, SC 1999, c 33, CEAA-2012 *supra* note 141, *Transportation of Dangerous Goods Act,* 1992, SC 1992, c 34 and associated legislation such as the *Marine Liability Act*, SC 2001, c 6, *Marine Insurance Act,* SC 1993, c 22 and *Marine Transportation Security Act,* SC 1994, c 40

[590] TERMPOL 3.0 (January,2001) Foreword at <http://publications.gc.ca/collections/collection_2014/tc/T29-120-2001-eng.pdf>. The Departments of the Environment, Fisheries and Oceans, Transport, Public Works, representatives from other departments, agencies and the marine industry contributed to the content of the Code.

[591] TERMPOL 1.0 (February 1977), TERMPOL 2.0 (October 1983) was expanded to consider Liquefied Natural Gas [LNG] transportation, TERMPOL 3.0 (January 2001) following the passage of CEAA-1992. TERMPOL 4.0 (December 2014) [TERMPOL 4.0] at <https://www.tc.gc.ca/media/documents/marinesafety/tp743e.pdf> was passed, in part to account for the passage of CEEA-2012.

[592] TERMPOL 3.0, *supra* note 590 at Section 1.1.1 Dangerous Cargoes were those defined by Transport Canada.

[593] *Ibid* at Section 1.4.4.

[594] *Ibid* at Section 1.2

[595] *Ibid* at Section 1.4.1. TERMPOL criteria are used by Transport Canada in "determining the need for making or revising specific regulations, or for implementing special precautionary measures that may affect a ship's operation within a particular marine terminal system or transshipment site." At Section 1.4.2 "Any report issued by a TERMPOL Review Committee (TRP) should neither be interpreted as a statement of government policy, nor should it be inferred that the government endorses the report in whole, or in part. The report reflects only the judgments of the departmental representatives who reviewed the proposal and prepared the report. Consequently, the conclusions and recommendations presented in a TERMPOL report are not binding on any department, agency, group or individual. Implementation of any recommendation, however, is the prerogative of applicable departmental executives performing regulatory functions or of the proponent, as appropriate."

aboriginal matters.[596] Nonetheless, in the EA of both the Northern Gateway and Trans Mountain Projects the TERMPOL oil tanker forecasted traffic reports, requirements and particularly the potential of an oil spill were considered.[597]

A TERMPOL Review Process is initiated on the Proponent's request and coordinated by TC, a Review Panel [TRP] consisting of representatives from the Proponent, government departments and agencies will review the Proponent's plans and studies and may ask for clarification but are not limited by those plans as they may have additional relevant information.[598] The review process is usually confidential, and Proponents' submissions will only be made public with the release of the TERMPOL Report.[599]

Northern Gateway TERMPOL

The Northern Gateway TERMPOL Final Report (January 20, 2010)[600] said the Project's Marine Terminal would be built at Kitimat, at the head of the Kitimat Arm, which extends northeast from the Douglas Channel that is BC's largest coastal fjord, extending inland approximately 96 km from open water. Kitimat would receive 250 oil tankers annually using two existing routes for shipping.[601] Sixty of them, being the designed capacity, would be Very Large Crude Carriers [VLCC] with a dead-weight-tonnage [DWT] of 320,000 tonnes, fully laden draught of 24 m, a length of 350 m and width (beam) of 32.2 m whereas the largest ships received, by Kitimat in the 1980s had a DWT of 51,000 tonnes, a fully laden draught of 13.3 m and one half of the length and beam of the proposed VLCC.[602] Ships would not be owned or operated by Northern Gateway, although they proposed an enhanced safety qualification requirement. The proposed tanker traffic would comprise 10 per cent of the large ship traffic in Wright Sound and about one-third in Douglas Channel leading to Kitimat.[603]

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[596] See TERMPOL 4.0, *supra* note 591, Intended to address the passage of CEEA-2012, in the Background at ii, "clarify the scope and intent of TERMPOL, focusing on navigation safety and marine pollution prevention. The scope of TERMPOL *does not extend to the potential environmental effects of a project.* encourage proponents to engage local waterway users, particularly Aboriginal groups, in the preparation of the surveys and studies." [*Emphasis* added].

[597] Aboriginal concerns, presumably under the *Taku River* equivalency of process doctrine *Taku River, supra* note 16 at 2, were discussed as well.

[598] TERMPOL 4.0, *supra* note 591 at Section 1.6.1. This is in conjunction with a request to the Canadian Coast Guard that administers the requirements under the *Navigable Waters Protection Act* that protect the public right of navigation by prohibiting the placement of any structures without the approval of DFO.

[599] *Ibid* at Section 1.6.7.

[600] Northern Gateway TERMPOL Final Report (January 20, 2010) [Northern Gateway TERMPOL] available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/792408 >. Northern Gateway requested a TERMPOL review in 2005 and suspended that request until 2009 see page 6.

[601] Kitimat, population 10,000 has an aluminum smelter that produces and ships 420,000 tonnes per year, importing raw materials from Korea and Australia and exporting aluminum the western coast of the United States.

[602] Northern Gateway TERMPOL, *supra* note 600, at 2-1. Northern Gateway justified the use of VLCC saying that it would reduce the number of transits and VLCC were less likely to be affected by weather.

[603] *Ibid* at 22. "If all anticipated projects become operational, annually, there could be up to 415 additional oil tankers, liquefied natural gas carriers and bulk carriers calling at Kitimat, or 830 additional transits of the waterways. …. Approximately 20 vessels a day, an average of less than one vessel per hour, use the Wright Sound on a peak day. Adding up to four large vessels to this waterway would represent a 20-per cent increase in peak vessel traffic."

The Northern Gateway TERMPOL described the North Passage from the Open Sea point off of Dixon Point, to the proposed pickup of two licenced Pilots at Triple Island (which may be delayed by weather – a constant concern) and thereafter through constricted waters 300km to Kitimat.[604] The Northern Tanker Route "comprises a series of waterways that are wide enough and deep enough for two-way navigation," however the weather conditions and ocean waves would mandate a minimum of draught of 33.2 m for safe transit.[605] The proposed North Passage was equal to or greater than 35 m, but "[g]iven the size, beam and manoeuvrability of the largest design vessel, there are sections of the route as described that are narrow enough to warrant caution with two way traffic flow."[606] The proposed Southern Route from Caamaño Sound to Kitimat exhibited similar concerns, although there was one portion having 35 m depth.[607]

Navigational challenges would be compounded by weather conditions including, among others wind driven waves, freezing spray in the winter and extensive banks of dense fog.[608] Anchorage sites, necessary to accommodate storm or operational delays, outside of Kitimat Harbour's 3 sites, were limited with only one approved anchorage site.[609] Navigational aids were relatively sparse, although landforms would give radar returns, "however, due to the length and remoteness of the route at 160 nm (300 km), it is recommended that back up contingencies and plans are in place, such as tug escort, contingency for machinery failure and operational procedures ready for implementation in the event of a delay or incident."[610]

Enbridge proposed to enter into contractual arrangements for the design and construction of five escort tugs 10,000 [hp] capacity, and two harbour tugs 5,000 [hp] capacity.[611] The escort tug would accompany laden tankers from the Open Sea point and an additional escort tug would be tethered in the Confined Channel area from Browning Entrance or Caamaño Sound to the Kitimat Terminal. Unladen tankers would have an escort tug with three or four harbour tugs for docking at Kitimat Terminal. [612] Tanker speeds would be reduced in the Confined Chanel to 12 knots from the standard 18 knots of other cargo vessels. These additional precautions were not required by law but the TERMPOL Report indicated these commitments will "help enhance the safety of the project's marine transportation components."[613] There were uncertainties as to the increased traffic effects on marine mammals, particularly vessel strikes that warranted additional studies that the Proponent had committed to make.[614]

The likelihood and extent of tanker spills and consequent environmental effects and cleanup costs were central in the TERMPOL Report.[615] As noted in the TERMPOL Report, "[o]ne of the

[604] *Ibid* at 2-2 to 2-23.
[605] *Ibid* at 2-24. Depth Charts were included at pages 2-25 to 2-29.
[606] *Ibid.* Traffic management would not be necessary but could be developed in the future.
[607] *Ibid* Section 2.2 at pages 2-30 to 2-41.
[608] *Ibid* at Section 4 at pages 4-1 to 4-6.
[609] *Ibid* at Section 10 at pages 10-1 to 10-11. With two others that could be used with care and several other emergency anchorages with less than ideal room for manoeuvres and bottom conditions.
[610] *Ibid* at 2-25. Improvements in navigational aids were discussed in Section 5.1.
[611] *Ibid* at 2-25.
[612] *Ibid* at Section 8 at pages 8-1 to 8-2.
[613] *Ibid* at page 10.
[614] *Ibid* at page 16 to 17. This would include coordination with Fisheries studies and Fishery Liaison Committees.
[615] *Ibid* at pages 4-5. The report did not consider: Maritime Liability and Compensation regimes or Oil Pollution Response Planning and Preparedness, these were addressed by TC in submissions to the Northern Gateway Panel.

proponent's key submissions is the Marine Shipping Quantitative Risk Analysis, which estimates the risk associated with the oil tankers." The Proponent held a roundtable of stakeholders and First Nation groups to identify tanker concerns with TERMPOL Participants contributing to the scoping, terms of reference and selection of the consultant that completed the Proponent's Marine Shipping Quantitative Risk Analysis.[616]

The Report concluded that, while there will always be residual risk, no regulatory concerns were identified for the Project's maritime component. The TRP did make findings and recommendations where further action is proposed that would provide a higher level of safety for vessel operations.[617]

Northern Gateway TERMPOL Report at the Joint Review Panel

Northern Gateway proffered its TERMPOL Report to the JRP but those finding were challenged by Indigenous and environmental groups. Northern Gateway successfully argued before the JRP, that the combination of double hulled tankers and implementation of tug escorted tankers within the Confined Channel would reduce the chances of any oil spill to 18.2% over the 50-year life of Project, with a corresponding 0.003% chance of a major oil spill of more than 40,000 m^3. [618] The Panel said, environmental effects of a major spill would be significant,[619] but "there is a low probability of a large spill occurring. The Panel does not accept that a large spill is inevitable or likely given the available safety technology, management systems and the regulatory regime."[620]

Northern Gateway proposed a framework for Oil Spill Response planning that would involve, among other things, escort tugs equipped with oil pollution emergency response equipment, a Response Organization with a 32,000-tonne response capability capable of having one major on-water recovery task force at the site of a spill in the Confined Channel Assessment Area in 6-12 hours, and at in the Open Water Area within 6-12 hours *plus travel time*.[621]

The JRP found "that Northern Gateway's extensive evidence regarding oil spill modelling, prevention, planning, and response was adequately tested during the proceeding, and was credible

[616] *Ibid* at page 8. The Haisla Nation and Kitamaat Village Council, the only local Participant, filled an advisory role.
[617] *Ibid* at page 28.
[618] *Considerations, supra* note 213 at 142.
[619] *Ibid* at 146 to 147. "…significant adverse environmental effects, and that functioning ecosystems would recover through mitigation and natural processes… A relatively large proportion of a large spill is likely to be naturally dispersed and degraded. Extensive remediation would be necessary, particularly in sensitive shoreline habitats. The time for environmental recovery would depend on the type and volume of product spilled, environmental conditions, the success of oil spill response and cleanup measures, and the extent of exposure of living and non-living components of the environment to the product spilled….Recovery of different environmental components may occur over different time frames ranging from weeks to years, and in the extreme, decades. Effects to communities and commerce would be significant. Chronic effects are likely in some locations. Compensation would be required for affected persons and communities."
[620] *Ibid* at 148.
[621] *Ibid* at 157. Notably the recovery taskforce timing was a "target" time for fair weather operations.

and sufficient for *this stage in the regulatory process*," with perhaps additional requirements in subsequent regulatory permitting processes.[622]

Trans Mountain TERMPOL

The Trans Mountain TERMPOL Report (December 2014)[623] described the terminus at Westridge Marine Terminal, located in Burrard Inlet within Port Metro Vancouver jurisdiction. The project would see an estimated 408 tankers per year (34 tankers per month) depending on market demand.[624] These tankers would be independently owned, but subject to Trans Mountain approval, with a design maximum of double hulled Aframax Class Tankers [Aframax], the same maximum size calling at the terminal today, with DWT of 80,000 to 120,000, a length of approximately 308 m, a beam of 44 meters, a fully loaded draught of 15.5 metres.[625] The Port Metro Vancouver's Movement Restriction Area [MRA] draught rules dictate a vessel can only have a maximum loaded draught of 13.0 meters, so Aframax tankers would be partially loaded to ensure they are in compliance with Port Metro Vancouver MRA rules.[626]

The proposed route to and from the Westridge marine terminal up to Buoy Juliet at the mouth of the Juan de Fuca Strait was 300 km used existing shipping routes. It was divided into 7 sections, with inbound routes transiting Canadian and U.S. territorial waters and outbound routes in Canadian territorial waters – by design to avoid engaging U.S. environmental regulations.[627]

Inbound tankers would pick up a pilot from Victoria Pilot station, transit the relatively narrow waters of the Gulf Islands with the pilot replaced at English Bay.[628] The tankers would proceed into Vancouver harbour through the First Narrows under Lions Gate Bridge as one-way preauthorized transit, the Second Narrows which requires, "among other restrictions, daylight transit in slack water conditions, one-way transit, clear narrows, two pilots, special trim requirements, and additional tug assist"[629] and arrive at the Westridge Terminal.[630] Outbound

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[622] *Ibid* at 165. Terrestrial and maritime emergency response planning and efforts are at 148 to 167. The JRP did impose additional study requirements to *inform* additional planning, especially with regard to diluted bitumen behavior in water and additional studies on large maritime mammals.
[623] Trans Mountain TERMPOL Report (2014) available at <https://apps.neb-one.gc.ca/REGDOCS/File/Download/2584073>. The Proponent requested a TERMPOL review on October 2012. The Trans Mountain TRC does not appear to include local community representation.
[624] *Ibid* at vii.
[625] *Ibid* at 3. Smaller qualifying Panamax tankers could also be used.
[626] *Ibid* at 23. It was noted that possible update in 2018 would extend the Under Keel Clearance [UKC] to 15 m but partial loading would still be required. Port Metro Vancouver's current Port Information Guide (March 2018) is at <https://www.portvancouver.com/wp-content/uploads/2015/03/Port-of-Vancouver-Port-Information-Guide.pdf> has an UKC of 15 m at page 63.
[627] *Ibid* at 10. These were listed in Appendix 4 at 55, with Segments No. 1 and No. 2 within Port Metro Vancouver jurisdiction. The proponent would require, as part of the Tanker Approval requirements that outbound laden tankers "upon exiting the Juan de Fuca Strait, they will steer a course no more northerly than due West (270°), until the tankers are outside the Canadian Exclusive Economic Zone (EEZ), 200 nautical miles from Canada's coast." at 15. See also: Scott Knutson and Craig Dougans, *Canada – United States (Salish Sea) Spill Response Organizations: A Comparison Revisited*. International Oil Spill Conference Proceedings: May 2017, Vol. 2017, No. 1, pp. 2017-102.
[628] *Ibid* at 16.
[629] *Ibid* at 22.
[630] *Ibid.*

tankers would proceed in the reverse order, two pilots required from East Point in the Gulf Islands and dropped off at Victoria Pilot Station.[631]

Escort tugs were required for tankers in the Gulf Islands, between East Point and Race Rocks by the Pacific Pilotage Authority and within the boundaries of Port Metro Vancouver.[632] Based on a Marine Shipping Quantitative Risk Analysis prepared by the Proponent's consultant (the same one engaged by Northern Gateway) Trans Mountain proposed extending escort tugs and pilots to the mouth of the Juan De Fuca Straits and implementation of a moving exclusion zone for project tankers for the entire route on the basis that grounding and collisions were the primary mitigable risks. [633] The TRC looked at the proposed moving exclusion zone and decided it was unnecessary and burdensome but approved the proposed pilot and escort tugs plan and other traffic measures.[634] In terms of Traffic Measures, Vancouver the third largest port in North America by tonnage, Trans Mountain prepared traffic studies accounting for current and forecast traffic which noted that sailed nautical miles for tankers increased by an average of 70% and for all vessels by an average of 3.2%, with tanker traffic adding on average two transits per day.

The Trans Mountain TERMPOL Report approved the proposed: Tanker Qualification measures, the Maritime Terminal Operations and Trans Mountain Westridge Terminal Oil spill response plans. Tanker operations require an agreement with the appropriate Response Organization for spill response, which on the west coast is the Western Canada Marine Response Corporation [WCMRC]. The Report approved the Trans Mountain proposed risk based analysis of a credible worst case spill scenario from a Project tanker of 15,500 tonnes, and an agreement with WCMRC for establishing five new bases to enable a spill response initiation times of less than two hours in Vancouver harbour and six hours for the rest of the proposed route, capable of addressing spills of 30,000 tonnes.[635] The Trans Mountain TERMPOL Report concluded that, while there will always be some risk in any project, Trans Mountain proposal poses no regulatory concerns.[636]

Trans Mountain TERMPOL Report at NEB

The Issues List (July 29, 2013) included Issue No. 5 "[t]he potential environmental and socio-economic effects of marine shipping activities that would result from the proposed Project, including the potential effects of accidents or malfunctions that may occur." [637] This resulted in

[631] *Ibid* at 16.
[632] *Ibid* at 17.
[633] *Ibid* at 27 to 29.
[634] *Ibid* at 31 to 33. Other measures included maritime safety awareness programs, radio traffic notices and updated Pilotage Notices. Trans Mountain proposed additional traffic measures in the Gulf Islands and First Narrows but the TRC rejected those proposals noting traffic management was adequate for the additional two tanker transits on a daily basis, see 27 to 27.
[635] *Ibid* at 40.
[636] *Ibid* at 45. "While there will always be some risk in any project, after reviewing Trans Mountain's studies and taking into account its commitments, the TRC has identified no regulatory concerns for the tankers, tanker operations, the proposed routes, navigability, other waterway users and the marine terminal operations associated with Project tankers.
[637] Issues List for the Project (July 29, 2013) at <https://www.neb-one.gc.ca/bts/nws/nr/archive/2013/nr22-eng.html>. This is an archived press release; the actual List of Issues is not available on the NEB website. The links are either broken or go the current documents. The Issues List for the Project is attached as Appendix I to the

additional Filing Requirements for Trans Mountain (September 10, 2013) for evidence of consultation, description of increased shipping and their effects, navigation and proposed mitigation measures. [638] This was formalized in the Direction on CEAA-2012 Environmental Assessment Issues (April 2, 2014). [639]

Trans Mountain accepted the recommendation of its TERMPOL Report, but those recommendations were challenged in the NEB hearings, on various grounds, including among others, the methodology of risk analysis, shipping forecasts, oil spills possibility and response adequacy. The NEB deprecated the proposed response time at the Westfield Terminal and directed the Proponent to fully consult and engage first responders in developing the Oil Spill Geographic and Community Response plans.[640] It noted Trans Mountain's commitment to develop a Marine Mammal Protection Program and incorporated it into Condition No. 132.[641] The NEB found that the Southern resident killer whale population [SRKW] has crossed a threshold where any additional adverse environmental effects would be considered significant and said this was an adverse cumulative environmental impact of the Project.[642]

Based on the totality of the submissions, the NEB said, "although a large spill from a tanker associated with the Project would result in significant adverse environmental and socio-economic effects, such an event is not likely" and ultimately recommended Project approval. [643]

TERMPOL Comparisons?

The TERMOL Reports' navigational difficulties for Tanker Traffic for both Projects were similar: extensive ~300-km narrow approaches; areas of shoaling reducing underkeel clearances; weather difficulties and escort tug requirements. The greenfield comparison of Northern Gateway with additional navigational aids and spill response requirements would appear to be outweighed by the existing traffic and established processes in Vancouver Harbour in Trans Mountain, although the cost of environmental damage would be higher in the urbanized area

4. Different Consultation Processes?

The Proponent's in both Projects used substantially the same process in their Proponent engagement with aboriginal groups but there were some differences.

Hearing Order (April 2, 20130) [Hearing Order] at page 18 the Hearing Order is available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2445930>

[638] Additional Filing Requirements for Trans Mountain (September 10, 2013) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/1035381>

[639] NEB Direction on CEAA-2012 Environmental Assessment Issues (April 2, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2445374>.

[640] NEB Report, *supra* note 186 at 152 to 158

[641] *Ibid* at 349.

[642] *Ibid* at 350 to 351. The adverse environmental impact would continue with the projected increase of shipping in any event, but the Project related shipping while small would have a cumulative environmental effect.

[643] *Ibid* at 375.

Northern Gateway Aboriginal Consultation

Northern Gateway, in its EIS (May 27, 2010) [644] described its Aboriginal Engagement Program as intended to provide information to aboriginal groups,

> … about the Project, answer project-related questions, identify and address issues and concerns, and obtain community input for incorporation into project planning activities and the environmental and socio-economic assessment (ESA). Information gathered through the Aboriginal engagement program will enable Northern Gateway to improve the Project by avoiding, reducing or mitigating*, wherever reasonable and feasible,* potential adverse effects of the Project and enhancing positive effects of the Project on Aboriginal interests. Northern Gateway is committed to ensuring that Aboriginal groups derive sustainable benefits from *project-related activities that arise throughout project development, construction and operations, including economic activity, equity participation, business development, and employment and training initiatives*.[645]

Significant proponent consultation was limited to aboriginal groups "located within 80 km of the project corridor and the Kitimat Terminal or whose traditional territory may overlap with the project corridor."[646] This engagement would be guided by Enbridge's two page *Aboriginal and Native American Policy* in Appendix A. That policy involved "forging mutually beneficial relationships with Aboriginal and Native American Peoples in proximity to its projects and operations," aside from the usual policies of hiring, contracting and community support agreements, Enbridge offered the opportunity to aboriginal groups "to purchase equity in certain new green field projects." [647] These principles would be modified in the Canadian context to recognize legal and constitutional rights possessed by Aboriginal peoples and *the need for fair treatment relative to issues such as project benefits*."[648]

The aboriginal consultation within the engagement area was *community based* and tailored to individual aboriginal groups, although some communities preferred to engage through larger groupings such as Tribal Councils.[649] Other groups expressing an interest would be sent information on the Project, an enquiry as to whether the Project affected their traditional territory with Enbridge assessing those maps to determine the Project's effect on traditional territory.[650] The Proponent left the degree to which communities chose to be engaged, after the initial Project information was provided to them – absent compelling reasons.[651]

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[644] Northern Gateway EIS, *supra* note 545.
[645] *Ibid,* Vol 5, page 1-1 *Emphasis added.*
[646] *Ibid* at 2-1.
[647] *Ibid* Appendix A at 2.
[648] *Ibid* at 2-3. The Proponent "has been mindful to respect cultural differences among Aboriginal and non-Aboriginal communities, varying levels of capacity among Aboriginal groups along the project corridor, and *the need for fair treatment relative to issues such as project benefits.* The preferential sole sourcing from aboriginal business was qualified as it "may be subject to competition among qualified Aboriginal providers and to bids reflecting regionally competitive rates."
[649] *Ibid* at 2-4. National, Regional and Treaty aboriginal groups were provided Project information and updates and engaged with respect to general obstacles and opportunities for aboriginal training, employment and participation.
[650] *Ibid* at 2-3. See for example: Beaver Lake Cree at 5-1 to 5-2.
[651] For example, the Alexander First Nation which agreed to move Enbridge infrastructure onto Reserve Lands for, among other things, property tax revenue as Own Band moneys.

The Proponent invited the engaged communities to participate in various Proponent funded Advisory Boards (e.g. Community Advisory Boards, Quantitative Risk Analysis Working Group) to filter and streamline information – although ATK and TLU agreements were community based.

Northern Gateways consultation process had several phases:

1. Initial Engagement (April 2002 to June 2005): The Aboriginal engagement program began in 2002 during feasibility studies at which time various options and routes were being considered with 171 Aboriginal groups identified with potential interest.
2. Community Engagement (July 2005 to December 2009) : After the Project corridor was defined in 2005 (the PIP was submitted on November 1, 2005) Enbridge focused its engagement activities on 81 aboriginal groups (including Métis) in the 80 km engagement area along the corridor.[652] Engagement with these groups varied in accordance with the scope of the rights or interests at stake, and while all Aboriginal groups were afforded *similar opportunities* to participate in the Project through direct consultations and the completion of ATK studies, greater consideration was given to groups with an increased impacts to Aboriginal interests.
3. Post-Filing (December 2009 to February 2013): Enbridge continued its proponent consultation through the Panel hearings and provided updates to the Panel as noted above.

Copies of the Project Information Package [PIP] were sent to Aboriginal groups in March 2006, with an invitation to contact Enbridge to meet and discuss the PIP, leaving. [653] Enbridge used a number of methods for communication, including correspondence, newsletters, meetings, telephone and email exchanges, information sessions, open houses and project website.[654]

Aboriginal Title, Rights and Treaty Rights

Northern Gateways said in its May 2010 EIS in developing the Project it has,

> …endeavoured to avoid characterizing or taking a position on the merits of claims asserted by Aboriginal groups in respect of Aboriginal rights, including title. Instead, … [f]or example, rather than engaging in an analysis of whether a particular group has the Aboriginal right to fish at a particular watercourse crossing, the policy of Northern Gateway has been to assume that members of the group may have such a right, to assess whether a pipeline crossing at that location would have effects on the underlying fisheries resource, and to identify mitigation measures to limit such effects.[655]

This lead to the Enbridge's assertion that it was confident that the Northern Gateway would not have a significant adverse effect on those who depend on the land and water for sustenance.[656] Enbridge promised to continue consultation "..during detailed engineering, construction and

[652] See Table 2, *supra* notes 209 to 212.
[653] *Ibid.* Enbridge hosted, in total, nine Aboriginal open houses in 2005 and 34 in 2008 and 2009 that were intended to provided Aboriginal groups with the opportunity to learn about the Project, speak with Enbridge representatives, voice their opinions about the Project and identify their interests in the Project.
[654] Northern Gateway EIS *supra* note 545, Vol 5 at 2-10. It is not suggested that every group will have received or participated in every type of communication listed. The listing is merely intended to provide examples of various types of communication tools or tactics used by Northern Gateway during the course of engagement.
[655] *Ibid* at 2-13.
[656] *Ibid* at 2-13 to 2-14.

operational phases of the Project to address site-specific concerns that may be raised." [657] This consultation was qualified as it was intended to "address, *where practical*, ongoing concerns regarding potential project effects on traditional uses and cultural resources."[658]

Enbridge described economic opportunities for Aboriginal groups in "equity investment; employment, training and business development … contracting opportunities … such as sole-sourcing; greening initiatives; [and] environmental research initiatives." [659]

ATK Studies

Enbridge offered most communities funding for ATK / TLU studies either community driven or with the assistance of Enbridge's' consultants.[660] The February 23, 2013 Update said of the 62 Aboriginal Groups identified,[661] 29 groups had completed ATK Studies, 5 ATK Studies were pending approval, with 12 ongoing ATK studies without completion dates – the balance of 16 groups represented those either unengaged by Enbridge by their choice or by the Enbridge's determination.[662] All but one of the Coastal First Nations, [663] and the Northwest British Columbia First Nations had refused Enbridge's terms for ATK studies.[664] In Alberta, most of the Métis and First Nations undertook ATK studies, on the basis of claims to traditional territories.

Equity Agreements

Enbridge proposed confidential Equity Agreements sharing a capped 10% participation to be shared between aboriginal groups.[665] These Equity Agreements were controversial amongst aboriginal groups, in part because Enbridge would not release the names of the aboriginal groups that had signed, instead asserting that the 80% of them had agreed.[666] Further, while traditional IBA's contained warranties that the aboriginal groups concerns were addressed to their satisfaction – the Equity Agreements prohibited the expression of concerns by aboriginal group members.

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[657] *Ibid* at 2-14.
[658] *Ibid* at 2-14. This engagement will include opportunities for Aboriginal involvement in: • compensating trappers (including baseline data collection and reporting of trapping yields during and after construction); • monitoring construction; • developing and implementing access management plans; • developing and implementing fisheries habitat compensation plans; • developing a fisheries liaison committee, either separately or in conjunction with non-Aboriginal fishers; • developing and implementing species-specific monitoring and management plans for sensitive species such as grizzly.
[659] *Ibid* at 2-14 to 2-15. These had very few details.
[660] *Ibid* at 2-4.
[661] There were Tribal Groupings i.e. Carrier Sekani Tribal Group that incorporated and represented some aboriginal groups as well as Métis Groups e.g. BC Métis Association that were listed in the EIS
[662] These included: Beaver Lake Cree Nation, Buffalo Lake Métis Settlement, Kikino Métis Settlement, Métis Nation of Alberta Region 1, Gunn Métis Local #55, Blueridge Métis, Maskwacis Cree Nation (the 4 component Nations were engaged), Métis Nation of Alberta Region 5, Red Bluff Indian Band, Tahltan First Nation
[663] These included: Hartley Bay Band (Gitga'at Nation), Kitasoo/Xai'xais Nation, Lax Kw'alaams First Nation, Metlakatla First Nation, Old Massett Village Council (Council of the Haida Nation), Skidegate Band Council (Council of the Haida Nation), Coastal First Nations/Turning Point Initiative/Great Bear Initiative
[664] Gitxsan Hereditary Chiefs Office, and Office of the Wet'suwet'en.
[665] The equity agreement provides 10 per cent share of the $5.5 billion project. From: Shari Narine, "Wording of Enbridge equity agreement draws criticism" Vol 19 2012 (8) Alberta Sweetgrass at <http://www.ammsa.com/publications/alberta-sweetgrass/wording-enbridge-equity-agreement-draws-criticism>
[666] There were complaints that Métis Groups, having no land rights in British Columbia were signatories.

Accommodation in Route Alignment Alternatives

Originally, in the PIP filed in November 2005 the preliminary route avoided Indian Reserves.[667] The Application referred to Pipeline Route Rev. R where the pipeline route and Iosegun River crossing were revised to accommodate the interests of the Alexis Nakota Sioux Nation; the Hunter Creek and Chist Creek crossings were relocated to avoid salmon spawning areas identified by Aboriginal groups; the Bear Lake and Whitecourt pumping stations were considered for relocation at the request of McLeod Lake Indian Band and Alexis Nakota Sioux Nation respectively and other small changed to the pipeline route to avoid Indian Reserves.[668] The Update to the Application (Volume 3), which was filed in December 2010, referred to Pipeline Route Rev T, the Update to the Application (Volume 3), which was filed in January 2012, referred to Pipeline Route Rev. U. These revisions are incorporated in Pipeline Route Rev. V in the Update filed February, 2013[669] where the Bear Lake pumping station was relocated off of the Sas Mighe 32 Indian Reserve at the request of McLeod Lake Indian Band. In Alberta, the Alexis Nakota Sioux Nation requested pipeline route alignment onto their Reserve Lands, under confidential business agreements.

Commitment Table

Northern Gateway's aboriginal commitments also fell into several categories, with some addressed to individual groups and others to aboriginal groups generally and were given in response to various participants – not just aboriginal groups. These were often superseded by NEB approval conditions and included:

- Archeological discussions;[670]
- In Detailed Route Selection Hearings to discuss specifics of route selection;[671]
- Preferential economic benefits including training programmes, procurement and hiring;[672]
- Environmental monitoring by interested aboriginal groups engaged by Northern Gateway;[673]
- Environmental protection;[674]
- Mapping areas of cultural concern prior to construction [PTC]; [675]
- Reclamation;[676]

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[667] Northern Gateway Preliminary Information Package (October 2005) at 2-28.
[668] Northern Gateway Application Vol 3, *supra* note 318 at 4-5. See also Commitment No. 49, 117, 115 and 116
[669] Additional Evidence - Northern Gateway Pipelines Limited Partnership - Aboriginal Engagement and Public Consultation Update (A50587) (February 23, 2013) at <https://www.ceaa-acee.gc.ca/050/documents/p21799/86423E.pdf>
[670] Northern Gateway Commitments Table, *supra* note 562, Numbers 1-13 specific groups, 64, 86 and 209 CMT, 135 and a general commitment in 94 for the terminal area to meet with First Nations and the BC government.
[671] *Ibid,* Nos. 15 to 19, 52, 53, 121, 256 and No 14 to all First Nations in response to Federal IR.
[672] *Ibid,* Nos. 21, 22, 57, 58, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 46, 133, 263, 282, and 283; Generally Nos. 236 Economic benefits in response to JRP IR No. 1; Nos. 231 employment in maritime response and 223 training in the June 2013 Update. Procurement No. 235 and generally Nos. 229, 230, 233, 240, and 281 with goal of 15% aboriginal participation. in the Application and Updated Consultations.
[673] *Ibid*, Nos. 38, 169, 172, 258, 261 and 284; and generally, 370 Spill Response, 197 Application, and 257 JRP IR.
[674] *Ibid*, Nos. 39, 47, 60, 61, 150, 151, 152, 153, 157, 158, 159, 160, 162, 163, 164, 202, and 303; generally Marine Habitat 316, 317 and 345 Marine Compensation; and 203 Gaps in Wildlife Surveys.
[675] *Ibid*, Nos. 40, 41, 42, 55, 56, 940 and generally 178 in the Application.
[676] *Ibid*, Nos. 97, 341, 345, and generally 349 in response to JRP IR and 351 Employment.

- Noise abatement;[677]
- Culturally significant plants identification, removal and replacement;[678]
- Access Planning;[679]
- Emergency Planning especially with regard to water crossings;[680]
- Fresh and saltwater fisheries identification and compensation plans; and [681]
- Wetlands.[682]

There were numerous commitments for additional technical meetings with aboriginal groups, most of which had been completed, and various other commitments to individual groups.[683]

Trans Mountain's Aboriginal Engagement

Trans Mountain, in its application to the NEB (December 16, 2013)[684] included Volume 3B Aboriginal Consultation[685] describing its Aboriginal Engagement program focussing on,

- enhancing trusting and respectful relationships;
- sharing Project information such as the Project scope, routing options, safety and emergency response, scheduling, environmental field study components;
- negotiating group and community-specific protocols, capacity agreements, Letters of Understanding (LOUs), and Mutual Benefit Agreements (MBAs), as appropriate;
- facilitating TLU and TMRU studies, including TEK [ATK] and socio-economic research;
- identifying potential impacts and addressing concerns;
- discussing the adequacy of planned impact mitigation and opportunities; and
- identifying education, training, employment, and procurement opportunities.[686]

Included in the Aboriginal Engagement Program was the integration of TLU and TMU studies, and ATK into Project planning and the design of mitigation measures as appropriate.[687]

Trans Mountain's consultation started May 29, 2012, with letters from Ian Anderson, Trans Mountain's President, to over 100 Indigenous groups with a general project description, route map and project schedule requesting a response about how they wished to be engaged.

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[677] *Ibid*, Nos. 43, 44, 45 and 122.
[678] *Ibid*, Nos. 46, 51, 54, 144, 156, 219, 136, 201, 258, 259, and 278 Weed control.
[679] *Ibid*, Nos. 134, 265 and 343; generally, 199 and 206 in Application.
[680] *Ibid*, Nos. 138, 139, 143, 287-290, and 353-354; Generally, in Application 291 and 299 Water Crossings, 303 in TERMPOL, 355 IR West Coast and 985.
[681] *Ibid*, Nos. 146, 147, 148, 149; Generally, 300, 344.
[682] *Ibid,* Nos. Generally, 222 and 223.
[683] *Ibid,* Nos 98 Electrical service; Water use 221, 260 Water tanker filling; Salmon 102; Trapping 251-252; Safety 253; 255 and 104 for Education.
[684] Trans Mountain NEB Application (December 16, 2013). This is a multi-volume application that is listed under the Project Regulatory Documents at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2392873>. The Application is part of the first filings by Trans Mountain Pipeline ULC.
[685] Trans Mountain Aboriginal Engagement, *supra* note 546.
[686] *Ibid* at 3B-11.
[687] *Ibid* at 3-B12 to 3-B13.

In the Project Description (May 25, 2013)[688] the Trans Mountain said that the Alberta segment of the Project would Traverse Treaty No. 6 and Treaty No. 8 lands but did not traverse any Indian Reserves. In British Columbia, the Project crossed 15 Indian Reserves as well as least 24 Traditional Territories.[689] In Alberta, an Engagement Area of 100 km was applied to the corridor, in British Columbia, traditional Territories information from the BC Treaty Process were used with a 10 km buffer zone to form an Engagement Area. Métis groups with potential interest include Métis Nation British Columbia and the British Columbia Métis Federation and Métis Nation of Alberta (Region 4).[690] Trans Mountain organised 5 Regional Teams for consultation along the Project,[691] with a defined process of preliminary notice, meetings with the elected leadership with subsequent discussions subject to the wishes of the relevant group.[692]

Trans Mountain filed an application with the NEB for approval on December 16, 2013, and said,

> Trans Mountain has executed 46 agreements including Letters/Memorandums of Understanding, capacity funding, and integrated cultural assessments with an aggregate total dollar commitment to date for capacity funding in excess of $6 million. Additionally, a total of 37 communities have participated in [TLU] studies, 9 communities in [TMRU] studies, and 28 communities in [ATK] studies. ….. Some, although relatively few, have refused to engage at all, on the basis that they oppose oil pipelines in principal or believe that consultation is a Crown duty and cannot be delegated to the proponent.[693]

Engagement activities have been carried out using a variety of communication tools, including face-to-face meetings, phone conversations, letters and emails.

Agreements with Indigenous Groups

Trans Mountain entered into several agreements with Aboriginal Groups under the Community Benefits Program, including Letters of Understanding, MOU containing funding agreements for third-party studies such as TLU, TMRU, a Stó:lō Integrated Cultural Assessment [ICA], and IBA's known as Mutual Benefit Agreements. Trans Mountain said,

> Trans Mountain, collectively with Aboriginal communities and others, is seeking to provide procurement, employment, and workforce development opportunities, and consider Mutual Benefit Agreements. A $1.5 million funding program has been established to contribute to education and training initiatives that focus on pipeline construction and

[688] Project Description NEB (May 25, 2013) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/956916>.
[689] *Ibid* at 45, Indian Reserves at Table 3-1 on page 42, Grass No. 15 Indian Reserve was shared by Aitchelitz First Nation, Kwaw-kwaw-apilt First Nation, Shxwha:y Village, Skowkale First Nation, Skwah First Nation, Soowahlie Indian Band, Squiala First Nation, Tzeachten First Nation, and Yakweakwioose First Nation.
[690] *Ibid* at 45.
[691] Trans Mountain Aboriginal Engagement, *supra* note 546 at 3B11 to 3B12. Regions were Edmonton to BC Border, BC Border to Kamloops; Kamloops to Hope; Hope to the Burnaby Terminal–Burrard Inlet; and the marine corridor from Burrard Inlet to international waters.
[692] *Ibid.* In order: project announcement; initial contact with Aboriginal community or Aboriginal group; meetings with Chief and Council, and meetings with staff; negotiate and execute confidential LOU/capacity agreement; host community information session(s); conduct TLU/TMRU/TEK studies; identify interests and concerns; review key mitigation options; provide additional capacity funding, if required; and negotiate and execute confidential MBA.
[693] Trans Mountain Aboriginal Engagement, *supra* note 546, at 3B-1 to 3B-2.

> related skills that are transferable and allow for employment in many work environments. Through our Aboriginal Procurement Policy, Trans Mountain is actively working to connect with Aboriginal businesses offering services or products relevant to Project construction or operation. Where new investment in oil spill preparedness and response capacity is required, Trans Mountain will seek to maximize the benefit to Aboriginal communities along the pipeline or marine route. [694]

Like Northern Gateway, those agreements were confidential and are unavailable for review.

Practical Proponent Accommodation

Michel First Nation requested that reclamation plans replant native species to a similar pre-disturbance state (Calliou Group 2014). Stó:lō community members identified numerous historical, cultural resources and sacred sites[695] which the proponent offered practical accommodation measures.[696]

Lower Nicola Indian Band expressed concern about potential disturbances to unrecorded pit houses located on the north end of Zoht IR No. 4 (Lower Nicola Indian Band 2014) and they requested "that locations be left undisturbed and an Elder be consulted about the locations of these sites". [697] Lower Nicola Indian Band expressed concern about potential disturbances to burial sites, the cemetery at Zoht IR No. 4 is near the existing pipeline and Lower Nicola Indian Band does not want this cemetery to be disturbed (Lower Nicola Indian Band 2014).[698] The Trans Mountain responded "[i]n the event archaeological, palaeontological or historical sites are discovered during construction, follow the contingency measures identified in the Heritage Resources Discovery Contingency Plan (Appendix B of Volume 6B) (Filing ID A3S2S3)."[699]

Route Changes – Reserve Lands

Route alignments were proposed by Trans Mountain to avoid existing Reserve land crossings, often as a negotiating tactic to obtain support for the Project. The reasons for this were simple, if counter-intuitive: *if the Project was located on a Reserve* there would be ongoing fees for

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[694] Trans Mountain Aboriginal Engagement, *supra* note 546, at 3B-1 to 3B-2.
[695] *Ibid* at 4-28 to 4-29. These included 6 burial sites, 11 Sxwo:yxwey places, 18 puberty places, 11 smilha/syuwel places, 10 historic bathing sites and 17 current bathing sites located within 100 m of the pipeline corridor edge. Exact locations of the identified sacred sites were incorporated in the ICA. Stó:lō community members identified the following concerns for sacred sites during the TLRU for the Project including: protection of spiritual places for future generations; and loss/damage to cultural sites or cultural landscape features. Several sacred sites were identified within the proposed pipeline corridor during the TLRU study. It was requested that several mitigation measure be used for any identified sacred sites, including in part: changing the alignment; minimize visual, auditory and other sensory impacts; adhere to seasonal or time constraints for scheduling construction near spiritual sites; establish barriers to prohibit increased public and crew access to cultural areas, while maintaining Stó:lō access; and integration of, and support for, Stó:lō spiritual works as may be required throughout the construction and operation process.
[696] *Ibid.* These were agreed to subject to discussion at the time of detailed design and actual construction.
[697] Proponent Technical Update No. 4 (December 1, 2014) Part Two available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2578721> Filing is at B291-30 - Part_13_Traditional_Land_Resource_Use_Supplemental_Report - A4F5D1.pdf at 4-9.
[698] *Ibid* at 4-13
[699] *Ibid* at 5-8.

easements that went to Ottawa for the benefit the Reserve Nation(s) *but* the possibility of property taxes on infrastructure under a Band Council Resolutions that would go directly to the Reserve Nation(s) *and* the possibility of confidential IBA that would compensate the First Nation or their business arm directly. For example:

- in the Proponent's Technical Update #1 (August 1, 2014)[700] Trans Mountain converted the previously proposed pipeline corridor that crossed the Ohamil IR, that the Shw'ow'hamel First Nation preferred, into the alternative pipeline corridor because of the inability to reach an agreement on the proposed routing on Reserve lands with the Shw'ow'hamel First Nation;
- in the Proponent's Technical Update #2 (August 22, 2014)[701] the proposed pipeline corridor in the Hope to Burnaby Segment would have gone around the Matsqui Main No. 2 Indian Reserve but following confidential negotiations the new proposed route crossed 146 m of the Reserve;
- in the Proponent's Technical Update #1 (August 1, 2014) [702] the Proponent has considered several corridor options in the vicinity of Peters IR No. 1A, the previous preferred corridor crossing the northeast of the Reserve, a corridor following the highway that may or may not cross the Reserve with the notation that the Peters Band had only recently commenced discussions.

The Appendix in the Proponent's Updated Answer to the NEB IR No. 3 dated July 31, 2015,[703] listed the Indian Reserves that the Project would go through as follows:

1. Zoht IR No. 5, Zoht IR No. 4 and Joeyaska IR No. 2 held by Lower Nicola Indian Band;
2. Popkum IR No. 1, held by Popkum First Nation;
3. Tzeachten IR No. 13, held by Tzeachten First Nation; and
4. Matsqui Main IR No. 2, held by Matsqui Nation.

The requested pipeline route, subject to negotiations with the groups, would not go through:

1. Coldwater IR No. 1, held by Coldwater Indian Band;
2. Ohamil IR No. 1, held by Shxw'ow'hamel First Nation;
3. Grass IR No. 15, held by Aitchelitz First Nation, Kwaw- kwaw-apilt First Nation, Shxwha:y Village, Skowkale First Nation, Skwah First Nation, Soowahlie Indian Band, Squiala, First Nation, Tzeachten First Nation, Yakweakwioose First Nation (represented by TTML).

Trans Mountain Commitment Table

Trans Mountain aboriginal commitments also fell into several categories, with some addressed to individual groups and others to aboriginal groups generally and were given in response to various

[700] Proponent Technical Update No. 1 and Consultation Report #2 (August 1, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2490918>, <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2491129>. That document is B248-10 - Trans_Mountain_Pipeline_ULC_Tech_Update_1_Cons_Update_2_Part_1_Routing_Pt09 - A3Z8F3 at 36 to 39.
[701] Proponent's Technical Update #2 (August 22, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2499084>. Routing Update is B255-3 - Part_1_Routing_Update - A4A4A5 at 8.
[702] Proponent Technical Update No. 1 and Consultation Report #2 (August 1, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2490918>, <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2491129>. That document is B248-10 - Trans_Mountain_Pipeline_ULC_Tech_Update_1_Cons_Update_2_Part_1_Routing_Pt09 - A3Z8F3 at 39 to 44.
[703] Proponent's Updated Answer NEB IR No. 3 (July 31, 2015) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2809348>.

participants – not just aboriginal groups. These were often superseded by NEB approval conditions and included:

- Routing on Reserve with permission only and Alternate routes after investigation; [704]
- Archeological information review;[705]
- Environmental monitoring by aboriginal groups to be employed by Trans Mountain;[706]
- Preferential economic benefits including training programmes, procurement and hiring;[707]
- Notification of construction and operations with contact listings;[708]
- Access planning and issues;[709]
- Emergency planning and issues;[710]
- Environmental matters;[711]
- Culturally significant vegetation, salvage, and replacement;[712]
- Reclamation;[713]
- Fisheries, marine protection and compensation;[714]
- Safety and security planning;[715]
- Ongoing consultation meetings;[716] and
- General commitments respecting worker training, replacement water supplies, hydrostatic water disposal, trapline compensation and Project use of Indigenous place names.[717]

5.6.1.3 Comparison of Proponent Consultation in Northern Gateway and Trans Mountain

There are substantial similarities in the aboriginal consultation process by both Proponents, such as the language of the engagement policies, informing groups about the project, leaving the level

[704] Trans Mountain Commitment Table, *supra* note 562, Generally Nos. 2 and 466 relating to On-reserve routing; 76 ROW to take into account community features and events and 893 Alternate Routes. Detailed Routing Hearings, after approval, require aboriginal input in the NEB process.
[705] *Ibid*, Nos. 334, 754, 1601, 3273, and generally 691-692 for Alberta Métis.
[706] *Ibid*, Nos. 45696, 702, 706, 2122, 1622, and generally 7, 113, 271 and 888.
[707] *Ibid,* Nos. 3570-3571, 3582-3583, 1642, 1644-1647, 3580-3581 all made to the Sto:lo Collective; generally 952, 972, 397, 440, 114 and 451Training Plan, 445, 14, 442, 447, 452, 3579, with 2942 and 2995 for Métis.
[708] *Ibid,* Nos. 698, 1660, 1655, 2125, and generally 1941, 80, 95, 436, and 895.
[709] *Ibid,* Nos. 854, 3591-92, 1640, 1626 and generally 260.
[710] *Ibid,* Nos. 255, 778, 864, 898, 1615, 1617-1619, 1631, and generally 686, 757, 869.
[711] *Ibid,* Nos. 70, 295, 316, 597-598, 755, 758 WC, 855 - 856, 936, 1620, 1629-1630, 1634-1637, 3739, 581, 431, 1310, 1522, 575, 585-586, 605, 793, 797, 801-802, 805, 810, 862, 258, and generally 307, 441, 259 Spotted Owl, 267 Grizzly, 268 Follow-up Programmes 269 WC, 408 Marine Offset, 459 Social Effects Monitoring, 488, Freshwater fish, 571fish and fish habitat, 335-336 Avian, 951SEA, 1471 MMP, 1576, 257, and 604.
[712] *Ibid,* Nos. 1625, 1628 Weed, and generally 100 and 443.
[713] *Ibid,* Nos. 699, 808, and generally 261, 265, 695, and 857.
[714] *Ibid,* Nos. 3023, and generally 266, 1707, 3002, and 264.
[715] *Ibid,* Nos. 91, 859, 1659, 3586, 245, 570, 577, 584, 866, 3590, 3589, 1638.
[716] *Ibid,* Nos. 1, 3, 9, 183, 743, 795, 874, 896, 1006, 1611, 1612-1614, 1616, 1623-1624 1627, 1630, 1633, 1639, 1644-1643, 1648, 1656, 1661, 2519-2520, 2522-2528, 2530, 2533-2535, 2538-2540, 2542, 2544-2546 and 3595, generally 8 Ongoing, 18, 551, 697, 2899 Westridge and 2466.
[717] *Ibid,* Nos. Training 1651-1653, 1658 Code of Conduct, and 1960 ATV use; Water supplies 756 Boil water advisories, 2495 and 3603; Hydrostatic disposal 5; Trapping compensation 2677 and Indigenous name use 1634.

of engagement to the group, similar capacity funding agreements, communication options, and incorporation of TLU, TRMU and ATK provided by groups into the design of the Project.

There are differences between the aboriginal engagement process, including:

1. Aboriginal Opposition – Different Timelines?

Northern Gateway started aboriginal engagement in 2002 with planning discussions with aboriginal groups over the proposed route, the PIP describing the Project was filed on October 2005.[718] There was a break from November 27, 2006 with Northern Gateway citing economic concerns suspended the formal EA,[719] only to revive the process on June 18, 2008.[720] This long lead time of 7 years arguable lead to the growth of aboriginal and environmental groups awareness of the proposed Project and the creation of entrenched opposition. Northern Gateway's aboriginal engagement was conducted in the early days of consultation and accommodation for aboriginal groups; this coupled with the greenfield nature of the project would lead to inevitable errors.

In contrast, Trans Mountain's aboriginal engagement started May 29, 2012, the Project Description was filed on May 25, 2013[721] with the formal application for approval to the NEB on December 16, 2013. This compressed timeline, combined with the brownfield nature of the project may have lessened non-coastal aboriginal groups opposition. Trans Mountain's engagement would benefit from more legal definition, the lessons from Northern Gateway and arguably established local relations with affected communities from 50 years of operation.

It can be argued that the Northern Gateway's lengthy consultation process raised public awareness of export pipelines generally. It appears that public interest was equally high between the two Projects. In the EA of Northern Gateway, the Panel Report said,

> [p]ublic hearings for the proposed project attracted a high level of public interest. There were *206 intervenors*, 12 government participants, and 1,179 oral statements before the Panel. Over 9,000 letters of comment were received. The Panel held 180 days of hearings, of which 72 days were set aside for listening to oral statements and oral evidence. [722]

In Trans Mountain, the NEB issued a direction (December 31, 2013)[723] to publish notices informing the public that they could apply to participate by February 12, 2014, and the NEB issued a Ruling on Participation (April 2, 2014) to all parties, stating,

> [t]he Board reviewed 2,118 Applications to Participate (ATPs). This includes six ATPs that were filed late [and accepted] and excludes those that were withdrawn.

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[718] Northern Gateway PIP, *supra* note 547.
[719] Northern Gateway Withdrawal Letter (November 27, 2006) at <http://www.ceaa-acee.gc.ca/050/documents/30175/30175E.pdf>
[720] Northern Gateway Resumption Letter (June 18, 2008) at <http://www.ceaa-acee.gc.ca/050/documents/29968/29968E.pdf>
[721] Trans Mountain Project Description NEB (May 25, 2013) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/956916>.
[722] *Considerations, supra* note 213 at page 4.
[723] NEB Call for Applications to Participate (December 31, 2013) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2398619>.

Of the 2,118 ATPs reviewed by the Board:

- *400 requested intervenor status and have been granted intervenor status;*
- 798 requested commenter status and have been granted commenter status;
- 452 requested intervenor status and have been granted commenter status; and
- 468 have been denied.[724]

Another consideration is government opposition to the project, while some interior municipalities in British Columbia had concerns in the EA of Northern Gateway, the City of Kitimat where the terminus was located did not. In contrast, the EA of Trans Mountain, the City of Burnaby with the terminus, the City of Vancouver with its harbour transited by tankers and the Province of British Columbia continue to object to Trans Mountain.

2. Executive Involvement

Northern Gateway's initial engagement in 2002 with aboriginal groups was a "feasibility analysis stage, [and] these contacts were general in nature because the decision to proceed with the Project had not been made" and appear to have involved junior personnel such as planners, engineers and other technical experts overseen by an "Aboriginal affairs manager."[725]

In contrast, the Trans Mountain aboriginal consultation started May 29, 2012, with letters from Ian Anderson, the President of the Trans Mountain and a personal commitment to ensure an "open, responsive and thorough" consultation.[726] Mr. Anderson personally lead consultation meetings with approximately 21 First Nations.[727]

The contrast is striking between the initial general enquiries to familiarize the Northern Gateway Project with Indigenous communities in the general area and Trans Mountain's approach with a defined project and a personal commitment from a decision maker in requesting consultation. The importance of high-level proponent aboriginal consultation was reinforced by the change in procedure used by Northern Gateway in March 2013 when it, revised its strategy to involve senior executives in meetings with Indigenous communities.[728]

3. Public advisory groups

In the Northern Gateway PIP, it was noted that:

> *In addition to ongoing meetings with community Elders and the elected leadership*, the Aboriginal communities and agencies have received or will receive invitations to participate in community open houses. Offers are also being made to hold meetings in Aboriginal communities in conjunction with the open house meeting schedule, therefore

[724] NEB Ruling on Participation (April 3, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2445932>.
[725] Northern Gateway Preliminary Information Package (October 2005) at 4-8 to 4-9.
[726] Trans Mountain Application Volume 3 available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2385938>. These letters are attached as Appendix D to Volume 3 as document B1-43 - V3B_APPD_01_OF_02_ENGAGE_LETTERS - A3S0U9.pdf.
[727] *Ibid* at 3B-25 to 3B-68.
[728] *Considerations, supra* note 213 at 35

> providing everyone similar opportunities to learn about the ESA [Environmental and Socio-Economic Assessment] and offer their input.[729]

This gave the impression that Northern Gateway was looking to go around the elected leadership of Aboriginal groups and engage community members directly. Also, Northern Gateway encouraged participation in Community Advisory Boards [CAB], "as an opportunity for meaningful exchange between Northern Gateway, Aboriginal groups, local communities, industry, stakeholders and the public."[730] The majority of Aboriginal communities contacted, 28, did not respond to this urging and 4 outright rejected this concept or called for an Aboriginal only advisory body. In early 2009, Northern Gateway proposed a small working group, the Quantitative Risk Assessment (QRA) Working Group, comprising Aboriginal groups and environmental and local community organizations.[731] This incorporation of Aboriginal rights holding groups into public advisory boards equated their comments with the general public, a practice that was deprecated in *Mikisew*.[732]

Trans Mountain, in contrast used a defined process of consultation: after notification to Chief and Council *prior* to hosting community information sessions with Public Open Houses "held in communities along the pipeline corridor throughout 2012 and 2013 where Aboriginal community members were invited to attend but members of the Aboriginal engagement team attended to provide information, address questions, and host members from the Aboriginal communities in attendance."[733] This procedure would ensure direct communication as to aboriginal concerns with Trans Mountain's aboriginal engagement team.

4. Rights assessment and incorporation

It can be argued that Northern Gateway's blanket assessment of treating differing aboriginal claims as equally valid, as described above – exacerbated distrust in overlapping claims from Aboriginal groups. In contrast, Trans Mountain's aboriginal engagement activities, appeared to be tailored to specific groups and claims with overlapping claims being acknowledged but not with efforts in "refining traditional territory maps … including overlaps or shared territories."[734] Generally both projects relied on environmental mitigation to address impacts on Aboriginal rights.

5. Equity Agreements v Mutual Benefit Agreements

Northern Gateway used confidential Equity Agreement with a fixed 10% share of the Project to be shared by Aboriginal groups with 80 groups participating of 180 potential groups. In contrast, Trans Mountain negotiated confidential Mutual Benefit Agreements with separate Aboriginal groups, with 43 MBA's concluded – 10 in Alberta out of 131 potential groups.[735]

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[729] Northern Gateway PIP, *supra* note 547 at 4-9 [*Emphasis* added].
[730] Northern Gateway EIS *supra* note 545, Vol 5 at 3-28 to 3-30. The 4 CAB meetings are described at 3-30 to 3-37.
[731] *Ibid* at 3-37 to 3-38. Seven QRA Working Group meetings were held during 2009 and 2010
[732] *Mikisew, supra* note 17 at para 64 "The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users)."
[733] Trans Mountain Aboriginal Engagement, *supra* note 546, at 3B-17
[734] *Supra* note 568.
[735] Trans Mountain website at <https://www.transmountain.com/indigenous-peoples>.

6. Funding Capacity

There appear to be differences in funding: Northern Gateway saying: "in aggregate, it provided $10.8 million to Aboriginal groups,"[736] while Trans Mountain said it "has provided more than $13 million in capacity funding" for conducting traditional land use or marine use studies.[737]

The scope and impact of these differences is uncertain but suggest that Trans Mountain had a *better aboriginal consultation process* than Northern Gateway, although it did have the benefit of developing law and practice. However, both proponent aboriginal consultation processes received approval, the NEB, in Trans Mountain[738] and reluctantly in Northern Gateway[739] where the JRP noted, that Northern Gateway did not engage in effective aboriginal consultation in all cases.[740]

5.6.2 EA Process Export Pipelines Northern Gateway and Trans Mountain

The EA process for each Project was different with a Joint Review Panel holding public hearings in Northern Gateway whereas the NEB Review Panel public hearings in Trans Mountain were limited to oral testimony from aboriginal groups, with written evidence and arguments for all participants, all within tight timelines. At the time the EA was commenced for both projects no provincial EA was required, but a court level decision *Coastal First Nations v British Columbia (Environment)*[741] on May 5, 2016, about Northern Gateway, interpreting the applicable Equivalency Agreement to require a BC EA screening, as discussed below.

5.6.2.1 EA Process Northern Gateway

Northern Gateway submitted a Preliminary Information Package (October 2005) [PIP][742] on November 1, 2005, proposing the Project proceed immediately to a NEB Review Panel for an EA. The NEB issued an IR on December 22, 2005, to the Proponent for additional information to justify

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[736] *Considerations, supra* note 213 at 29. With $5.6 million of that amount provided to Aboriginal groups in British Columbia, including coastal Aboriginal groups.
[737] Trans Mountain's website at < https://www.transmountain.com/indigenous-peoples>.
[738] Trans Mountain Report, *supra* note 324 at 50 "…principles of thorough and effective consultation, an applicant must adequately demonstrate how it considered the input and information it received from potentially-affected groups, and that this is appropriately communicated back to those groups and individuals that provided input. The Panel *finds that Northern Gateway did not in all cases communicate in this manner*…. In the Panel's view, the company could have done more to clearly communicate to Aboriginal groups how it considered, and would continue to consider, information provided by them."
[739] *Considerations*, *supra* note 213 at 49. "The Panel finds that Northern Gateway has considered and, to the extent possible, incorporated the information provided by Aboriginal groups in its studies, design, and mitigation measures."
[740] *Ibid. Emphasis* added. Further "The Panel is of the view that these consultation activities, when undertaken with goodwill and commitment by all participating parties, would result in effective dialogue. This would lead to improved understanding and adaptive mitigation through initiatives such as the Fisheries liaison Committee, the initiation of scientific research to improve the knowledge of the existing marine environment, and to identifying any site-specific traditional use interests during detailed routing. The Panel finds that inclusion of Aboriginal groups in these and other processes would contribute to shared understanding of the project and its impacts, and the sharing of opportunities and successes, for the applicant and affected communities and people."
[741] *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34 [*Coastal First Nations*].
[742] Northern Gateway Preliminary Information Package (October 2005) at <http://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_21799/2075.pdf>

a direct recommendation,[743] and the response, filed on January 9, 2006,[744] noted significant public concern as a result of its public and aboriginal engagement since 2002.

EA Design

A direct Referral to Panel was issued on September 29, 2006,[745] with a Draft Panel Agreement [DPA][746] and Notice of Public Comment soliciting public comments on the DPA to close on November 27, 2006.[747] The JRP's jurisdiction and scope was set out in the terms of Reference in Appendix A and those terms included environmental assessment under CEEA-1992, satisfying the NEB's requirements and an agreement acknowledging an overlap between the JRP and TERMPOL Reports regarding marine traffic.[748] The Proponent, citing economic conditions in a letter dated November 27, 2006 asked to suspend the EA and record their preliminary comments on the DPA.[749]

The EA process was revived by a letter from the Proponent on June 18, 2008.[750] The Panel, on January 6, 2009, notified Indigenous groups by letter and on February 9, 20009 a Notice of Public Comment soliciting comments on the DPA to close on April 14, 2009.[751] The April 14, 2009, deadline was not enforced as many governments, public and aboriginal group comments dated after April 14, 2009, appear on the Registry.[752]

Crown Consultation – Separate Approach

The Approach to Crown Consultation was included, in the sample letter to Alexander First Nation of February 9, 2009, and involved several phases:

- Phase I – Preliminary Phase: Consult on JRP Agreement with the Agency and NEB providing information on their roles.
- Phase II – Pre-Hearing: The Agency and NEB provide information on the JRP process and encourage aboriginal groups to participate.
- Phase III – Hearing: Aboriginal groups and federal agencies with regulatory responsibilities for the project will participate in the hearing.

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[743] NEB IR#1 to Proponent (December 22, 2005) at <http://www.ceaa-acee.gc.ca/050/documents/37441/37441E.pdf>
[744] Proponent to NEB IR# 1 (January 9, 2006) at <http://www.ceaa-acee.gc.ca/050/documents/37442/37442E.pdf>
[745] Direct Referral (September 29, 2009) at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=80035>
[746] Northern Gateway Draft Panel Agreement (September 29, 2006) at < https://www.ceaa-acee.gc.ca/050/documents/29966/29966E.pdf>
[747] Notice of Public Comment (September 29, 2006) at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=17245>
[748] Northern Gateway Draft Panel Agreement, *supra* note 746 at 10.
[749] Withdrawal Letter (November 27, 2006) at <http://www.ceaa-acee.gc.ca/050/documents/30175/30175E.pdf>
[750] Resumption Letter (June 18, 2008) at <http://www.ceaa-acee.gc.ca/050/documents/29968/29968E.pdf>
[751] Public Comment Notice (February 9, 2009) at <https://www.ceaa-acee.gc.ca/050/evaluations/document/91402 >
[752] There is correspondence dated May 6, 2009 from the Agency to Office of the Wet'suwet'en encouraging them to participate and extending the deadline until June 8, 2009 Agency Letter to Office of the Wet'suwet'en (May 6, 2009) at <http://www.ceaa-acee.gc.ca/050/documents/37982/37982E.pdf>. The Office of the Wet'suwet'en responded on June 8, 2009 calling for among other things input into the design of EA at <http://www.ceaa-acee.gc.ca/050/documents/38452/38452E.pdf>.

- Phase IV – Report/Decision: Crown consultation will be carried out on the JRP Report prior to consideration of project approval by the Governor-in-Council [GIC].
- Phase V – Regulatory/Permitting: If additional consultation is required on permits or authorizations which federal departments are required to issue, the Crown will appoint a federal department to lead any consultations that may be required.

The Agency was the contact for the Crown for project related matters raised by Aboriginal groups outside of the mandate of the JRP in all phases and the Crown Consultation Coordinator.

Guidelines to Proponent & Aboriginal Groups

On August 10, 2009, the Agency provided the Proponent with the *Scope of the Factors – Northern Gateway Pipeline Project: Guidance for the assessment of the environmental effects of the Northern Gateway Pipeline Project* (August 2009).[753] During the first week in November 2009 the Agency issued a form letter[754] to 108 Aboriginal groups enclosing:

- copy of the Proponent's guidance document;[755]
- *Updated Federal Aboriginal Consultation Framework* (November 6, 2009) for Northern Gateway prepared by the Agency;[756]
- Final Draft Northern Gateway JRP Agreement and Terms of Reference;[757] and
- *Consideration of Aboriginal Group Comments on the Draft Northern Gateway JRP Agreement* (October 22, 2009).[758]

The form letter asserted that the Final Draft JRP had been modified extensively in response to Aboriginal and public comments, with the scope expanded to consider marine transportation with the attached Scope of Factors providing guidance to the proponent on marine impacts.[759]

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[753] *Scope of the Factors – Northern Gateway Pipeline Project: Guidance for the assessment of the environmental effects of the Northern Gateway Pipeline Project* (August 2009) at <http://www.ceaa-acee.gc.ca/050/documents/44033/44033E.pdf>.
[754] Agency Form Letter (November 5, 2009) at <http://www.ceaa-acee.gc.ca/050/documents/40863/40863E.pdf>.
[755] *Supra* note 781.
[756] *Updated Federal Aboriginal Consultation Framework* (November 6, 2009) at <http://www.ceaa-acee.gc.ca/050/documents/40861/40861E.pdf>. This is not the current Federal Consultation Policy.
[757] The Final Draft Northern Gateway JRP Agreement and Terms of Reference (February 9, 2009) at <https://www.ceaa-acee.gc.ca/050/evaluations/document/93532>.
[758] *Consideration of Aboriginal Group Comments on the Draft Joint Review Panel Agreement* (October 22, 2009) at <http://www.ceaa-acee.gc.ca/050/documents/40862/40862E.pdf>. An Agency prepared Table as a response to requested changes to the DPA, with customizing to address that groups comments, if any, with general responses.
[759] *Ibid at 3.* Saying "[t]he mandate in sections 6.5, 8.1 and 8.2 in the final draft JRP agreement specifies that the JRP will receive information related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the project and the impacts that the project may have on these rights. In addition, the scope of the project has been expanded to include marine transportation;" which "was developed in consideration of comments received. The primary purpose of this document is to provide additional guidance to the proponent on the assessment of environmental effects associated with the marine components of the project."

JRP Panel Agreement – EA Commences

The Agency issued the Final JRP Agreement (December 4, 2009).[760] The JRP Agreement was amended August 12, 2012[761] to account for the amendments in *CEEA-2012*, impose a time limit of 543 days, and absent delays, the Panel Report was due December 31, 2013.[762]

EIS – Panel Procedural Direction

The Proponent filed an EIS on May 27, 2010,[763] which was added to and updated on August 18, 2010; December 17, 2010; and March 31, 2011. [764] Over objections from the Proponent[765] the Panel on July 5, 2010, prior to making a Hearing Order issued a Panel Direction for input from the public and aboriginal groups on the draft List of Issues; any additional information the Proponent should file; and locations for the Oral hearings with comments to close on September 8, 2010. [766] Many submissions were made from members of the public, aboriginal groups, governments, government ministries, competitors and environmental groups. The Proponent responded on October 28, 2010,[767] and in response to public comments released Technical Reports referenced in the EIS on October 26 to 29, 2010 as well as an updated EIS.[768] The Panel issued a document entitled *Response to Panel Sessions Enbridge Northern Gateway Project* (January 19, 2011)[769] with a revised List of Issues.

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[760] Northern Gateway Final JRP Agreement (December 4, 2009) [Northern Gateway JRP] at <http://www.ceaa-acee.gc.ca/050/documents/40851/40851E.pdf>. A further technical Amendment to the JRP was made on October 7, 2013 to permit a continuing appoint to the Panel and did not involve any substantive changes at <http://www.ceaa-acee.gc.ca/050/documents/p21799/95264E.pdf>

[761] Amendment to the Final JRP Agreement (August 12, 2012) at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=80690>. An unofficial consolidation was filed on August 27, 2012 Northern Gateway Amended Final JRP Agreement (August 27, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p21799/80935E.pdf>, A further technical Amendment to the JRP was made on October 7, 2013 to permit a continuing appoint to the Panel and did not involve any substantive changes at <http://www.ceaa-acee.gc.ca/050/documents/p21799/95264E.pdf>

[762] Transmittal Letter to Panel (August 3, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p21799/80716E.pdf>

[763] Northern Gateway EIS, *supra* note 545.

[764] Updated EIS (August 18, 2010) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=44742>; Updated EIS (December 17, 2010) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=47139>; and Update to EIS (March 31, 1011) General Oil Spill Response Plan at <http://www.ceaa-acee.gc.ca/050/documents/49401/49401E.pdf> and Volume 4 (Public Consultation) Update available at <http://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_21799/2478/v4update.pdf>.

[765] Proponent Letter (June 17, 2010) at <http://www.ceaa-acee.gc.ca/050/documents/43751/43751E.pdf>.

[766] Northern Gateway Panel Notice and Procedural Direction (July 5, 2010) at <http://www.ceaa-acee.gc.ca/050/documents/44010/44010E.pdf>. A Panel Direction FAQ (May 27, 2010) is at <http://www.ceaa-acee.gc.ca/050/documents/44011/44011E.pdf>.

[767] Proponent Response (October 28, 2010) at <http://www.ceaa-acee.gc.ca/050/documents/46421/46421E.pdf>

[768] Volume 6C: Environmental and Socio-economic Assessment (ESA) - Human Environment and Section 4.4: Regional Socio and Economic Effects (October 25, 2010) at <http://www.ceaa-acee.gc.ca/050/documents/46156/46156E.pdf>.

[769] *Response to Panel Sessions Enbridge Northern Gateway Project* (January 19, 2011) at <http://www.ceaa-acee.gc.ca/050/documents/47510/47510E.pdf>.

Panel Hearing Order

A Panel Hearing Order was issued on May 5, 2011,[770] setting the process, format, procedures, deadlines and a timetable for the Panel hearings and final Report (July 2012). It included Proponent Information Sessions in a number of communities in Alberta and British Columbia.

With the Hearing Order, additional information from the Proponent were considered Additional Evidence and the Proponent provided this on: June 8, 2011;[771] June 9, 2011;[772] and August 11, 2011.[773] The Panel issued 17 IR to the Proponent between May 27, 2011, and February 8, 2013, to which the Proponent responded.[774] The Panel issued Panel IR No. 1 to Transport Canada (October 31, 2011)[775] requesting details and update on the TERMPOL review. Transport Canada responded on November 24, 2011,[776] promising an update by December 22, 2011, and the updated Report was filed on February 23, 2012.[777]

Commencement of Public Hearings

After two rounds of evidence exchanges by IR, the Panel Commenced Public hearings on January 10, 2012, in Kitamaat Village, British Columbia. [778] The Panel constrained these public hearings to direct personal evidence and experiences. Prior to the Final Panel Hearings, the Panel issued proposed conditions on April 12, 2013, for comment from the Parties by May 31, 2013. Parties would have the opportunity to address the comments of other Parties on the proposed conditions during oral final arguments in Terrace, British Columbia, beginning on 17 June 2013.[779] The final Panel Hearings were held in Terrace B.C. on June 24, 2013.[780]

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[770] Hearing Order (May 5, 2011) at <http://www.ceaa-acee.gc.ca/050/documents/p21799/50036E.pdf>.
[771] Northern Gateway Additional Evidence (June 8, 2011) TERMPOL Surveys and Studies (A29571) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=50846>; Updates to Volume 5A Aboriginal Engagement available at and Volume 5B Aboriginal Traditional Knowledge (A29573) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=50854> ; and Hydrocarbon Mass Balance Estimates: Inputs for Spill Response Planning TDR (A29574) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=50855>.
[772] Northern Gateway Additional Evidence (June 9, 2011) - Volume 2: Economics, Commercial and Financing available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=50856>.
[773] Update to Volume 2 (Commercial Considerations) available at <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=51663>.
[774] Minor updates to IR not included.
[775] Panel IR#1 to Transport Canada (October 31, 2011) at <http://www.ceaa-acee.gc.ca/050/documents/p21799/83629E.pdf>
[776] Transport Canada Response to Panel IR#1 (November 24, 2011) at <http://www.ceaa-acee.gc.ca/050/documents/53562/53562E.pdf>
[777] Northern Gateway TERMPOL Report (February 23, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/57633/57633E.pdf>.
[778] Northern Gateway Hearing Transcript (January 10, 2012) at <http://www.ceaa-acee.gc.ca/050/documents/p21799/81596E.pdf>.
[779] Northern Gateway Hearing Proposed Conditions (April 12, 2013) at <http://www.ceaa-acee.gc.ca/050/documents/p21799/89010E.pdf>.
[780] Hearing Transcript (June 24, 2013) at <http://www.ceaa-acee.gc.ca/050/documents/p21799/90747E.pdf>.

Northern Gateway Panel Report

The Panel issued its Report on December 19, 2013, in two volumes. The first volume entitled *Connections: Report of the Joint Review Panel Report for the Enbridge Northern Gateway Project (Volume 1)* (December 19, 2013) [*Connections*][781] provided an overview of the Panel's EA of the Project and recommendations for approval subject to 209 conditions, including the Proponent's 450 commitments with conditions enforced by NEB. The Panel found:

> We recommend that project effects, in combination with cumulative effects, be found likely to be significant for certain populations of woodland caribou and grizzly bear. …*We recommend that the Governor in Council find these cases of significant adverse environmental effects are justified in the circumstances*.[782]

The second volume, *Considerations* contained an expanded rationale and additional details for the conclusions of the Joint Review Panel.

Aboriginal Accommodation Conditions

The Panel imposed minimal aboriginal accommodation conditions on the Project outside of requiring the Proponent to fulfill its commitments. The Panel found,

> … the general approach Northern Gateway used to assess the potential impacts of the project on Aboriginal interests to be acceptable.
> ……
> The Panel heard from Aboriginal groups that any potential biophysical impacts arising from the project could have impacts on other aspects of Aboriginal society such as governance systems, community structure, and traditional teachings and learning. The Panel accepts Northern Gateway's assessment that, during construction and routine operations, there would not be significant adverse effects to the biophysical resources used by Aboriginal groups or to the ecosystems that support these. Based on this finding, the *Panel finds that other associated or consequential impacts, such as those mentioned above, cannot be attributed to this project*. The Panel also finds, based on this finding, that there would not be significant adverse effects on the interests of Aboriginal groups that use lands, waters, and resources in the project area.[783]

Aboriginal complaints that the Proponent had not incorporated ATK and TLU information provided to them in the Project were rejected by the Panel. However, it did require the Proponent "to continue its consideration and incorporation of additional information it receives from Aboriginal groups as it proceeds to final design."[784]

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[781] *Connection: Report of the Joint Review Panel Report for the Enbridge Northern Gateway Project (Volume 1)* (December 19, 2013) [*Connections*] at <http://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_21799/97178/Considerations_-_Report_of_the_Joint_Review_Panel_for_the_Enbridge_Northern_Gateway_Project_(Volume_2).pdf>

[782] *Connections, supra* note 781 at 72. "We used a precautionary approach in arriving at our view. Despite substantial mitigation proposed by Northern Gateway, there is uncertainty over the effectiveness of Northern Gateway's proposed mitigation to control access and achieve the goal of no net gain, or net decrease, in linear feature density."

[783] *Considerations, supra* note 213 at 49.

[784] This was fleshed out in the 209 Approval Conditions in Appendix 1 to *Considerations*.

The Panel noted that,

> …principles of thorough and effective consultation, an applicant must adequately demonstrate how it considered the input and information it received from potentially affected groups, and that this is appropriately communicated back to those groups and individuals that provided input. The Panel *finds that Northern Gateway did not in all cases communicate in this manner*.[785]

Despite this assessment, 69 of the Panel's 209 conditions contemplated *additional consultation* with Aboriginal groups. The Panel said,

> The Panel is of the view that these consultation activities, when undertaken with goodwill and commitment by all participating parties, would result in effective dialogue. This would lead to improved understanding and adaptive mitigation through initiatives such as the Fisheries Liaison Committee, the initiation of scientific research to improve the knowledge of the existing marine environment, and to identifying any site-specific traditional use interests during detailed routing. The Panel finds that inclusion of Aboriginal groups in these and other processes would contribute to shared understanding of the project and its impacts, and the sharing of opportunities and successes, for the applicant and affected communities and people.[786]

The Panel rejected the views of aboriginal groups that the Project's impacts would eliminate the opportunity for Aboriginal groups to maintain their cultural and spiritual practices and the pursuit of their traditional uses and interests associated with the lands, waters, or resources.

While acknowledging there would be some adverse impacts of the Project, the Panel found those would be temporary.[787] It noted that, the interconnectedness that many parties pointed out, including the Proponent, that no industrial development can occur without impacts and said,

> The Panel is of the view that there are opportunities for potentially-affected Aboriginal groups to maintain and strengthen some aspects noted as being important to Aboriginal communities through project-related programs, such as Northern Gateway's commitment to ongoing wildlife studies, monitoring programs, and support for new education and language training opportunities.[788]

he Panel's 69 conditions that refer to aboriginal groups – fall into 2 categories, reporting on aboriginal consultation for various plans and programs for information and potential action; and three substantive consultation reporting for approval by the NEB to be undertaken by the

[785] *Considerations, supra* note 213 at 49, *Emphasis added.*
[786] *Ibid.*
[787] *Ibid* at 49 to 50. This included "…reduced or interrupted access to lands, waters, or resources used by Aboriginal groups, including for country foods, may result in disruptions in the ability of Aboriginal groups to practice their traditional activities. The Panel recognizes that such an event would place burdens and challenges on affected Aboriginal groups. The Panel finds that such interruptions would be temporary.
[788] *Considerations, supra* note 213 at 50.

Proponent: (1) prior to the detailed alignment phase; (2) pre-construction consultation; and (3) protection plans for post-AD 1846[789] culturally-modified trees (CMT).[790]

5.6.2.2 Trans Mountain EA Process

The original Trans Mountain Pipeline system under NEB Certificate OC-2 was planned in 1951[791] and constructed in 1952 through 1953 prior to environmental assessment legislation. The original pipeline was gradually upgraded to provide an operating capacity of 47,690 m3/d (300,000 bbl./d) using 24 active pump stations and 40 tanks.

The Proponent filed a Project Description with the NEB on May 25, 2013, for the expansion of the Trans Mountain Pipeline by way of constructing and operating two parallel lines and revising the Westridge Marine Terminal in Burnaby BC. [792] The NEB issued an Issues List for the Project (July 29, 2013) in the standard form with the addition of consideration of the maritime component as follows:

> 5. *The potential environmental and socio-economic effects of marine shipping activities that would result from the proposed Project, including the potential effects of accidents or malfunctions that may occur.*
> ….
> The NEB does not intend to consider the environmental and socio-economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline. [793]

Some 131 Indigenous Groups received an initial notice Letter from the MPMO, on August 12, 2013[794] indicating the federal Crown would be relying on the upcoming NEB hearings and the MPMO to fulfill Canada's duty to consult and accommodate aboriginal peoples.

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[789] This was the date of the Oregon Treaty (1846) when the British claims to sovereignty were settled *per Calder v Attorney-General of British Columbia*, [1973] SCR 313 at 321, see also *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC) at 145.

[790] Culturally Modified Trees of British Columbia: A Handbook for the Identification and Recording of Culturally Modified Trees, Version 2.0 (Victoria: British Columbia Government, 2001) at <https://www.for.gov.bc.ca/hfd/pubs/Docs/Mr/Mr091/cmthandbook.pdf>, Charles M. Mobley and Morley Eldridge, "Culturally Modified Trees in the Pacific Northwest" (1992) Vol. 29 (2) Arctic Anthropology 91

[791] Prior to the decriminalization of "Indians" hiring lawyers. Chief Joe Mathias and Gary R. Yabsley, "Conspiracy of Legislation: The Suppression of Indian Rights in Canada" (1991) B.C. Studies 89 (Spring 1991) at 38 "In 1927, the federal government amended the *Indian Act* [s. 141] to make it illegal for an Indian or Indian nation to retain a lawyer to advance their claims, or even to raise money with the intention of retaining a lawyer. Anyone convicted of this offence could be imprisoned." This prohibition was removed in the 1951 amendments to the *Indian Act*. It should also be noted that "Indians" had no unqualified right to vote in federal elections until 1960 or provincial elections with Quebec being the last province to do so in 1969, see "Aboriginal people: history of discriminatory laws", Library of Parliament Background Paper BP-175E, revised ed (Ottawa: Supply and Services, 1991) online at: <http://publications.gc.ca/Collection-R/LoPBdP/BP/bp175-e.htm>.

[792] Project Description NEB (May 25, 2013) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/956916>.

[793] Issues List for the Project (July 29, 2013) at <https://www.neb-one.gc.ca/bts/nws/nr/archive/2013/nr22-eng.html>. This is an archived press release; the actual List of Issues is not available on the NEB website. The links are either broken or go the current documents. [Additional conditions *emphasized*]

[794] NRC Notification (August 12, 2013) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/995067>.

The Proponent formally filed an application with the NEB for approval of Trans Mountain on December 16, 2013.[795] The Proponent filed Consultation Update #1 and Miscellaneous Errata (March 20, 2014)[796] which the NEB ordered to maintain the pagination in the original Application (April 23, 2014).[797]

Public Notice and ATP

The NEB issued a direction (December 31, 2013)[798] to the Proponent to publish notices informing the public that they could apply to participate in the EA by February 12, 2014, with any Proponent response to those applications by February 19, 2014; and rebuttals due March 4, 2014. The NEB followed up directly with letters to 151 Aboriginal groups on January 27, 2014, with the same information – noting that even if contacted in proponent consultation they still had to apply.[799]

There were 1,723 applications filed by members of the public and Aboriginal groups before the deadline. The United States Environmental Protections Agency [EPA] sought a two-week extension on February 12, 2014, which was denied on February 13, 2014, they applied again on March 14, 2014, seeking leave from the NEB for late filing with reasons.[800] The NEB responded in a form letter, sent to all late applicants, saying it would be issuing a Hearing Order once it had determined the Proponent's application was complete and at that time would notify all Participants.[801] The Proponent wrote to the proposed proponents and the NEB on February 19, 2014, taking no position on the applications to participate but suggested the interpretation of the legislation's standing provision being limited to those "directly affected or having relevant expertise."[802] This proposed interpretation was contested by numerous parties.[803]

Participation Ruling

[795] Proponent Application (December 16, 2013). The Application is a multi-volume electronic application and rather than listing all of the folders, an Exhibit List For Hearing Order OH-001-2014 (A61576) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2484704>. Trans Mountain Pipeline ULC A54-2 - B - Trans Mountain Pipeline ULC - A3Y9H2 is a hyperlinked PDF file organized in chronological order with all of the Application Volumes and maps there, excepting certain Errata as discussed below.

[796] Proponent Consultation Update #1 and Miscellaneous Errata (March 20, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2434443>.

[797] NEB Maintain Pagination Application (April 23, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2451300>.

[798] NEB Call for Applications to Participate (December 31, 2013) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2398619>.

[799] NEB Followed up letters (January 27, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2404547>.

[800] EPA Application (March 14, 201) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2432169>.

[801] NEB Form Letter – EPA (March 14, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2432167>.

[802] Proponent Standing Letter (February 19, 2014) at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2423769>

[803] The City of Vancouver; Mac Nelson; EcoJustice; Lyakson First Nation; Christine Cunningham; Environmental Law Centre – University of Victoria on behalf of BC Nature and Nature Canada; Graham Hallson; Pachdeet First Nation; the Swinomish, Tulalip, Suquamish, and Lummi Indian Tribes and NS Nope; with late letters from Fredrick Holl Phd; and June Wells that were not considered by the NEB.

The NEB issued a Ruling on Participation (April 2, 2014).[804] In its ruling, the NEB referred to the Proponent's proposed interpretation as wells as other commentators' interpretations.[805] In the NEB's view, the CEAA-2012 amendments established time limits for reporting and the new section 55.2 that gives discretion to the NEB to "consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise." In considering the ATP, the NEB said it would be guided on a case-by-case basis by "section 55.2 of the NEB Act, the List of Issues (to determine the relevance of the issues people wish to address), and the Guidance Document" taking into account the facts and circumstances of each application, and the information provided in the completed ATP Form.[806]

Directly Affected - The NEB said when it assesses whether a person or group was "directly affected it would look at how the person uses the project area and project's environmental effects on that use of the area, and closer these elements are connected (their proximity), the more likely the person is directly affected. The Board also considers interests and direct effects that that are commercial or financial (including employment) as well uses of land and resources for traditional Aboriginal purposes. The NEB considered all the information in the filed ATPs, including the address or any references to locations, and compared this to the location of the pipelines or marine shipping corridor. So long as the applicant demonstrated a reasonable probability of impact, they would receive standing. A general community interest not sufficient. When an applicant raised an issue outside the List of Issues, the obligation was on the applicant in the ATP to show why it is a specific and detailed interest that was directly affected.[807]

Relevant information or expertise - The NEB said in determining whether an applicant has relevant information or expertise, it considers whether the applicant has met the onus of showing possession of relevant information or expertise. Noting the Proponent had misquoted this aspect, it said it had discretion to receive that information and would provide an opportunity for some type of participation.[808]

Participation – After the standing determination, the NEB proceed to assess what process and participation rights were most appropriate for a person to have his or her representations considered and which meets natural justice requirements on a case-by-case basis, as follows:

- Intervenors: they are either directly affected by the proposed project or are in possession of relevant information or expertise that will assist the Board in its assessment.
- Commentator: participants who requested this status were given this, participants who sought Intervenor status but received Commentator status where the NEB determined that the person

[804] Ruling on Participation (April 3, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2445932>.
[805] *Ibid. Ruling on Participation at 3-4*
[806] *Ibid* at 2 "The ATP form indicated that applicants must clearly describe their interest in relation to the List of Issues, which was replicated in the form itself. To convey the importance of providing enough information for the Board to consider an applicant's request for standing, it was emphasized that "If you do not provide sufficient information on this ATP Form, you will not be allowed to participate "" – Note this was limited in the form to 500 words. The City of Vancouver had noted that the Proponent's Standing Letter involved 6,000 words to this issue.
[807] *Ibid* at 5.
[808] *Ibid.*

> was directly affected, but an intervenor method of participation was not appropriate or necessary for the concern raised.[809]

The NEB granted participation to 1,650 applicants (78%), the balance were denied as they did not meet the standing test.[810] The NEB provided three lists: Intervenors, Commentators that were updated throughout the proceedings and persons denied standing attached to the Participation Ruling. Several late ATP were received and granted on condition that prior issues would not be re-opened with the appropriate status being given.[811]

Completeness Direction

The NEB Issued an Application Completeness determination to the Proponent (April 2, 2014),[812] engaging the 15-month time limit for an EA Report.

Hearing Order

The NEB issued a Hearing Order (April 2, 2014) [813] and was updated throughout the proceedings with the List of Issues attached.

The NEB issued a Direction on CEAA-2012 Environmental Assessment Issues (April 2, 2014),[814] stating the Project was a designated project under CEAA-2012 and the NEB was a RA for that EA and accordingly, it would conduct an environment assessment,

> The Board has determined that the potential environmental and socio-economic effects of increased marine shipping activities to and from the Westridge Marine Terminal that would result from the designated project, including the potential effects of accidents or malfunctions that may occur, will be considered under the NEB Act (see the NEB's Letter of 10 September 2013 for filing requirements specific to these marine shipping activities). To the extent that there is potential for environmental effects of the designated project to interact with the effects of the marine shipping, the Board will consider those effects *under the cumulative effects portion of the CEAA 2012 environmental assessment*.[815]

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[809] *Ibid* at 11. These included concerns over: temporary effects from construction do not require intervenor status and where marine operations were a concern, the more specific nature of those concerns would give the participant Intervenor status; effects of accidents/malfunctions, generalized concerns could be addressed as a commentator, unless specific demonstration of impacts to interests was made – municipalities qualify as Intervenors on this basis; and relevant information and expertise that can best be collected in documentary form.

[810] *Ibid.* Some denied applicants lived in other areas, expressed general concerns or support for the Project with other applicants not providing any explanation. Some applicants raised matters outside of the NEB's jurisdiction such as "oil sands development, climate change, sustainable energy alternatives, or were related to issues that were not specific to the particular applicant or to the project."

[811] In total 15 late ATP's were processed from Melody Richards (April 3, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2450894> to Commentator Status for the Pacific Pilotage Authority (May 28, 2015) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2786476>.

[812] NEB Completeness Ruling (April 3, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2445713>.

[813] NEB Hearing Order (April 3, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2445930>.

[814] NEB Direction on CEAA-2012 Environmental Assessment Issues (April 2, 2014) [Scoping Decision] available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2445374>.

[815] *Ibid* at Attachment page 1 [*Emphasis added*].

NEB Evidence

The NEB, the Proponent, and Intervenors went through five rounds of evidence exchanges from the NEB IR#1 to the Proponent on April 15, 2014, [816] and NEB Draft Conditions (April 16, 2014)[817] to closed of the public record with the filing of the Proponent's Reply Argument on February 17, 2016.

Evidence exchanges involve filing rounds of Information Requests [IR] asking questions from the NEB, Proponent or Intervenors about another Participant's filed written evidence and filing Reponses from that Participant to the questions in the IR. Applications could then be made by Participants, by way of Notice of Motion to the NEB to declare those Responses inadequate and compel additional answers. Evidence exchanges were massive undertakings, for example in the first round the Proponent sought an extension on May 28, 2014[818] to respond noting that they had received over *10,000 questions from 122 Intervenors*. [819]

Equally motion days were busy, for example, the NEB in Ruling No. 33 ruled on September 26, 2014[820] on approximately 50 motions to compel, involving approximately 2,000 requests for full and adequate answers to IRs. It said: "in considering a motion to compel full and adequate responses to IRs, the Board looks at the relevance of the information sought, its significance, and the reasonableness of the request."[821] The bulk of the applications to compel were denied, for example the NEB issued Ruling No. 63 on April 27, 2015[822] dealing with motions to compel additional responses 69 intervenors who asked approximately 5,700 questions of the Proponent during the second round of IRs. The NEB received motions from 26 of those intervenors, involving 1,379 requests for fuller answers, of those 88 requests were withdrawn, as the Proponent and of the remaining 1,291 requests l NEB compelled further information in only 32 instances.

Throughout the EA Process for Trans Mountain the NEB Review Panel issued: 122 Rulings on Notice of Motion by the Parties, on interpretation of the Panel Mandate and the adequacy of answers by Parties; and 20 Procedural Directions regarding scheduling and other matters.

Some notable rulings include:

[816] NEB IR#1 Proponent (April 15, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2450383>.
[817] NEB Draft Conditions (April 16, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2450980>.
[818] Proponent NOM Extension (May 28, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2478059>.
[819] NEB Ruling #17 Re Extension (June 2, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2477664>. The Board granted an extension to June 18, 2014.
[820] NEB Ruling 33 Compel Intervenor IR#1 (September 26, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2524448>.
[821] *Ibid* at 2.
[822] NEB Ruling No. 63 (April 27, 2015) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2774066>.

1. Jurisdiction Enquiry

The NEB responded on May 15, 2014[823] to jurisdiction enquiry from the Tsleil-Waututh Nation [TWN] (April 22, 2014)[824] asking about cooperation under CEAA-2012, and the NEB responded on March 4, 2014, and noted TWN's ATP as an Intervenor asking if the cooperation requested would be beyond that of an Intervenor and details about the TWN's environmental assessment. There was no response, and this was the genesis of the *Tsleil-Waututh No 1* discussed below. The TWN updated the NEB periodically and filed its Assessment Report with its Written Evidence on May 26, 2015.[825]

2. Adequacy of Written Process

The NEB Ruling No. 14 on May 7, 2014[826] denied motions to include a phase for oral evidence and cross-examination of all witnesses, saying the parties had adequate time and information to present their evidence, and

> [t]he Board is an independent regulatory tribunal and must act in accordance with the principles of natural justice. The process outlined in the Hearing Order meets the natural justice requirements for notice, an opportunity to know the case to be met, and to be heard. The Board is of the view that there is sufficient opportunity to probe evidence that is filed by asking and receiving answers to written information requests.[827]

3. Route – Revision – Burnaby Suspension

Kennedy Stuart the NDP Member from Burnaby-South had written to the NEB on February 10, 2014 arguing that the Proponent had filed an incomplete application, and requesting the NEB require a complete application and hold off further proceedings.[828] The NEB requested clarification on the Project Corridor through Burnaby, British Columbia on June 3, 2014 by way of an IR Burnaby Route.[829] The Proponent's Response to IR#2 was filed June 10, 2014[830] advising that its preferred corridor for the to the Westridge Marine Terminal would run through Burnaby Mountain instead of around it as described in the original Application.

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[823] NEB Response Tsleil-Waututh Nation (May 15, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2462498>.
[824] Tsleil-Waututh Nation Jurisdiction (April 22, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2451423>.
[825] Tsleil-Waututh Nation Written Evidence (May 26, 2015) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2784474>.
[826] NEB Ruling No. 14 (May 7, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2453401>. Brought by from Ms. Robyn Allan (14 April 2014) and Ms. Elizabeth May (5 May 2014), supported by a number of Intervenors, the Proponent objected Proponent Objection – Aylward Motion (April 22, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2451383>.
[827] NEB Ruling No. 14 at page 4. The Ruling goes on to address the specific arguments.
[828] The NEB's website is a little confusing but the problem for Mr. Stuart was the mention of "alternate routes" in 2 pages of a 15,000 page application, the lack of information on the alternate routes and the lack of a printed version of the application in local libraries – a Proponent spokesperson said it would cost $6,000 for printing a single copy.
[829] NEB IR- Burnaby Route (June 3, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2478099>.
[830] Proponent Response IR#2 (June 10, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2481568>.

The NEB considered this change and ruled that it, and potentially affected participants required more information which the Proponent promised for November 30, 2014. To consider those studies and potential impacts additional time would be required and the NEB opened a separate process for the Burnaby Mountain Preferred Route. [831] The NEB, under subsection 52(1) announced an excluded period from 11 July 2014 until 3 February 2015 to allow the Proponent to file studies. This period would not be included in the 15-month time limit, and the deadline for the Report was now March 16, 2015.

4. Burnaby frustrates the NEB

The Proponent's access to Burnaby Mountain to conduct required studies had, in the Proponent's view been frustrated by the City of Burnaby, the Proponent filed a letter on July 25, 2014 with the NEB asking it to "confirm [its] rights under paragraph 73(a) of the NEB Act with respect to accessing City of Burnaby (Burnaby) lands for survey and examination purposes."[832] After extensive correspondence, including the City of Burnaby filing a NQCL, the NEB Ruled on August 18, 2014 that paragraph 73(a) was clear, the letter application was not an access order and did not raise constitutional questions.[833] Following up on this Ruling the Proponent filed a Notice of Motion (September 3, 2014)[834] requesting access to Burnaby Mountain which had been denied under municipal by-laws.

Burnaby applied to the BC Supreme Court for an injunction to prevent the Proponent or its agents conducting surveys and examinations contrary to Burnaby's By-laws, this was denied on September 17, 2014.[835] On October 2, 2014, Burnaby filed application in BC Court of Appeal seeking leave to appeal the decision dismissing Burnaby's injunction application. Justice Neilson, in chambers, denied leave on November 27, 2014, as there was a pending application for leave to appeal NEB's Ruling No. 40 in the Federal Court of Appeal and, "Burnaby's attempt to raise the same issue on an appeal to this Court is clearly directed at nullifying or reversing the NEB's decision. It thus constitutes a collateral attack on Ruling No. 40 … and represent an abuse of process.[836] Burnaby then asked a three-member division of the Court of Appeal to vary the order of Justice Neilson in *Burnaby (City) v Trans Mountain Pipeline ULC*. [837] The panel dismissed the application to vary on February 13, 2015, based in part by the Federal Court of Appeal's denial of leave on December 12, 2014 and mootness as the Proponent had completed the investigations. [838]

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[831] NEB New Route Burnaby (July 15, 2104) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2486043>.
[832] Proponent Access to Burnaby Mountain (July 25, 2014) available at https://apps.neb-one.gc.ca/REGDOCS/Item/View/2487454.
[833] NEB Ruling No. 28 Access to Burnaby Mountain (August 18, 2014) available at https://apps.neb-one.gc.ca/REGDOCS/Item/View/2498607.
[834] Proponent Notice of Motion Re: Access Order (September 3, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2504482>
[835] *Burnaby (City) v Trans Mountain Pipeline ULC*, 2014 BCSC 1820 [*Burnaby Injunction*].
[836] *Burnaby (City) v Trans Mountain Pipeline ULC*, 2014 BCCA 465 at para 36.
[837] *Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCCA 78.
[838] *Ibid* at para 6 to 9.

The NEB ruled on September 25, 2014,[839] dismissed the Proponent's application without prejudice to the Proponent filing a NQCL holding that the Proponents requested relief would involve enforcement of municipal bylaws as a matter of constitutional interpretation. The NEB proposed 4 questions of constitutional law that it would consider.

The Proponent filed a Notice of Motion with those NQCL on September 26, 2014.[840] Some municipal, environmental groups and Indigenous groups sought to be included in those proceedings which the NEB denied on October 2, 2014 as the issue was between Trans Mountain and Burnaby.[841] After hearing oral argument[842] the NEB Ruling 40 (October 23, 2014)[843] granted an Order to the Proponent saying in its decision that the NEB "has legal authority to consider constitutional questions relating to its own jurisdiction and this is such a question. Preventing access to lands as needed for the completion of surveys and studies relating to pipeline routing …is contrary to the NEB Act. The Board has the authority to determine that the specific bylaws at issue are inapplicable or inoperable for the purpose of the matter before the Board."[844]

Ruling 40 found Burnaby's by-laws invalid, by reason of federal paramountcy as there was an operative conflict or in the alternative under inter-jurisdictional immunity as the by-laws, in this case trenched on core federal jurisdiction.[845] The NEB said it "has the authority to issue an order to allow the NEB Act's statutory scheme to be carried out. That includes issuing an order under subsection 13(b) of the NEB Act that forbids the doing of any act, matter or thing that is contrary to the NEB Act or the Board's direction."[846] The facts in this case supported granting an Order to the Proponent, which was filed on October 27, 2014, in the Federal Court for the purpose of enforcement.

On October 29, 2014, Burnaby filed an application for leave to appeal Ruling No. 40 to the Federal Court of Appeal, which was dismissed on December 12, 2014, without reasons.[847] Burnaby was undeterred, it launched subsequent summary trial proceedings in the BC Superior Court in *Burnaby (City) v Trans Mountain Pipeline ULC* [848] for a declaration on constitutional questions arising from Ruling No. 40. Justice MacIntosh agreed that Superior Courts have the jurisdiction to decide constitutional questions, noting the conflict was between valid provincial laws in Burnaby's

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[839] NEB Ruling Re Access No. 32 (September 25, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2523963>.
[840] Proponent Notice of Motion with a NQCL (September 26, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2524825>, <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2524456>, <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2524748>, https://apps.neb-one.gc.ca/REGDOCS/Item/View/2525121.
[841] NEB Other Intervenors Denied (October 2, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2525679>. This dismissal would be followed by reasons which the NEB did on December 8, 2014, stating that "order requested by Trans Mountain is specifically against Burnaby, the lands at issue are Burnaby lands, and the by-laws giving rise to the Constitutional Question are Burnaby by-law" and does not affect other intervenors. available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2578694>.
[842] Transcript is available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2526215>.
[843] NEB Ruling No. 40 (October 23, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2541380>.
[844] *Ibid* at 7.
[845] *Ibid* at 12-15.
[846] *Ibid* at 17
[847] Federal Court Docket No. 14-A-63 per: Justice Noël, Justice Nadon and Justice Strata.
[848] *Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCSC 2140 [*Burnaby Declaration*].

bylaws and valid federal law in the NEB Act as represented by the NEB's authority over interjurisdictional pipelines.[849] Burnaby urged the court to exercise its jurisdiction, the Proponent urged the opposite. The Judge declined to exercise jurisdiction – on the basis that Burnaby was engaging in an abuse of process, but if that was mistaken, he ruled against Burnaby on the constitutional questions.[850]

That decision was appealed in *Burnaby (City) v Trans Mountain Pipeline ULC* [851] where Burnaby framed the issue as whether the trial Judge erred in the "declaration that the NEB had jurisdiction to issue an order to the City of Burnaby that directs or limits the City of Burnaby in the enforcement of its bylaws."[852] The Court of Appeal noted that, "Burnaby is really challenging the jurisdiction of the NEB to make the decision underlying the order, that is, to decide which of two valid laws prevails when they come into direct conflict. … the question of the NEB's jurisdiction with respect to Burnaby's bylaws will likely be an ongoing issue as the various steps in the Expansion Project proceed.[853] In dismissing the appeal the Court distinguished the Supreme Court of Canada's decision in *Windsor (City) v Canadian Transit Co*[854] rejecting Burnaby's argument that the NEB could only rule on the constitutionality of its home Act saying administrative tribunals must take into account all laws.[855]

In the result the NEB, in carrying out its jurisdiction will have paramountcy over municipal by-laws. It should be noted that municipalities are instruments of provincial jurisdiction, and this would be relevant for BC's continuing opposition to Trans Mountain.

5. Kelly Evidence Struck

The contemplated completion of the hearing phase on October 5, 2015, did not happen, because of the July 28, 2015, appointment of Mr. Steven J. Kelly to the NEB, effective October 13, 2015. Because he was a consultant for the Proponent and had tendered evidence on its behalf the NEB struck that evidence on August 21, 2015, and issued Ruling No. 92 on September 24, 2015, for the process of replacing his evidence. [856] That process included an excluded period under subsection 55(2) of the NEB Act running from September 17, 2015 ending on January 8, 2016 that for an NEB Report which was now due on May 20, 2016.

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[849] *Ibid* at 9. The current situation was, "[37] To summarize where matters stand, Burnaby's efforts to secure an injunction based on Trans Mountain's activities in 2014 are at an end, with no injunction having been granted. The NEB has ruled against Burnaby on the constitutional matters. The Federal Court of Appeal's denial of leave means that the NEB's Ruling 40 is the final word to this point on the constitutional matters."
[850] *Ibid* at 49.
[851] *Burnaby (City) v Trans Mountain Pipeline ULC*, 2017 BCCA 132 [*Burnaby Declaration Appeal*].
[852] *Ibid* at 17.
[853] *Ibid* at 18.
[854] *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 Released the morning of the appeal.
[855] *Supra* note 96 at 30-33. See also: Nigel Bankes, "BC Court Confirms That a Municipality Has No Authority with Respect to the Routing of an Interprovincial Pipeline", ABlawg.ca Post on December 17, 2015.
[856] NEB Letter (August 25, 2015) striking Mr. Kelly's evidence is available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2812678>. NEB Ruling No. 92 (September 24, 2015) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2825509>. Mr. Kelly was never a member of NEB Review Panel.

Beginning of the End?

The NEB issued Procedural Direction No. 18 (September 24, 2015)[857] that required the Proponent to file its Replacement Evidence by September 25, 2015) and contemplated additional IR, Notices of Motion, Commentator Letters, and revised Proponent written arguments on December 15, 2015 and oral summary arguments from the Proponent on December 17, 2015 with Intervenor written arguments due January 13, 2016 and Intervenor oral summary arguments scheduled in January to February with the Proponent's written reply Evidence to close the evidence on February 17, 2016.

Trans Mountain NEB Panel Report

The NEB Panel Report on the Trans Mountain Project [Trans Mountain NEB Report] was released on May 20, 2016, and recommended that the GIC approve the Project with 157 proposed conditions. [858] It noted that "that marine shipping beyond the WMT is not part of the Project and is not within the Board's regulatory jurisdiction. Other governmental departments and agencies are charged with those responsibilities."[859]

Other practical proponent accommodations listed in Trans Mountain NEB Report involved:

- reconfiguring the pipeline design in the Upper Fraser River and Upper North Thompson River Valley as a result of concerns raised during Aboriginal engagement activities;
- revising a proposed route as a result of engagement with Peters First Nation on routing options across the Peters Indian Reserve No. 1A;
- implementing mitigation to ensure Project personnel are prohibited from fishing on Jacko Lake during construction activities, and working to provide continuous access to Jacko Lake for Stk'emlupsemc te Secwepemc members; and
- in response to concerns from the Katzie First Nation about Surrey Bend Regional Park, confirming that no land would be taken or removed from Surrey Bend Regional Park, and acquiring an easement for the pipeline that ensures ownership of the land will remain with the Park authority.[860]

The Trans Mountain NEB Report noted that 85% of the pipeline route parallels the existing pipeline, reducing the Project's impacts of construction and effects on nearby residents although that was not always the case in urban areas. It found, with the implementation of the Proponents commitments and mitigation measures, that the Project is not likely to cause significant adverse environmental effects except for,

[857] NEB issued Procedural Direction No. 18 (September 24, 2015) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2825510>.
[858] Trans Mountain Report, *supra* note 324.
[859] *Ibid* at xi.
[860] Trans Mountain Report, *supra* note 324 at 43. Trans Mountain also committed to provide current Project-related marine traffic information to Aboriginal groups and enable participation in Emergency Response Planning.

> ...effects from the operation of Project-related marine vessels would contribute to the total cumulative effects on the Southern resident killer whales, [SRKW] and would further impede the recovery of the [SRKW] population, an endangered species that lives in the Salish Sea. Therefore, pursuant to its authority under the NEB Act, the Board finds that the operation of Project-related marine vessels is likely to result in significant adverse effects to the [SRWK], and that it is *likely to result in significant adverse effects on Aboriginal cultural uses associated with these marine mammals*.[861]

The Trans Mountain NEB Report also considered greenhouse gas emissions from the Project and Project-related marine traffic to be serious and directed the Proponent to develop an offset plan for the Project's construction-related greenhouse gas emissions to ensure there are no net greenhouse gas emissions from the Project construction.

The NEB took into account the likelihood and potential consequence of a spill from the Project or from a Project-related tanker, found that while the consequences of large spills could be high, the likelihood of such events occurring would be very low given the extent of the mitigation and safety measures that would be implemented.

Accommodation Conditions

Trans Mountain NEB Report's 157 conditions were applicable to the lifecycle of the Project and were detailed in Appendix 3. [862] Appendix 3 included definitions applicable to all conditions, including an expansive definition of *construction* excluding only routine surveying or data collection activities, *monitoring* including socio-economic impacts, and *consultations* requiring adequate detail and response timelines.[863] There may be overlap between conditions and categories, and a condition may apply to more than one category and conditions of interest to Aboriginal people may appear under the *Specific effects on Aboriginal interests* category, as well as various *Environment* and *People* categories.

Notable aboriginal conditions include:

> 96. Reports on engagement with Aboriginal groups - Construction: The Proponent must file, at least 2 months PTC and every 6 months until operations, and serve a Report on the engagement activities it has undertaken with potentially affected Aboriginal groups, including details of engagement activities; a summary of any issues or concerns raised; and the measures taken, or proposed to address them, or an explanation why no further action is required.[864]

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[861] *Ibid* at xii and xiv.
[862] Trans Mountain NEB Report Conditions in Appendix 3 at 413 to 494.They were summarized in a table at page 9.
[863] *Ibid* at 413-415.
[864] *Ibid* at page 465. The plan must include: a summary of engagement activities with Aboriginal groups to determine opportunities to participate in monitoring activities; a list of Aboriginal groups, if any, that have reached agreement with the Proponent to participate in monitoring activities (the plan must be served on these groups); the scope, methodology, and justification for monitoring activities to be undertaken by the Proponent and each participating Aboriginal group including those elements of construction and geographic locations that will involve Aboriginal Monitors with a description of how the Proponent will use this information and distribute that information to participating Aboriginal groups

> 98. Plan for Aboriginal group participation in construction monitoring: The Proponent must file with the NEB, at least 2 months PTC, a plan describing participation by Aboriginal groups in monitoring activities during construction for the protection of traditional land or marine resource use for the Project.[865]
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> 146. The Proponent must file with the NEB, on or before January 31 for the first 5 years after commencing operations, a report on the engagement activities it has undertaken with Aboriginal groups and serve on that group detailing each engagement, a summary of any issues or concerns raised; and the measures taken, or that will be taken, to address or respond to issues or concerns, or an explanation why no further action is required to address or respond to issues or concerns.[866]
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> 58. Training and education monitoring reports – The Proponent must file with the NEB 3 months PTC and every 6 months until commencing operation, monitoring reports for the implementation and outcomes of *Aboriginal*, local, and regional training and education measures and opportunities for the Project and a Final Report with 6 months of commencing operations.[867]
>
> 107. Aboriginal, local, and regional employment and business opportunity monitoring reports - The Proponent must file with the NEB, within 3 months after commencing construction, and every 6 months thereafter until after commencing operations, monitoring reports for Aboriginal, local, and regional employment and business opportunities for the Project and a Final Report within 6 months after commencing operations.[868]

Other conditions, may be applicable to Aboriginal communities based on a broad interpretation of communities.[869] Notably Condition No. 145 entitled "Community Benefit Program progress reports" applied to "Aboriginal groups" saying,

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[865] *Ibid* at page 467. The role of Aboriginal monitors was explained in the Proponent's Response to NEB IR#1, *supra* note 64 at 138 to 140. The plan must include: a summary of engagement activities with Aboriginal groups to determine opportunities to participate in monitoring activities; a list of Aboriginal groups, if any, that have reached agreement with the Proponent to participate in monitoring activities (the plan must be served on these groups); the scope, methodology, and justification for monitoring activities to be undertaken by the Proponent and each participating Aboriginal group including those elements of construction and geographic locations that will involve Aboriginal Monitors with a description of how the Proponent will use this information and distribute that information to participating Aboriginal groups.

[866] *Ibid* at page 488.

[867] The reports must include the following: i) A description of each training and education measure and opportunity indicator that was monitored, including duration, participant groups, education and training organization, and intended outcomes. ii) A summary and analysis of the progress made toward achieving intended outcomes of each training and education measure and opportunity, including an explanation for why any intended outcomes were not achieve. iii) A description of identified or potential training or education gaps, and any proposed measures to address them or to support or increase training and education measures and opportunities.

[868] The reports must include: i) a summary of the elements or indicators monitored; ii) a summary and analysis of Aboriginal, local, and regional employment and business opportunities during the reporting period; and iii) a summary of Trans Mountain's consultation, undertaken during the reporting period, with relevant Aboriginal groups and local, regional, community and industry groups or representatives, regarding employment and business opportunities. This summary must include any issues or concerns raised regarding employment and business opportunities and how Trans Mountain has addressed or responded to them.

[869] *Ibid.* These including filing for approval within a certain timeline prior to undertaking construction, for example #48 Navigation and Navigation Safety Plan, this category includes Conditions Nos. 13, 60, 72, 74, 78, 80, 81 and 86. The other conditions include filing plans for information and potential comment within a certain time prior to construction such as No. 82 for a Westridge Marine Terminal a Light Emissions Management Plan, this category includes Conditions Nos. 93, 94, 95 and 73.

> 145. Trans Mountain must file with the NEB, on or before 31 January of each of the first 5 years after commencing operations, a progress report summarizing the initiatives and activities *undertaken as benefits that are in addition to compensation for access and potential impacts to community lands, and/or that exceed regulatory requirements*. The report must summarize initiatives supported, at a minimum, in the areas of community programs and infrastructure improvements, environmental stewardship, and education and training during the reporting period, including local emergency management enhancements, improvements to community parks, as well as support for events….The filing must contain a commitment from Trans Mountain, and a description of how Trans Mountain will make *progress reports publicly available* until the Project is abandoned or decommissioned pursuant to the NEB Act.[870]

In addition, numerous other reporting conditions contemplated aboriginal consultation including the provision of ATK and TLU, including:

For approval 5 months PTC:
- 40 Rare Ecological Community and Rare Plant Population Management Plan
- 41 Wetland Survey and Mitigation Plan
- 42 Grasslands Survey and Mitigation Plan

For approval 4 months PTC:
- 44 Wildlife Species at Risk Mitigation and Habitat Restoration Plans
- 45 Weed and Vegetation Management Plan
- 46 Contamination Identification and Assessment Plan
- 47 Access Management Plan(s)
- 48 Navigation and navigation safety plan
- 52 Air Emissions Management Plan for the Westridge Marine Terminal
- 54 Fugitive Emissions Management Plan for Edmonton, Sumas and Burnaby Terminals
- 56 Grizzly Bear Mitigation Plan

For approval 3 months PTC:
- 60 Environmental and socio-economic assessment - s 58 temporary construction lands and infrastructure
- 71 Riparian Habitat Management Plan;
- 72 Pipeline Environmental Protection Plan – with updated comprehensive measures;
- 73 Traffic Control Plans for public roadways –pipeline (2 months for facilities);
- 75 Nooksack Dace and Salish Sucker Management Plan
- 76 Old Growth Management Areas Mitigation and Replacement Plan
- 78 Facilities Environmental Protection Plan –with updated comprehensive measures
- 79 Air Emissions Management Plan for the Edmonton, Sumas and Burnaby Terminals
- 81 Westridge Marine Terminal Environmental Protection Plan – with updated comprehensive measures;

For approval as specified on or before January 31 after the fifth growing season (or as specified):
- 154 Riparian Habitat Reclamation Evaluation Report and Offset Plan
- 155 Rare Ecological Community and Rare Plant Population Mitigation Evaluation Report and Offset Plan
- 156 Wetland Reclamation Evaluation Report and Offset Plan
- 157 Grasslands Reclamation Evaluation Report and Offset Plan (tenth complete growing season)

[870] *Ibid* at 487. The progress reports must include: a) a description of the initiatives undertaken or supported; b) a list of participants or beneficiaries, including Aboriginal groups, local and regional communities, service providers, or others; c) an update on the timing, status, and outcomes of each initiative, including its estimated completion date, if applicable; and d) a summary of Trans Mountain's consultation activities regarding the Community Benefit Program initiatives.

For information as specified:

92 Updates under the Species at Risk Act – 2 months PTC;
43 Watercourse crossing inventory – 5 months PTC in the specific crossing;
94 Consultation reports protection of municipal water sources – 2 months PTC, annually and 5 years after operation;
95 Visual Impact Plan – 2 months PTC;
113 Hydrostatic Testing Plan – 3 months prior to pressure testing any component;
128 Offset Measures Plan for residual effects on caribou habitat – 3 months PTO Draft, final 31 January after the second complete growing season after completing final clean-up;
132 Marine Mammal Protection Program – 3 months PTO;
151 Post-construction environmental monitoring reports – on or before 31 January following the first, third, and fifth complete growing seasons. [871]

Notification provisions and subsequent consultation were required for aboriginal communities in Safety, Evacuation, Traffic Control, Construction Planning notifications etc.

The Tran Mountain Report addressed a number of constitutional arguments over aboriginal rights protected in section 35 (1) of the *Constitution Act, 1982* by concluding,

> While the Board does not itself owe the duty, its process is relied upon, to the extent possible, to discharge the duty to consult. Having considered all the evidence submitted in this proceeding, the consultation undertaken with Aboriginal groups, the impacts on Aboriginal interests, the proposed mitigation measures, including conditions, to minimize adverse impacts on Aboriginal interests and the commitments to and Board imposed requirements for ongoing consultation, *the Board is satisfied that the Board's recommendation and decisions with respect to the Project are consistent with section 35(1) of the Constitution Act, 1982.* The Board is of the view that this assessment is consistent with what is required for the purposes of the Board's Report.[872]

This section 35 language is common to all projects in this Report.

5.6.3 EA Process Difference between Northern Gateway and Trans Mountain

The principal difference between the two EA processes was in the nature of procedure. Northern Gateway's EA involved 180 days of evidentiary hearings and oral arguments, with 72 of those days devoted to public hearings limited to "personal knowledge." Trans Mountain's EA was confined to written evidence and argument with the exception of reception of ATOE by 35 Aboriginal Groups over 22 days of hearings.

In the Northern Gateway Project, a PIP was filed on November 1, 2005, an EIS on May 27, 2010, and the JRP Report on December 19, 2013 – a total of approximately 8 years. In the Trans Mountain Project, a Project Description was filed with the NEB on May 25, 2013, an Application on December 16, 2013, and the NEB Report on May 20, 2016 – a total of approximately 3 years.

Generally speaking, in terms of aboriginal accommodation, aside from the Proponent's practical accommodations, the Northern Gateway JRP Report imposed only additional consultation

[871] *Ibid,* 415-494.
[872] *Ibid* at 52 [*Emphasis* added].

obligations with Aboriginal groups on the Proponent *that might lead to accommodation*. While the Trans Mountain NEB Report imposed on the Proponent a continuing Aboriginal consultation reporting requirement every six months during construction and annually during the first 5 years of operation, opportunities for aboriginal monitoring of construction and other detailed accommodation measures.

5.7 NEB STANDARD PACKAGE OF ABORIGINAL ACCOMMODATION

The NEB has, over time, altered it practices and requirements respecting aboriginal accommodation. The primary changes have included a standard *aboriginal package* of:

1. Reception of Aboriginal Oral Traditional Evidence

In Trans Mountain, the NEB issued Procedural Direction No. 1 on May 5, 2014, on the receipt of what it termed Aboriginal Traditional Oral Evidence [ATOE] as part of the Aboriginal Intervenor's evidence saying the NEB,

> understands that Aboriginal peoples have an oral tradition for sharing stories, lessons, and knowledge from generation to generation. Since this information cannot always be shared adequately in writing and the Board believes it would be valuable for its consideration of the Project, the Board will be gathering oral traditional evidence from Aboriginal intervenors. [873]

To do so Aboriginal Intervenors would register their intent by June 5, 2014. ATOE would be presented at scheduled public hearings and cross-examination on that testimony was limited to the Proponent and the Panel. The public hearings would be webcast with daily transcripts posted on the Registry. The NEB advised that oral testimony "focus on how the Project would impact their community's interests and rights" and gave examples of what it did not consider ATOE including: technical and scientific information; opinions, views, information, or perspectives of others; and arguments such as detailed views or recommendations on Panel decisions.[874]

The NEB received aboriginal Oral Traditional Evidence in Edmonton, Alberta, Chilliwack, Kamloops and Victoria BC for 22 days from 35 Aboriginal groups.[875] In attendance were the Panel, Proponent and Indigenous Group's presenting evidence. There were no identified intervenors in attendance until October 20, 2014, when a Senior Policy Adviser with the MPMO attended for the evidence of Musqueam Indian Band in Chilliwack. He also attended November 13, 2014, in Kamloops, and the sessions in Victoria with a separate member of the MPMO attending the January 28, 2015, session for the Alexander First Nation.

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[873] NEB issued Procedural Direction No. 1 (May 5, 2014) at < https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2452818/A30%2D1_%2D_Procedural_Direction_No._1_–_Oral_traditional_evidence_participation_%2D_Trans_Mountain_Expansion_Project_%2D_A3W4L6.pdf?nodeid=2452736>.

[874] *Ibid.* These should be included in the filed as Aboriginal Intervenors written testimony or argument, as would any supporting presentation in ATOE prior to that testimony.

[875] Trans Mountain Hearings Page available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2498240>. Volume V was the Oral Argument in NEB Ruling No. 40, see, *supra* note 843.

Enbridge Line 3 provided some additional guidance. The NEB Review Panel for Enbridge Line 3, issued a Procedural Direction No. 1 (August 28, 2015) for receiving ATOE.[876] The Board's Procedural Direction No. 1 described ATOE as before with a modified example:

> For example, an Aboriginal Intervenor may choose to provide information from an Elder explaining practices that are developed, sustained and passed on orally from generation to generation within a community that may potentially be impacted by the Project. The information provided should be relevant to the List of Issues for the Project, as those are the issues that have been deemed relevant to the Board's assessment.[877]

The restrictions on what ATOE was remained the same, although this was moved to an Appendix II.[878] The NEB issued Ruling No 15 (October 20, 2015)[879] on a motion from the Association of Manitoba Chiefs [AMC] requesting in part, reconsideration of the Procedural Direction No. 1 to remove the restrictions on ATOE.[880].[881]

The NEB said, the Board has a discretion to determine its procedure and Procedural Direction No. 1 was procedurally fair.[882] In terms of ATOE, the Board said its description is intended to be applied flexibly. Aboriginal Intervenors may be best placed to decide what information to include, but, "for reasons of fairness to all Participants and efficiency, Appendix II to is intended to provide guidance as to the type of information that is not, in general, appropriately given as oral traditional evidence" as that information may be presented at other stages in the Hearing.[883] Further oral traditional evidence and technical matters are not mutually exclusive in all cases, the Board's description of oral traditional evidence is intended to be applied flexibly to fulfill the objective of

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[876] Enbridge NEB Procedural Direction No. 1 (August 28, 2015) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2813765>.
[877] *Ibid*, at 2-3.
[878] *Ibid* in Appendix II.
[879] NEB Ruling No. 15 (October 20, 2015) [NEB Ruling No. 15] available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2855000>.
[880] *Ibid.* NEB Notice Letter (October 2, 2015) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2837443>. AMC suggested the Board's definition should have "regard for Aboriginal protocols and ceremonies and that the definition of "oral traditional evidence" for the purposes of the Board's public Hearing accords with the understanding of the Aboriginal group leading the evidence or alternatively, that the Board adopt the Federal Court Aboriginal Litigation Practice Guidelines as it relates to oral history or oral traditional evidence." The AMC Reply (October 19, 2015) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2839491>. The Peguis First Nation, supporting the motion said to give ATK a liberal interpretation and not sever the connection between ATK and western science, to be shared concurrently will improve the hearing process and the relevance of the contribution by First Nation Intervenors. Treaty 2 Territorial Alliance] argued that the definition of ATOE did not take into account the evolution of the use of oral traditional evidence in recent decades.
[881] *Ibid.* The Peguis First Nation, supporting the motion said to give ATK a liberal interpretation and not sever the connection between ATK and western science, to be shared concurrently will improve the hearing process and the relevance of the contribution by First Nation Intervenors. Treaty 2 Territorial Alliance argued that the definition of ATOE did not take into account the evolution of the use of oral traditional evidence in recent decades.
[882] *Ibid* at 5. Procedural fairness does not require prior submissions as the form of hearings, and that does accord with Board practices, for example in Hearing Orders for which Procedural Direction No. 1 was an amendment.
[883] *Ibid* at 6-7 It was not persuaded the definition inconsistent with the law or with the Federal Court Aboriginal Litigation Practice Guidelines regarding Elder Testimony and Oral History.

hearing evidence reflecting of their unique Aboriginal perspective. [884] It does not prevent Aboriginal Intervenors from participating in a meaningful way.[885]

The NEB's reception and tentative definition in Enbridge Line 3 ATOE proceeds would accord with the Supreme Court of Canada's exhortations in *Delgamuukw* to "adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land… [should be] given due weight by the Courts" or in this case the NEB.[886]

Table 7: Aboriginal Traditional Oral Evidence

Project	ATOE Transcripts	Notes
Trans Mountain	Volumes 1 to 4 and 6 to 24[887]	Possible Impact
Trans Mountain Reconsideration	Volumes 1 to 11[888]	Possible
Wolverine Loop	Changed to written hearing[889]	
Enbridge Line 3	Volumes 1 to 9[890]	Significant Impact
2017 NGTL System	Volumes 1 to 4[891]	Possible Impact
Towerbirch	Volume 1[892]	Possible Impact

The impact of ATOE in the EA Reports is difficult to assess – except in the EA of Enbridge Line 3. In all the EA in this report allowing ATOE, over the 46 days of testimony the various Proponents did not ask a single question (although the 11 days of ATOE in the Trans Mountain Reconsideration did result in 5 proponent clarification questions) and there were only a few clarification questions from the NEB Panels to the Aboriginal presenters. That is not to say ATOE was disregarded in NEB Reports. The standard format was fulsome recitals of what the NEB heard from ATOE [893] then the Board would give its "Views" acknowledging the receipt of ATOE without

[884] *Ibid.* Parenthetically one option would be to present oral teachings first and discuss western science to confirm this, a reversal of the normal packaging. See: Laidlaw, "ATK in Courts", *supra* note 287 at 1-2.
[885] *Ibid.* Particularly with the flexibility to combine written and optional oral evidence.
[886] *Delgamuukw, supra* note 13 at para 84. See also para 82 and 8.
[887] Trans Mount Hearings Page available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2498240>. Volume V was the Oral Argument in NEB Ruling No. 40, see, *supra* note 879.
[888] Trans Mountain Reconsideration Hearings Transcripts at < https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3689831>.
[889] Wolverine Loop NEB Report (March 5, 2015) at 6 available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2697319> and NEB Participant Funding (May 6, 2014) at <http://www.ceaa-acee.gc.ca/050/evaluations/document/99171>.
[890] Enbridge Line 3 Hearing Transcripts at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2858485>.
[891] 2017 NGTL System Hearing Transcripts at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2840022>. The other volumes are the cross-examination of participants.
[892] Towerbirch Hearing Transcripts at < https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2958148>.
[893] 2017 NGTL System NEB Report, *supra* note 186 at 70: "The Board notes that oral traditional evidence sessions provided an opportunity for Aboriginal Intervenors to share their local and traditional knowledge directly with the Board. The Board values this local and traditional knowledge as it provided important context and information that allowed the Board to better understand the nature and extent of the interests and concerns of the participating Aboriginal Intervenors and how the Project may affect their interests."; Towerbirch NEB Report, *supra* note 338 at 113 "The Board finds OTE provided by Aboriginal groups valuable for the Board's consideration of a project. … The Board thanks West Moberly First Nation for providing its local, traditional and cultural knowledge at the oral traditional evidence hearing, as it allows the Board to better understand the nature and extent of the interests and concerns of participating Aboriginal Intervenors and how the Project may affect their interests."; Trans Mountain

mentioning how that influence their recommendations - although to be fair other evidence is rarely mentioned in its recommendations.

One possible impact of the ATOE is imposition of the NEB's standard accommodation package reference above and discussed below. This is most clearly seen in Enbridge Line 3 where the proposed project traversed 95% private lands and there were limited aboriginal rights – but the ATOE demonstrated aboriginal stewardship interests in the Project area. Over Enbridge's objections, the NEB Panel recommended a Condition on Enbridge to file Report for approval on an *Operational Consultation Plan for Aboriginal Groups* "developed in consultation with Aboriginal groups … plans should also respect *the cultural interests of Aboriginal groups regardless of the nature of the land use in the Project area* (for example, unoccupied Crown land, occupied Crown land, or privately owned land)" that applied during operations and decommissioning .[894]

That is not to say that ATOE is not important for Aboriginal groups, and by extension all Canadians, as it represents their accumulated knowledge and experience in their territories. Recording their perspectives in ATOE gives voice to them and their lands – even if it is not heard in decisions, there remains hope for the future as demonstrated in Enbridge Line 3.

2. Aboriginal Monitors: Employment of Environmental Monitors

Generally speaking, the construction phase of projects presents the most risk of adverse impacts to Aboriginal interests. Given their extensive traditional knowledge of their traditional territories, employment of aboriginal environmental monitors became an issue in EA.

- Trans Mountain: The proponent proposed employment of aboriginal monitors as part of onsite Environmental Monitoring Teams,[895] the NEB concurred recommending Condition 98 requiring a Report filed with the NEB 2 months prior to commencing construction "a plan describing participation by Aboriginal groups in monitoring activities during construction for the protection of traditional land and resource use."[896]

NEB Review Report, *supra* note 186 at 47:"The Board thanks each community for providing their traditional and cultural knowledge at the oral traditional evidence hearings."

[894] Enbridge Line 3 replaced an aging pipeline from 1968 from Alberta to the US border in Manitoba, with a new line in same corridor and decommissioning the old pipeline. Enbridge Line 3 NEB Report, *supra* note 246, Volume 2, Condition No. 29 at 224 and Condition No. 37 at 228.

[895] Trans Mountain Report, *supra* note 324 at 43. "In response to the high level of interest in monitoring activities, Trans Mountain said Aboriginal Monitors would be part of the onsite Environmental Inspection Teams to provide traditional knowledge to the construction program to ensure protection of the environment, and to ensure the successful protection, mitigation and monitoring requirements set out in the EPPs."

[896] *Ibid* at 467. Trans Mountain Plan for Aboriginal group participation in construction monitoring. This Plan would require: a) a summary of engagement activities undertaken with Aboriginal groups to determine opportunities for their participation in monitoring activities; b) a list of potentially affected Aboriginal groups, if any, that have reached agreement with Trans Mountain to participate in monitoring activities; c) the scope, methodology, and justification for monitoring activities to be undertaken by Trans Mountain and each participating Aboriginal group, including those elements of construction and geographic locations that will involve Aboriginal Monitors; d) a description of how Trans Mountain will use the information gathered through the participation of Aboriginal Monitors; and e) a description of how Trans Mountain will provide the information gathered through the participation of Aboriginal Monitors to the participating Aboriginal group. Trans Mountain must provide a copy of the report to each potentially affected group identified in b) above at the same time that it is filed with the NEB."

- Wolverine Loop: The proponent resisted the Woodland Cree First Nation call to employ aboriginal monitors, but the NEB recommended Condition 7 requiring a Report "[a]t least 30 days [PTC], NGTL shall file with the Board, and serve a copy on Aboriginal groups [who agreed to participate], a plan describing participation by Aboriginal groups in monitoring during construction."[897]
- Enbridge Line 3: The proponent stood by the limited aboriginal engagement in its Engagement Policy of informational meetings as required,[898] based on aboriginal concerns expressed in ATOE the NEB recommended Condition 12 requiring a Report on a plan detailing Aboriginal groups participating in monitoring in identical terms as Wolverine Loop.[899]
- 2017 NGTL System: Over the proponents logistical concerns the NEB recommended Condition 12 requiring a Report 30 days PTC on a plan describing participation by Aboriginal groups in monitoring during construction as in Wolverine Loop Condition 7.[900] It rejected calls for post-construction monitoring, instead recommended Condition 13 requiring a Report, at least 30 days PTC, and every six months until completing construction, on NGTL's engagement with all potentially affected Aboriginal groups identified.[901]
- Towerbirch: The proponent resisted the Draft Condition 7 that was supported by Aboriginal groups. The NEB noting "the value and unique perspective that Aboriginal groups can provide in determining mitigation measure effectiveness, partly based on their traditional knowledge," recommended Condition 7, requiring a Report on a plan describing participation by Aboriginal groups in monitoring during construction *and post-construction* of the Project.[902] Condition 20 requiring a Report within 90 days of the date that the last order is issued to open the pipeline. NGTL shall file with the Board and serve a copy on those Aboriginal groups who participated, a Report summarizing the participation by Aboriginal groups in monitoring during construction of the Project.[903]

Reporting

Towerbirch is now operational. The consequent Report to the NEB on the Towerbirch Aboriginal Monitoring Plan (January 12, 2017) [ACCP] reported that one member of the Blueberry River First Nations (BRFN), Doig River First Nation (DRFN), Saulteau First Nations (SFN) to

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[897] Wolverine Loop NEB Report, *supra* note 244, at 32-33. Condition 7 is at 67

[898] Enbridge Line 3 NEB Report, *supra* note 246 at 98 to 101. Consistent with the limited collection of information the Association of Manitoba Chiefs [AMC] "submitted that Enbridge's analysis of the engagement log finds not one instance where detailed information is provided explaining how an issue or concern raised by one of the 26 Aboriginal communities or eight Aboriginal organizations in Manitoba was then fed into Project design and decision-making." at 99.

[899] *Ibid* at 219 to 220. That Plan is at <https://apps.cer-rec.gc.ca/REGDOCS/Item/Filing/A84731>. See Enbridge's Line 3 Aboriginal Construction Monitoring website at < https://www.enbridge.com/l3monitoring>.

[900] 2017 NGTL System NEB Report, *supra* note 186 at 84. Condition 12 is at 174, with the addition of "a list of the Aboriginal groups engaged concerning participation in monitoring during construction" is in the same form as Condition 7 in Wolverine Loop.

[901] *Ibid.* Condition 23 is at 174-175. These reports include: a) a summary of the concerns raised by Aboriginal groups; b) a description of how NGTL has addressed or will address the concerns raised; c) a description of any outstanding concerns; and d) a description of how NGTL intends to address any outstanding concerns, or an explanation as to why no further steps will be taken.

[902] *Ibid* at 118, Condition 7 at 174. The required detail in the plan was identical to Trans Mountain, *supra* note 324.

[903] Towerbirch NEB Report, *supra* note 338, Condition 8 at 117-118 Condition 20 at 177-178. NEB Draft Conditions (May 17, 2016) available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2957327>

participate in the ACPP for the Tower Lake Section of the Project and one member from West Moberly First Nations (WMFN), Kelly Lake Cree Nation (KLCN), Duncan's First Nation (DFN) to participate in the ACCP for the Groundbirch Mainline Loop.[904]

After construction the Towerbirch Aboriginal Monitoring Report (January 26, 2018) noted the participation of Dawson Creek Métis Federation, Prophet River First Nation to the HDD on Kiskatinaw River crossing, Saulteau First Nations (SFN) were unable to select a Participant and will be offered a post-construction site visit in 2019, results were positive with suggestions "included extending the duration of the ACPP and the provision for additional opportunities for cultural knowledge sharing during the program."[905]

3. Aboriginal Benefits: Aboriginal Employment, Training and Community Benefits

In order to address the socio-economic situation of Indigenous peoples, [906] Proponents will in their engagement with Aboriginal groups provide standardized plans for training, aboriginal employment and procurement for aboriginal firms. Those plans usually do not include any defined percentages for aboriginal employment or procurement, or "good faith efforts" language – they are skeletal policies/plans to be "fleshed out" in discussions with each Aboriginal group.

In the Trans Mountain EA Application these Plans/Policies include an Aboriginal Procurement Policy (2 pages), and Training Policy for Aboriginal Peoples (2 pages). [907] Generally speaking aboriginal employment is qualified by requiring appropriate skills, for which Proponents may partner with local or regional training centre to provide, and aboriginal procurement is qualified by requiring appropriate commercial capacity, for which Proponents may provide investment and support.[908] In Proponent consultation with Aboriginal groups, Project requirements and associated opportunities will be discussed. Any procurement agreements reached would be commercial in nature and held in confidence. The Public Engagement logs would reference those discussions and Updates to the Application make reference to various Project-related initiatives all with few details.

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[904] Towerbirch Aboriginal Monitoring Plan (January 12, 2017) available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3160060> NEB Filing Doc: A81268.
[905] Towerbirch Aboriginal Monitoring Report (January 26, 2018) at 5 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3460575>.
[906] There is an extensive literature on the ongoing poverty of Indigenous and Métis Nations, some of which include: Omolara O Odulaja and Regine Halseth. *The United Nations Sustainable Development Goals and Indigenous Peoples in Canada*, (Prince George, BC: National Collaborating Centre for Aboriginal Health, 2018) at <https://www.nccah-ccnsa.ca/docs/determinants/RPT-UN-SDG-IndPeoplesCanada-Halseth-Odulaja-EN.pdf>. Pamela D Palmater, "Stretched Beyond Human Limits: Death By Poverty in First Nations" (2011), Nos. 65/66 Canadian Review of Social Policy 112 at <https://crsp.journals.yorku.ca/index.php/crsp/article/view/35220>.
[907] Trans Mountain Application, *supra* note 550, These are Appendices G and H in Document "B1-45 - V3B_APPE_TO_APPH - A3S0V1"
[908] *Ibid.* For example the Trans Mountain Aboriginal Procurement Policy is qualified in the last lines "[r]egardless of the practice used for procurement, KMC will always seek competitive market based costs and will not compromise safety, the environment, quality or schedule." ISNetworld® registration is a requirement for contracting with Trans Mountain and to date, Trans Mountain has identified and worked with 12 Aboriginal businesses (represented by 28 Aboriginal communities) to secure an ISNetworld subscription. ISNetworld is an online contractor and supplier management platform.

It should be noted that most Project employment opportunities will be short-term, and provide only limited indirect benefits to Aboriginal groups, they may request direct Proponent funding for community facilities to provide longer-term social benefits. These Community Investments are discretionary for the Proponent and are not required by the NEB.

In the EA of Trans Mountain, the NEB recommended conditions:

11. Report, at least 6 months PTC, for an Aboriginal, local, and regional skills and business capacity inventory for the Project.[909]
12. Report for approval, at least 6 months PTC, a plan for monitoring the implementation and outcomes of Aboriginal, local, and regional training and education measures and opportunities for the Project.[910]
13. Report for approval, at least 6 months PTC, a plan for monitoring potential adverse socio-economic effects of the Project during construction.[911]
58. Monitoring Reports at least 3 months PTC, and every 6 months until operations, on the implementation and outcomes of Condition 12.[912]
107. Monitoring Reports at within 3 months of construction and every 6 months until operations, monitoring reports for Condition 11.[913]

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[909] Trans Mountain Report, *supra* note 324, at 419, [Aboriginal Skills and Business Capacity Inventory] The skills and capacity inventory must include: a description of the information sources; a summary and an analysis of this for the Project; communication plans and a description of skills and business capacity gaps, with proposed measures to address them and communication plans for this, with update to the NEB, at least 3 months PTC.

[910] *Ibid.* [Training and Education Monitoring Plan] The plan must include: descriptions and rationale for indicators to be monitored to track the implementation of training, education measures and opportunities; monitoring methods and timing (including information and sources); plans for consulting and reporting on this with appropriate Government authorities, potentially affected Aboriginal groups, business, industry, and education and training organizations; with a summary of those consultations on the development of the plan to be update to the NEB 3 months PTC.

[911] *Ibid* at 420. [Socio-Economic Effects Monitoring Plan] The plan must include: descriptions and justification for the factors or indicators to be monitored for baseline socio-economic conditions with monitoring methods and timing (including third party data sources; data recording) to assess any changes with reporting details. A discussion of measures to be implemented to address any identified adverse socio-economic effects, including thresholds the criteria or for implementation, and how these monitoring methods and measures implemented to address adverse effects, as necessary, are incorporated into Construction Execution Plans. This will require a description of the roles and responsibilities of construction prime contractors, sub-contractors, and community relations staff in monitoring socio-economic effects and implementing measures to address adverse effects. The plan will summarize consultations with Appropriate Government Authorities, potentially affected Aboriginal groups and affected landowners/tenants, detailing their recommendations, and provide justification for how Trans Mountain has incorporated the results of consultation, into the Plan. There must be plans for regular consultation and reporting on effects during construction with potentially affected communities, to Aboriginal groups, local and regional authorities, and service providers.

[912] *Ibid* at 447 [Monitoring Reports for Training and Education] The reports include: descriptions of each training and education measure and opportunity indicator that was monitored, including duration, participant groups, education and training organization, and intended outcomes. A summary and analysis of the progress made toward achieving intended outcomes of them, or an explanation for why any intended outcomes were not achieved. A description of identified or potential training or education gaps, and any proposed measures to address them or to support or increase training and education measures and opportunities. Trans Mountain to file a final Report within 6 months of operations.

[913] *Ibid* at 469. [Monitoring Reports for Aboriginal Skills and Business Capacity] The reports include: a summary of the elements or indicators monitored; a summary and analysis of Aboriginal, local, and regional employment and business opportunities during the reporting period; and a summary of Trans Mountain's consultation, undertaken

In combination with Condition 145 on Community Benefit Progress Reports, these Conditions would describe how Aboriginal communities would obtain a share of benefits from the project. Trans Mountain is under construction, and the relevant plans have been developed, and monitoring is underway:[914]

- Aboriginal, Local and Regional Skills and Business Capacity Inventory (February 16, 2017) and (May 15, 2017) to meet NEB Condition 11.[915]
- Socio-Economic Effects Monitoring Plan (June 23, 2017) to meet NEB Condition 13.[916]
- Training and Education Monitoring Plan (May 5, 2017) to meet NEB Condition 12[917]
- Plan for Aboriginal group participation in construction monitoring (June 16, 2017) to meet NEB Condition 98.[918]

In the EA of Enbridge Line 3: Enbridge made commitments on Aboriginal employment, training and procurement and said "through the construction of the Alberta Clipper Project, Aboriginal participation through employment ranged from 10% to more than 30% in varying sections of that project. Enbridge stated that it anticipates that it will be able to achieve that level of participation again and looks to maintain that level where possible."[919] This was satisfactory to the NEB.[920]

In the EA of Wolverine Loop: the NEB found the NGTL's discussion and evidence regarding Aboriginal and local employment and contracting to be at an abstract level (much like Trams Mountain) and recommended Condition 8 requiring NGTL to file Reports with specific information, prior to and through the construction period, on Aboriginal and local employment, and consultation efforts with Aboriginal communities.[921]

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during the reporting period, with relevant Aboriginal groups and local, regional, community and industry groups or representatives, regarding employment and business opportunities. This summary must include any issues or concerns raised regarding employment and business opportunities and how Trans Mountain has addressed them. Trans Mountain to file a final Report within 6 months of operations.

[914] Trans Mountain Monitoring Reports can be found at the Trans Mountain NEB Certificate and Compliance (OH-001-2014) at < https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2981674>.

[915] Trans Mountain Aboriginal, Local and Regional Skills and Business Capacity Inventory (February 16, 2017) at < https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3186514>; Trans Mountain Aboriginal, Local and Regional Skills and Business Capacity Inventory (May 15, 2017) at < https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3267979>.

[916] Trans Mountain Socio-Economic Effects Monitoring Plan (June 23, 2017) available at < https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3185907>. Approved NEB Letter Condition Compliance Report No. 2 (August 11, 2017) available at < https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3309935>.

[917] Trans Mountain Training and Education Monitoring Plan (May 15, 2017) Condition 12 available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3267221>; approved NEB Letter Condition Compliance Report 1 (August 3, 2017) [NEB Compliance No. 1] available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3308818>.

[918] Trans Mountain Plan for Aboriginal group participation in construction monitoring (June 16, 2017) Condition 98 available at < https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3298142>, Approved NEB Compliance No. 1, *supra* note 917.

[919] Enbridge Line 3 NEB Report, *supra* note 246 at 207 and 208. Alberta Clipper (Enbridge Line 67) was a similar pipeline project constructed in 2008 at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/465178> and expanded in 2013.

[920] *Ibid* at 211.

[921] Wolverine Loop NEB Report, *supra* note 244 at 63. Condition 8 entitled Aboriginal and Local Employment and Contracting Monitoring Reports is at 68. It says: NGTL shall file with the Board, at least 30 days [PTC], and every

In the EA of 2017 NGTL System: the proponent was able to avoid Reporting Conditions by commitments to Aboriginal communities and the NEB, including: setting aside ROW clearing, log hauling, medical and security services for Aboriginal communities; and NGTL and its Prime Contractor would look at other opportunities for local Aboriginal communities consistent with their business capacities and Project requirements but would consider all businesses proposals put forward by the Aboriginal communities.[922] These commitments were followed by a statement that,

> NGTL would apply TransCanada's established Aboriginal Contracting and Employment Program to the Project, which it states in 2014 resulted in $106 million in spending on contracting and employment of Aboriginal communities and their joint venture partners. NGTL estimated that 8 per cent to 12 per cent of the total construction contracts for the Project would be awarded to qualified Aboriginal businesses and Aboriginal partnerships, totaling an estimated $54 to $81 million. NGTL also expects that roughly 8 per cent to 10 per cent of the Project workforce would be comprised of Aboriginal individuals.[923]

In the EA of Towerbirch: the proponent made various similar commitments and repeated the company wide estimates on Aboriginal employment and procurement stating it anticipates similar results for the Project.[924] The NEB saying "it is useful to collect data with respect to economic benefits" recommended Condition No. 21 requiring a Report on its employment, contracting, and procurement outcomes, including Aboriginal Contracting and Employment Program, and related to non-Aboriginal businesses and individuals in a standardized form.[925]

Towerbirch has completed construction. The post-construction *Towerbirch Employment, Contracting and Procurement Report* (April 11, 2018) required by Condition No. 21, indicates that a total of 70,056 person hours involved self-described aboriginal employees (4,680: Regional, 62,267: Provincial) of a total of 703,515 person hours or ~10% Aboriginal employment. Aboriginal procurement totalled for labour: $3,323,868 ($184,317: Regional, $2,786,425: Provincial) and non-labour: $11,568,720 ($3,421,858: Regional, $11,568,720: Provincial) for total

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60 days thereafter (coinciding with, or included in, the reports on Aboriginal consultation as per Condition 6 until completing construction), monitoring reports for Aboriginal and local employment and contracting for the [pipeline]. The reports must include: a) a summary and analysis of the total Aboriginal and local employment and contracting during the reporting period; b) any proposed measures to address identified or potential gaps or barriers in relation to Aboriginal and local employment and contracting opportunities for the [pipeline]; and c) a summary of NGTL's consultation with relevant Aboriginal and local groups or representatives regarding employment and contracting for the reporting period, including any issues or concerns raised and how NGTL has addressed or responded to them. NGTL shall file with the Board, within three months of completing construction, a final report on employment and contracting during the construction phase.

[922] 2017 NGTL System NEB Report, *supra* note 186 at 153 to 154. Additional commitments included: NGTL indicated that the prime contractor also provides feedback to Aboriginal communities in order to help build their overall capacity and gain a better understanding of contracting requirements for future projects. NGTL "regularly meets with Aboriginal communities to solicit feedback on its Aboriginal Contracting and Employment Program." NGTL indicated that post-construction debrief meetings would be held with communities at the completion of the Project to better understand the successes and challenges regarding their economic participation.

[923] *Ibid.* Compliance with Commitments was required by Condition No. 5 Commitments Tracking Table.

[924] Towerbirch NEB Report, *supra* note 338, at 166. NGTL anticipates achieving an 8 to 12 per cent rate for Aboriginal contracting and an 8 to 10 per cent Aboriginal employment rate on the Project consistent with NGTL's historic average.

[925] *Ibid* at 167. Condition 21 is at 178.

Aboriginal procurement: $14,892,588; with non-aboriginal procurement totalling $77,604,481 for a project total of: $92,497,069 with Aboriginal procurement ~16%.[926]

4. Continual engagement with Aboriginal groups throughout the life cycle of a Project.

All prudent project proponents can be expected to respond to community issues near their projects throughout the lifetime of the project – if, for no other reason than being a good neighbor.[927] EA Tribunals, including the NEB, expect project proponents to consult with project-affected Aboriginal communities throughout a project's life cycle, and this will be one of the proponent commitments in the EA that may be replaced by a condition. NGTL and Enbridge would originally in their Application, once projects were operational, refer continued consultation as necessary i.e. at the instigation of Aboriginal groups to Regional Aboriginal Monitoring Offices with limited influence.

A. Late Aboriginal Information: Project Applications would include reference information for all of the proponent identified Aboriginal groups and any additional information acquired in proponent consultation to the date of the Application. Additional information would be included in Updates through the EA as TLU, ATK and other studies were provided by Aboriginal groups, as would any design changes in proponent practical accommodations. Inevitably, aboriginal studies would remain outstanding at the date of Report and the NEB would impose conditions, as follows:

> 9. Outstanding Traditional Land Use Investigations
> NGTL shall, at least 60 days [PTC] of the [pipeline], file with the Board for approval, and serve a copy on all participating Aboriginal groups, a plan to address outstanding traditional land use (TLU) investigations for the [pipeline]. The plan must include, but not be limited to:
> a. a summary of the status of TLU investigations undertaken for the [pipeline], including Aboriginal group specific TLU studies or planned supplemental surveys;
> b. a description of any outstanding concerns raised by potentially-affected Aboriginal groups regarding potential effects of the [pipeline] on the current use of lands and resources for traditional purposes, including a description of how these concerns have been or will be addressed by NGTL;
> c. a summary of any outstanding TLU investigations or supplemental surveys, and follow-up activities that will not be completed prior to commencing construction, including an explanation for why these will not be completed prior to commencing construction, an estimated completion date, if applicable, and a description of how any additional information provided by Aboriginal groups has been considered and addressed to the extent possible in the EPP or other mitigation measures for the [pipeline]; and
> d. a description of how NGTL has incorporated any revisions into the final EPP and Environmental Alignment Sheets.[928]

[926] Towerbirch Employment, Contracting and Procurement Report (April 11, 2018) available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3539379>

[927] Other motivations would include safety, emergencies, project vandalism, "social licence" concerns and public relations to name a few. Aboriginal communities should be no different.

[928] Towerbirch NEB Report, *supra* note 338 at 172.

All of the Projects in this Report have substantively identical conditions: Trans Mountain Condition 97; 2017 NGTL Project Condition 8; Wolverine Loop Condition 8; and Enbridge Line 3 Condition 10.

B. Periodic Aboriginal Consultation in Construction: It is commonly understood that the Construction phase of pipelines and associated infrastructure is when Aboriginal rights and interests are most affected, and the NEB would impose conditions as follows:

> 13. Aboriginal Engagement Reports
> NGTL must file with the Board, at least 30 days [PTC] of the [pipeline], and every six months thereafter until completing construction, a report summarizing NGTL's engagement with all potentially affected Aboriginal groups identified. These reports must include:
> a) a summary of the concerns raised by Aboriginal groups;
> b) a description of how NGTL has addressed or will address the concerns raised;
> c) a description of any outstanding concerns; and
> d) a description of how NGTL intends to address any outstanding concerns, or an explanation as to why no further steps will be taken.[929]

Every Project in this Report has substantially the same condition: Trans Mountain Condition 96;[930]; Enbridge Line 3 Condition 11; Wolverine Loop Condition 6 and Towerbirch replaced this with requirement for Aboriginal Monitoring during and after construction in Conditions 7 and 20.[931]

C. Aboriginal Consultation in Project's Lifecyle: Trans Mountain and Enbridge Line are large Projects both with ~1000 km of new pipeline and associated infrastructure. They also have NEB Conditions requiring regular aboriginal consultations throughout the project lifecycle. In the Trans Mountain EA, the NEB recommended Condition 146 requiring annual reporting for the first 5 years of operation,

> 146 Reports on engagement with Aboriginal groups – operations
> Trans Mountain must file with the NEB, on or before 31 January of each of the first 5 years after commencing operations, a report on the engagement activities it has undertaken with Aboriginal groups. Each report must include, at a minimum, for each Aboriginal group engaged:
> a) the name of the group;
> b) the method(s), date(s), and location(s) of engagement activities;
> c) a summary of any issues or concerns raised; and
> d) the measures taken, or that will be taken, to address or respond to issues or concerns, or an explanation why no further action is required to address or respond to issues or concerns.
> Trans Mountain must provide a copy of each report to each group engaged (and identified in a) above) at the same time that it is filed with the NEB.

[929] 2017 NGTL, *supra* note 186 at 174-174.
[930] Trans Mountain Report, *supra* note 324
[931] See text associated with footnotes, *supra* notes 926 and 927.

Likewise, in the EA of Enbridge Line 3, the NEB recommended Condition No. 29 for a Report on an *Operational Consultation Plan for Aboriginal Groups* to be developed in consultation with Indigenous groups for the operations phase.[932] This would include a 5-year *Operational Consultation Report* under Condition 27.[933] The

In addition, as complementary consultation measure in the direct Crown consultation after the Trans Mountain NEB Report, Canada established and funded the *Indigenous Advisory and Monitoring Committee - TMX* as a forum for Indigenous communities to engage with federal regulators and the federal government to participate in monitoring of construction, operation, and decommissioning of Trans Mountain which is now operational.[934] Further, in accordance with the cancellation of Northern Gateway,[935] Canada announced the formulation, and funding of a companion *Indigenous Advisory and Monitoring Committee – Line 3* intended as a forum for Indigenous communities to engage with federal regulators and the federal government to participate in monitoring of construction, operation, and decommissioning of Enbridge Line 3 which is now operational.[936]

The following table summarizes the general NEB condition for pipeline facilities in what we have called the "Standard Aboriginal Package."[937]

Table 8: NEB Standard Aboriginal Package

Project	Aboriginal Monitors	Aboriginal Benefits	Aboriginal Consultation
Trans Mountain	98	11, 12, 13, 58, 107, 145	96, 146
Wolverine Loop	7	8	6
Enbridge Line 3	12	Commitment	11, 29, 37
2017 NGTL System	12, 13	Commitments	13, 36
Towerbirch	8, 20	21	23

[932] *Supra* note 246 [ATOE – enbrige]
[933] Enbridge Line 3 NEB Report, *supra* note 246 , at 240 to 254, There are corresponding conditions in the Decommissioning Certificate relating to decommissioning activities: Condition 7 *Outstanding Traditional Land Use Investigations – Buoyancy Control Measures*; Condition 13 *Outstanding Traditional Land Use Investigations – Decommissioning Activities*; Condition 8 *Aboriginal Consultation Reports* [Decommissioning]; Condition 14 *Decommissioning Consultation Plan for Aboriginal Groups*; and Condition No 9 *Decommissioning Consultation Report* after 5 years
[934] Trans Mountain CAR, *supra* note 575 at 69. *Indigenous Advisory and Monitoring Committee - TMX* [IAMC-TMX] is in full operation and details are at their website: <https://iamc-tmx.com>.
[935] Government of Canada announces pipeline plan that will protect the environment and grow the economy (News Release, November 29, 2016) at < https://www.canada.ca/en/natural-resources-canada/news/2016/11/government-canada-announces-pipeline-plan-that-will-protect-environment-grow-economy.html>.
[936] The *Indigenous Advisory and Monitoring Committee – Line 3* [IAMC-Line 3] is in full operation and details are at their website: < http://iamc-line3.com>. [Enbridge Line 3 CAR]. For development see IAMC-Line 3 Final Summary Report: Co-Development Process at <http://iamc-line3.com/uploads/2018/09/2017-12-07-Co-Development-Final-Report.pdf>.
[937] There are some identical but fewer conditions in Section 58 Certificates.

6.0 CONCLUSIONS AND RECOMMENDATIONS.

In Canadian law aboriginal accommodation measures in the EA process have several sources:

1. Proper Project Design

The constraints on the design of a project are many, including but not limited to placement, engineering, ease of construction, safety, durability, impact on the environment and cost. The rise of environmental concerns over the past 50 years gives impetus to consider impacts on the environment as increasingly important – with the goal of reducing them. In the EA of Towerbirch, the NEB defined "standard mitigation" as follows:

> The Board recognizes that many adverse environmental effects are resolved through standard mitigation. Standard mitigation refers to a specification or practice that has been developed by industry, or prescribed by a government authority, that has been previously employed successfully and is now considered sufficiently common or routine that it is integrated into the company's management systems and meets the expectations of the Board.[938]

Ideally, projects would be designed in this manner, but technology, environmental knowledge and costs keep changing. For example, technical developments in directional drilling have led to lower costs and impacts on the environment such that pipeline water-crossings using that technology have become standardized in certain circumstances. There is a built-in delay in adaption to new practices, given human conservatism and "best practices" is a moving target and there is always room for improvement.

To the extent aboriginal rights to a livelihood are exercised in the environment,[939] reducing adverse environmental effects is an under-appreciated form of aboriginal accommodation. Information on aboriginal harvesting rights are not widespread – instead they are siloed into proprietary repositories although efforts are underway to correct this.[940] To an increasing extent aboriginal engagement specialists have moved from a knowledge resource to be consulted by project design teams to being embedded in them.[941] With growing awareness of aboriginal viewpoints and concerns impacts on aboriginal interests will increasingly be incorporated as a constraint into the design of projects in Canada.

Ascertaining aboriginal accommodation contributions in proper project design is difficult without access to business's project design information and is mentioned in this paper as a concept open to future research.

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[938] Towerbirch NEB Report, *supra* note 338 at 135

[939] *Van der Peet, supra* note 23 and *Sappier: Gray, supra* note 97. See also Lambrecht *supra* note 68. It should be noted that this does not include the cultural, spiritual nature of such harvesting activities or their interconnections with Aboriginal groups ways of life – which is beyond the mandate of EA currently. see: *Gitxaala, supra* note 131 at 240

[940] Clint Westman, Taking Research off the shelf, Indigenous Awareness Seminars and as well as educational efforts – this was # Calls to Action of the Truth and Reconciliation Commission note Call No. is addressed to the business community

[941] Personal communications. Even smaller companies can now engage consultants with the requisite skills.

2. Proponent Practical Accommodation

In Canadian Consultation Policies, proponents are delegated the procedural aspects of Crown constitutional duty to consult and accommodate aboriginal peoples – in part because they are ideally situated to adjust the design of their project to mitigate impacts to aboriginal interests.

Environmental Assessment is a planning tool to assess impacts from proposed projects on the environment (which includes human beings) and give information on them to enable better decisions. Some projects do not require EA including "brownfield projects" located on or contiguous to prior disturbances and projects screened out on an environmental basis. The projects screened out of an EA may have impacts on aboriginal interests and "brownfield projects" can have impacts on aboriginal right impact and ought to require aboriginal consultation.

Where an EA is required, proposed projects on traditional territories[942] will mandate proponents to collect information to ascertain projects impacts and mitigate those impacts on the environment and human environment of economy and social well-being, including aboriginal peoples.[943] Indigenous Nations are the experts in the environment of their traditional territories as they are embedded in them and understand the natural laws that govern their traditional territories and sustainable livelihood derived therefrom.[944] In a Canadian process of abstraction and categorization, this information would include, among other things: Indigenous Nations deep understanding of the environment and governing natural law in their traditional territories transformed into reports on Aboriginal Traditional Ecological Knowledge Systems [ATK]; their sustainable livelihood into reports on Traditional Land/Marine Resource Use [TLU];[945] their unique society into reports on Socio-Economic Assessment [ESA].[946] Their wholistic environmental understanding categorized into numerous Environmental studies, such as Baseline Environmental Studies, seasonal Wildlife, Vegetation, Species at Risk, and Migratory Birds Field Studies, medicines harvesting in Culturally important Vegetation Sites; culturally important locations into Historical Resource Reports; and Soil, Old Growth Forest, Wildlife Den and Wetland Studies to name a few.

Proponents will engage in consultation with Indigenous groups that may be affected by a project generally based on proximity to the proponents' project. Areas of impact can vary by the nature of the project: point projects such as mines will affect a limited number of aboriginal groups, linear projects will affect a significant number of aboriginal groups and crossing, or proximity to water bodies will see additional downstream aboriginal groups impacted.

Early changes in project design are preferred. Thus, early engagement in proponent consultation is optimal. Every project has problems with proponent identification of aboriginal groups to

[942] Given the prior occupation of Indigenous People in Canadian territory, it can be said everywhere is a traditional territory of an Indigenous Nation – at least historically.
[943] CEAA-1992 contained the wider mandate as to impacts on the human component of the environment. CEAA-2012 limited it to aboriginal peoples and the IAA has the wider mandate.
[944] 5 faces ATK.
[945] Laidlaw, "ATK in Courts", *supra* note 287.
[946] In rare cases this information would integrated into a community driven holistic exposition such the Sto:lo Integrated Cultural Assessment

engage, government advice may be mistaken, although it is usually expansive out of an abundance of caution with many departments giving differing and ever-expanding lists. All of this leading to proponent consultation with aboriginal groups being conducted later than ideal.

Many aboriginal groups lack the funding to properly assess the deluge of consultation notifications let alone analyze the voluminous Project documentation. Aboriginal groups Consultation Offices compete with other governance priorities for limited funds. Proponent capacity funding has become standard practice and can assist. However, that funding will be primarily directed at acquiring mandated information for Applications. Likewise, government funding for aboriginal participation is limited and a constant issue.

Often the first encounter for an Aboriginal group will usually come from a Project proponent, ideally early in the Project design phase. Proponents will structure their engagement program with a view to satisfying regulatory requirements. Proponents following service of the original notification package (usually containing a high-level Project Description, maps of the project route or impacts, and an invitation to respond) will leave it that Aboriginal group to allow them *to engage with the Proponent on their own terms*. This is a delicate balance for Proponents, they will usually be happy to have no response from notifications to Aboriginal groups, but certain crucial Aboriginal groups such as those in directly impacted areas of the Project may be pressed to respond in anticipation of regulatory requirements.

Through Proponent consultation, Aboriginal groups with their environment familiarity in their traditional territories can identify elements in that environment to avoid or protect, at the very least in the Projects EPP with standard mitigation measures. The incorporation of provided Aboriginal information into the design of the project is a proponent practical accommodation measure. Teasing out that information was one objective of this Report, direct correlation of Aboriginal information to design changes has been difficult – but there is evidence to support this contention.

While these may be a minor adjustment in the design, they can accumulate particularly as proponent consultation will extend throughout the formal EA process and be reflected in the Application and Updates. The common complaint is that the proffered information from Aboriginal groups is not incorporated into the project design – leaving the impression that proponent engagement is merely a matter of "ticking off the boxes" in the regulatory requirements. This is a significant issue for proponent's engagement teams to counter this understandable concern, highlighting their unique responsibilities.

Route revision can be a significant practical accommodation measure, but many aspects may have to be changed depending on the variation required, for example in the Trans Mountain EA a separate proceeding was required for the Burnaby Preferred Route involving 46 other parties.[947]

Invariably Aboriginal TLU, ATK, ESA Studies and environmental studies will remain uncompleted at the time of NEB Reports, and it has become standard practice for the NEB to recommend Conditions on Reports for approval regarding outstanding Aboriginal studies, to

[947] NEB Ruling on Participation for Burnaby Mountain Route (October 27, 2014) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2540970>

incorporate that information, once provided into the project design where appropriate prior to construction, this inclusion can be seen as a proponent practical accommodation measure.

Proponent commitments to aboriginal groups from proponent aboriginal consultation and in the EA process, can include proponent practical accommodation measures. These commitments, together with other commitments to participants in the EA Hearing process, including to the EA Tribunal, are recorded in proponent Commitment Tracking Tables updated throughout the EA. Compliance with these commitment's is an approval condition by the EA Tribunal.

Ideally, project design – incorporating ongoing consultation with Indigenous groups will reduce, but not eliminate impacts of the project on Aboriginal interests. However, proponents remain unable to authorize government only aboriginal accommodation measures.

3. EA Tribunals and Conditions of Approval

Generally, Environmental Tribunals – rarely impose aboriginal accommodation measures on Proponents. Their role in the aboriginal assessment is limited to assessing the reasonableness of the Proponent's aboriginal consultation *process* in light of the scope of the project. When the proponents' aboriginal consultation process is inadequate, as persuaded by Indigenous participants in the EA process or more rarely at the instance of the EA Tribunal itself, that Tribunal is free to act in the public interest by recommending approval Conditions. We have suggested that the NEB has done so in the NEB Standard Aboriginal Package described above.

The powers of EA Tribunals are somewhat limited, and it appears they have confined themselves generally to expanding on proponent promises in Applications – at least for project benefits. Arguably the reception of ATOE has influenced the expansion of Aboriginal monitoring for the entirety of the Project. Multiple EA Conditions provide aboriginal accommodation measures, often in environmental measures, including but not limited to, project timing, protection of culturally modified trees, sacred sites, water crossings, water quality etc. These will be amplified in the subsequent Detailed Alignment Hearings.

For project proponents, potential responses may require developing their own plans for Aboriginal Monitoring and plans for reporting on Project benefits to shift the argument to whether those plans are reasonable. For Aboriginal groups this change may be welcome, but the focus on procedural matters is still directed at better outcomes for their communities – including sharing Project benefits. NEB Reporting requirements for these project benefit outcomes is for *information only*. Absent Condition enforcement language such as "good faith efforts," promised outcomes or particulars of revenue sharing, while these conditions are a good start sharing project benefits remains elusive.

The general trend in EA Conditions is for more aboriginal consultation, for example the extensive list of conditions in the Trans Mountain EA requiring aboriginal consultation on various plans. With Indigenous groups being stripped of their control over traditional territories by historical Treaties, Canadian assertions of sovereignty, enabled by legislation such as the *Indian Act* and

court pronouncements,[948] aboriginal consultation is a shadow of that control – but it is recognized in Canadian law. Aboriginal groups have pressed EA Tribunals for additional aboriginal consultation to address ongoing developments in their traditional territories and influence, to the extent they can, impacts of those developments.

4. Government measures

Governments have incorporated EA processes to into the fulfillment of the constitutional duty to consult and accommodate Aboriginal peoples prior to making decisions affecting their rights, title and interests. In fulfilling the duty to consult, government policies delegate procedural aspects of consultation to proponents. EA Tribunals with the jurisdiction restricted from determining aboriginal rights and title, nonetheless, may in their consideration, from a practical point of view, *de facto* determine constitutional aboriginal rights and title of aboriginal groups *on a reasonableness standard*.

Recent court decisions have clarified the law regarding governments' obligations to accommodate Indigenous peoples living in Canada when approving developments on their traditional lands. *Tsilhqot'in Nation v British Columbia* (2014)[949] has confirmed that the honour of the Crown applies to both Federal and Provincial governments, and *Coastal First Nations v British Columbia (Environment)* (2016)[950] said provincial governments cannot avoid aboriginal consultation on matters within provincial jurisdiction.

In *Gitxaala Nation v Canada* (2016) interpreted the relevant legislation to say it comprised a complete code with the Governor-In-Council being the ultimate decision maker, meaning independent judicial administrative review of Panel Reports was unavailable. [951] It recognized that the Northern Gateway Panel Report had commented on some important matters,[952] but

> … the Report … covers only some of the subjects on which consultation was required. Its terms of reference were narrower than the scope of Canada's duty to consult. One example of this is the fact that Aboriginal subjects that, by virtue of section 5 of the Canadian Environmental Assessment Act, 2012, must be considered in an environmental assessment are a small subset of the subjects that make up Canada's duty to consult.[953]

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[948] See Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 Ottawa L Rev 301 [McNeil, and for reference: *Report of the Royal Commission on Aboriginal People* (Ottawa: Supply and Services Canada, 1996) [*RCAP*] online at: <https://qspace.library.queensu.ca/handle/1974/6874> and Sidney L Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: U of T Press, 1998)]

[949] *Tsilhqot'In, supra* note 12.

[950] *Coastal First Nations, supra* note 741. A Northern Gateway case.

[951] *Gitxaala, supra* note 131. The decision was released June 23, 2016. It interpreted CEEA-2012 and the NEB Act. This would apply to review of NEB Reports.

[952] *Ibid* at 239. "Phase IV was a very important part of the overall consultation framework. It began as soon as the Joint Review Panel released its Report. That Report set out specific evaluations on matters of great interest and effect upon Aboriginal peoples, for example matters involving their traditional culture, the environment around them, and, in some cases, their livelihoods. Specific evaluations call for specific responses and due consideration of those responses by Canada. Specific feedback regarding specific matters dealt with in the Report may be more important than earlier opinions offered in the abstract."

[953] *Ibid* at 240. Perhaps reception of ATOE can elaborate on missing components in assessing impacts on aboriginal rights. *Ibid* at 504 to 505. Citing *Clyde River, supra* note 73 at 45, 51 and *Chippewas, supra* note 381 at 42.

The Courts have said the EA aboriginal mandate does not encompass consideration of all topics to adequately fulfill the Crown's constitutional duty to consult and accommodate aboriginal peoples.

In *Tsleil-Waututh Nation v Canada (Attorney General)* (2018)[954] the Court affirmed *Gitxaala*, in finding that the GIC was the ultimate decision-maker, and it was the GIC who, "alone is to determine whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a "report" within the meaning of the legislation. "[955] The GIC is required to consider any deficiency in the Report submitted to it. That decision is then subject to review by the Courts under section 55 of the NEB Act on a reasonableness basis. A materially flawed Report will result in the GIC decision being set aside.[956]

The Trans Mountain NEB Report was such a materially flawed report, as the NEB had wrongfully excluded project-related shipping from the definition of the designated Project in assessing the project on a regulatory basis. The Board's unjustifiable exclusion of project-related marine shipping from its definition of the Project, led to an inadequate assessment of potential specific mitigation measures for the Southern resident killer whale population under both CEAA-2012 and SARA giving rise to "successive deficiencies such that the Board's report was not the kind of "report" that would arm the [GIC] with the information and assessments it required to make its public interest determination and its decision about environmental effects and their justification."[957]

The Court referred to *Clyde River* and *Chippewas* to provided helpful guidance as to *indicia* of a reasonable Aboriginal consultation process,[958] and gave guidance on implementation. For our purposes, Canada was under the mistaken belief that the GIC could not add conditions due to direct aboriginal consultations after a Report is received.[959]
This is what happened when Canada approved the Trans Mountain for the second time on June 18, 2019, after receiving the NEB Reconsideration Report (February 22, 2019)[960] and conducting direct Crown consultation, detailed in Trans Mountain Reconsideration Crown Consultation

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[954] *Tsleil-Waututh, supra* note 275.
[955] *Ibid* at 173. Citing para 124 in *Gitxaala.* The ascription of court-like powers to the GIC is notable.
[956] *Ibid* at 200-201. Further "If the decision of the [GIC] is based upon a materially flawed report the decision may be set aside on that basis. Put another way, under the legislation the [GIC] can act only if it has a "report" before it; a materially deficient report, such as one that falls short of legislative standards, is not such a report. In this context the Board's report may be reviewed to ensure that it was a "report" that the [GIC] could rely upon. The report is not immune from review by this Court and the Supreme Court."
[957] *Ibid* at 465 to 471. The Court said that reference in the Explanatory Note about Canada's commitments to an *Action Plan for the Southern Resident Killer Whale* and the *Ocean Protection Plan* were preliminary in nature, and while laudable could not address this deficiency in the Report.
[958] *Ibid* at 548.
[959] *Ibid* at 629. Canada's position was based on an interpretations of section 53 of the NEBA which provided in subsection "53(1) After the Board has submitted its report under section 52, the Governor in Council *may, by order, refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration*." and subsection 54 (1) After the Board has submitted its report under section 52 or 53, the Governor in Council may, by order, (a) *direct the Board to issue a certificate* in respect of the pipeline or any part of it and to make the certificate *subject to the terms and conditions set out in the report*; or (b) *direct the Board to dismiss the application* for a certificate. [*Emphasis* added]
[960] NEB Reconsideration Report (February 22, 2019) [NEB Reconsideration Report] and Errata Letter (March 15, 2019) both available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3754555>.

Report (June 2019).[961] Canada undertook to implement all the Recommendations in the NEB Reconsideration Report,[962] and amended 6 of the NEB recommended conditions.[963]

Governments can now modify Conditions of Project Approval, accept EA Tribunal Recommendations, with guidance on the process and implementation to fulfill the Crown's constitutional duty to consult aboriginal peoples and accommodate them, before making decisions affecting them.

5. Court measures

In *Haida* the Supreme Court said the "in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate."[964] We would suggest referring to NEB's quasi-judicial recommended conditions – particularly their Standard Aboriginal Package as a source for details to fill in the legal details of adequate Aboriginal accommodation. The *Tsleil-Waututh* criteria for a reasonable consultation process already calls for reception of ATOE at the an EA Tribunal.[965]

The premise of the honour of the Crown having a "generative purpose" to develop a new aboriginal legal order through Court assisted Crown negotiation with aboriginal peoples,[966] in the aboriginal consultation context has resulted the new aboriginal legal order as a private ordering, e.g. proponent vs aboriginal groups, enforced by Canadian regulatory procedures, not a public legal order. We suggest that the absence of Court supervision of the accommodation outcomes, the motivation for engaging in process, is responsible for this. Implementing Court supervision over Report conditions is workable; if a particular Report lacks a standard condition, it can be considered unreasonable, absent compelling arguments for exclusion and be set aside. This will advance reconciliation.

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[961] Trans Mountain Expansion Project Crown Consultation and Accommodation Report (June 2019) [Trans Mountain Reconsideration CAR] at <https://www.canada.ca/content/dam/nrcan-rncan/site/tmx/TMX-CCAR_June2019-e-accessible.pdf>.

[962] NEB Reconsideration Report, *supra* note 960 at 668 to 671. Recommendations included cumulative effects management for the Salish Sea, measures to offset increased underwater noise and increased strike risk posed to the Species at Risk Act-listed marine mammal and fish species, including the SRKW, marine oil spill response, marine shipping and small vessel safety, reduction of greenhouse gas emissions from marine vessels, and engagement on the marine safety system with the Indigenous Advisory and Monitoring Committee; to avoid or lessen effects SRKW and to monitor them.

[963] Order-In-Council (2019-0820) at <https://orders-in-council.canada.ca/attachment.php?attach=38147&lang=en>. These changes include: Condition 6: Commitments tracking table, Condition 91: Plan for marine spill prevention and response commitments, Condition 98: Plan for Indigenous group participation in construction monitoring, Condition 100: Heritage Resources and Sacred and Cultural Sites, Condition 124: Implementing improvements to Trans Mountain's Emergency Management Program and Condition 151: Post-construction environmental monitoring reports.

[964] *Haida, supra* note 16 at 11.

[965] *Tsleil- Waututh, supra* note 275. As noted above the NEB has a lengthy history as a quasi-judicial forum – so much so that the Supreme Court has confidence in their procedures to satisfy the Crown's duty to consult see: *Clyde River, supra* note 73, where the NEB was the decision maker.

[966] Slattery, Aboriginal Rights and Honour of the Crown, *supra* note 82