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Updated Federal and Alberta Legal Requirements for Consultation with Indigenous Peoples in Alberta - 2023

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Glossary

Acronym	Expanded Term
ACO	Aboriginal Consultation Office (2013+) (Alberta)
AEP	Ministry of Alberta Environment and Protected Places (2022+)
AER	Alberta Energy Regulator (2012+), formerly the Energy Resources Conservation Board [ERCB]
Agency	Impact Assessment Agency (2019+), formerly Canadian Environmental Assessment Agency [CEAA]
Alberta Cabinet	Alberta Provincial Executive Council
ALSA	*Alberta Land Stewardship Act*, SA 2009, c A-26.8
ATOE	Aboriginal Traditional Oral Evidence see Indigenous Knowledge [IK]
AUC	Alberta Utility Commission
CEAA-1992	*Canadian Environmental Assessment Act,* SC 1992, c 37
CEAA-2012	*Canadian Environmental Assessment Act,* SC 2012, c 19, s 5
CER	Canadian Energy Regulator (2019+), formerly the National Energy Board [NEB]
CERA	*Canadian Energy Regulator Act*, SC 2019, c 28 (2019+), formerly *National Energy Board Act*, RSC 1985, c N-7
CIRL	Canadian Institute of Resources Law
CNSC	Canadian Nuclear Safety Commission [CNSC], under *Nuclear Safety and Control Act*, SC 1997, c 9
Constitution Act, 1982	*The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11.
Constitution Act, 1867	*Constitution Act, 1867*, 30 & 31 Vict, c 3 (U.K)
CULTP	Current use of lands and resources for traditional purposes
DFO	Department of Fisheries & Oceans
DPD	Detailed Project Description (IAA)
DRIPA	*Declaration on the Rights of Indigenous Peoples Act* (BC)
duty to consult	The provincial and federal Crowns' constitutional duty to consult and accommodate Indigenous Peoples living in Canada prior to making decisions affecting their interests
EA	Environmental Assessment Process, see also Impact Assessment
EA Tribunal	Environmental Tribunal, see also IA Tribunal
EAB	Environmental Appeals Board (Alberta)
FPIC	Free, prior and informed consent (from UNDRIP)
Federal Assessments	IAA, Regional Assessments (s 92 on Federal Lands only, s 93 mixed jurisdiction lands and Strategic Assessments s 95)
GIC	Federal Governor-in-Council also Federal Cabinet
GoA	Government of Alberta
IA	Impact Assessment
IAA	*Impact Assessment Act*, SC 2019, c 28, s 1 (Canada)
IA Tribunal	Collectively: Agency Review, Review Panel, Joint Review Panel, CER Review Panel and CNSC Review Panel
IBA	Impact Benefit Agreement

Acronym	**Expanded Term**
ICCP	Indigenous Consultation Capacity Program (Alberta)
IGB	A council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*
IPD	Initial Project Description (IAA)
IK	Indigenous Knowledge see Aboriginal Traditional Oral Evidence [ATOE]
Federal IA Factors	IAA, section 22(1)
JRP	Joint Review Panel established under Joint Review Panel Agreements between Federal and Provincial EA, no longer permitted for CER and CNSC
LARP	Lower Athabasca Regional Plan (2012)
Modern Treaties	Land Claim Settlement Agreements (1975+)
MPMO	Major Project Management Office
Notice of Commencement	(a) Notice of the Commencement of the IA of the project that sets out the information or studies that the Agency requires from the proponent and considers necessary for the conduct of the IA; and (b) any documents that are prescribed by the *Time Limits Regulation*s, including *Tailored Guidelines* regarding the information or studies referred to in the Notice of Commencement and *Agency Plans* for cooperation with other jurisdictions, engagement with the Indigenous peoples of Canada, public participation and the issuance of permits.
NRCB	*Natural Resource Conservation Board*, RSA 2000, c N-3 (Alberta)
PFP	Participant Funding Program (Canada)
REDA	*Responsible Energy Development Act,* SA 2012, c R-17.3 (Alberta)
TC	Transport Canada
TOR	Terms of Reference
TLU	Traditional Land Use Studies
TRC	Truth and Reconciliation Commission of Canada (2015)
UNDRIP	*United Nations Declaration on the Rights on Indigenous People* (2007)
UNDRIP Act	*United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14
Yahey	*Yahey v British Columbia*, 2021 BCSC 1287

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Executive Summary

We have considered the United Nations Declaration on the Rights of Indigenous Peoples (2007) [UNDRIP] as implemented in Canada by the *United Nations Declaration on the Rights of Indigenous Peoples Act* [UNDRIP Act]. UNDRIP has some influence in Canadian law as an aid to interpretation but not unfortunately to the Crowns' duty to consult and accommodate aboriginal people. This has potentially changed with the passage of the UNDRIP Act, which we suggest provides two mechanisms, potentially complementary, for implementing UNDRIP: under section 4(a) Court driven with guidance in section 2(3) that there is nothing delaying the application of UNDRIP in Canadian law; and under 4(b) Government driven in consultation with Indigenous Peoples by ensuring consistency of current laws with section 5 and new measures by way of an Action Pan in section 6. Canada's position on "free prior informed consent" of Indigenous peoples [FPIC] is that the duty to consult will aim to obtain this – but it is not required. We have provided arguments supporting the broad application of UNDRIP, including provincial incorporation, but ultimately Supreme Court of Canada will determine the impact of UNDRIP.

In this Report we discuss the origin of the Crowns' constitutional duty to consult and accommodate aboriginal peoples prior to making a decision affecting their interests as expressed in *Haida* and *Taku River* in 2004 and extended to Treaty circumstance in *Mikisew* in 2005. The duty to consult is based on the honour of the Crown and arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates, and as *Rio Tinto* says *new* conduct that might adversely affect them. Consultation requires meaningful, good faith dialogue from and with each potentially affected aboriginal community, these obligations are reciprocal compelling aboriginal consultation, consistent with that community's: strength of the aboriginal claim or, when the claim is established by Treaty, the territorial extent of the current exercise of that right consistent with the Treaty; and the potential impact of the decision on those aboriginal interests. The historical numbered Treaties made livelihood promises to First Nations that could be exercised in lands they "surrendered" and set aside lands for Reserves for their use, these Treaties allowed for the Provinces to take up tracts of land in the surrendered territory for "settlement, mining, lumbering, trading or other purposes." The Court in *Mikisew*, noted the honour of the Crown infuses all Treaties, said this taking up was unregulated and the honour of the Crown mandated consultation and accommodation with affected aboriginal peoples in the area of taking up. Consultation contemplates dialogue and the depth of consultation can change as new information is disclosed. The consultation process may reveal a need to change the government's decision giving rise to a duty to negotiate reasonable accommodation measures that may range from decision modifications to cancellation; agreement is not required and aboriginal peoples are not given a "veto" on the use of their traditional lands absent special circumstances.

Courts can review decisions when it is alleged that government has failed to fulfill the duty to consult, and using analogues from administrative law set the standard for review for the government's assessment of aboriginal claims or impacts as being correctness to set aside the decision, if the government's assessment correct the decision will only be set aside if the government's consultation process is unreasonable. When decisions are set aside the Courts will order additional consultation with the same Crown that misunderstood them in the first place.

In *Haida*, a subsequent aboriginal consultation policy gave guidance to decision makers and while the Crown bore the ultimate to satisfy the duty to consult industry proponents could be delegated the procedural aspects of consultation as they were best positioned to alter their project. In *Taku River,* the Crown had satisfied the duty to consult by way of a legislated environmental assessment process which they had participated in with accommodation conditions in the project approval (substantive consultation) with additional consultation being contemplated in the "permitting and licencing phase" (regulatory consultation) in addition to nebulous broader consultation in land use plans or other measures (complementary consultation).

In response to this, every Canadian jurisdiction adopted an aboriginal consultation policy instrument focusing on project based environmental assessment legislation. Environmental assessment [EA] is a systematic assessment of proposed project's environmental impacts including societal impacts to determine whether a project's approval was in the public's best interest. Subjecting every project to an EA was impractical: screening measures were developed to assess what projects required an EA, but this was on environmental impacts only – not aboriginal rights.

Alberta's failed approach to aboriginal consultations have been explored in *Alberta First Nations Consultation & Accommodation Handbook* (2014), and *Update to Alberta First Nations Consultation and Accommodation Handbook* (2016). Nothing has changed in Indigenous consultation, aside from a new *Métis Consultation Policy* (2016) in the identical format.

There are recent developments as to the impact of the honour of the Crown and the public interest in the regulatory context. In *Fort McKay First Nation v Prosper Petroleum Ltd* (2020) the Alberta Court of Appeal interpreted the incorporating statute, the *Responsible Energy Development Act*, in accordance with the 2019 Supreme Court decision in *Canada (Minister of Citizenship and Immigration) v Vavilov* that governed judicial review of administrative decisions. The Court of Appeal concluded that the AER was statutorily obliged to take into account the honour of the Crown as part of reconciliation into the *public interest* in deciding whether to recommend approval of an oil sands project as this was different from the statutory bar of assessing the adequacy of consultation. Justice Greckol's concurring judgement canvassed the relevant jurisprudence and said the honour of the Crown applies to treaty interpretation and implementation, and the proposed buffer zone, the negotiations of which had yet to be completed, was an effort in this regard – particularly given First Nations concerns over cumulative impacts of development. The Alberta Court of Appeal in *AltaLink Management Ltd v Alberta (Utilities Commission)* (2021) overruled the Alberta Utilities Commission [AUC] on a statutory *Vavilov* basis saying the AUC erred by saying the relevant "no-harms test" was forward looking, as there was no legislative basis for this and the public interest requires wider consideration, especially with Indigenous controlled applicants. Justice Feehan's concurring judgement noted that much of the argument was focussed on the *honour of the Crown* and the necessity of reconciliation to clarify when the AUC need consider this. Citing the relevant jurisprudence, including *Fort McKay v Prosper* he noted that the Crown in all of its emanations must act honourably with Indigenous peoples and their collectives,

and in terms of reconciliation, while it was a foundational objective of aboriginal rights, it is a separate concept and part of the broader public interest with guidance from UNDRIP.

The Federal Consultation Policy (2011) is dated and has several flaws: its distributed nature requiring department specific consultation in conjunction with their priorities, and directions that only governments can define consultation processes and available accommodation measures.

Consultation policies partially incorporate EA legislation, the existing federal legislation was amended in 2012, reducing environmental protections; diminishing aboriginal rights consideration; only regulatory "designated projects" were considered for an EA, reducing the number of projects subject to an EA by 90%; imposing fixed deadlines for EA Reports; limited to making recommendations and giving political control over project approval to the Federal Cabinet.

These amendments were partially reversed in 2019, with the restoration of *Fisheries Act* protections; the re-named *Canadian Navigable Waters Act* maintained the limiting schedule, which can be added to on application, but restored the definitions of navigable waters and divided works that interfered with navigation into minor works and major works with a process of public notice for concerns to which Transport Canada's approval was required; and the renamed Canadian Energy Regulator [CER] which continued the National Energy Board [NEB]. All of this legislation contained consideration of aboriginal rights in granting project approvals.

The new *Impact Assessment Act* [IAA] expanded the consideration of environmental effects and included, for the first time, consideration of aboriginal rights in all aspects of decision making. It maintained the concept of designated projects, as defined in the *Physical Activities Regulations,* that would be subject to Impact Assessment [IA], but the Minister of the Environment has the discretionary power to designate activities of a project to be a "designated project" on request and may consider adverse impacts on aboriginal rights.

The Project Proponent [Proponent] will file with the Impact Assessment Agency [Agency] an Initial Project Description [IPD] containing the information mandated by the *Time Limits Regulations*, including amongst others: a list of Indigenous groups affected the project and a summary of any engagement; proximity to lands used for traditional purposes by them; a brief description of impacts on them including their physical and cultural heritage, the current use of lands and resources for traditional purposes and significant cultural sites; and impacts on their health, social or economic conditions. Once the Agency is satisfied that the IPD complies with the regulations, it will post it to the Agency's public website in a registry of public documents associated with that project [IA Registry], and the 180 days± Planning Phase will commence. The designation of deadlines with the "±" symbol represents a target date and the Agency, in order to obtain necessary information to conduct an IA or at a Proponent's request, can suspend that deadline with reasons posted on the IA Registry, until generally speaking, the Proponent provides relevant material, and if satisfactory, a Notice will be posted on the IA Registry as to the resumption of the timeline.

Within the 180 days± Planning Phase, the Agency is required to solicit public comments; offer to consult with any jurisdiction and any Indigenous group affected; and may ask federal authorities for input. The Agency will provide the Proponent with a summary of relevant issues and request a Response. The Proponent will provide a Response Notice and a Detailed Project Description [DPD] to the Agency who, once satisfied, must make a decision whether the Project will be subject to an IA and, amongst others, any adverse impacts on aboriginal rights with comments provided by an affected Indigenous group.

If an IA is required, the Agency must within the same 180 days± Planning Phase provide the Proponent with (a) Notice of the Commencement of the IA of the project that sets out the information or studies that the Agency requires from the proponent and considers necessary for the conduct of the IA; and (b) any documents that are prescribed by the *Time Limits Regulation*s, including *Tailored Guidelines* regarding the information or studies referred to in the Notice of Commencement; *Agency Plans* for cooperation with other jurisdictions; engagement with the Indigenous peoples of Canada; public participation and the issuance of necessary permits in a *Regulatory Plan* [collectively the "Notice of Commencement"]. In formulating the Notice of Commencement the Agency must take into account the Federal IA Factors in section 22(1):

> 22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:
> (a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including
> (i) the effects of malfunctions or accidents that may occur in connection with the designated project,
> (ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and
> (iii) the result of any interaction between those effects;
> (b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;
> (c) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;
> (d) the purpose of and need for the designated project;
> (e) alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;
> (f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;
> *(g) Indigenous knowledge provided with respect to the designated project;*
> (h) the extent to which the designated project contributes to sustainability;
> (i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;
> (j) any change to the designated project that may be caused by the environment;
> (k) the requirements of the follow-up program in respect of the designated project;
> (l) considerations related to Indigenous cultures raised with respect to the designated project;

(m) community knowledge provided with respect to the designated project;
(n) comments received from the public;
(o) comments from a jurisdiction that are received in the course of consultations conducted under section 21 [Jurisdiction Consultation]*;*
(p) any relevant assessment referred to in section 92, 93 or 95 [Federal Assessments];
(q) any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project;
(r) any study or plan that is conducted or prepared by a jurisdiction - or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition jurisdiction in section 2 - that is in respect of a region related to the designated project and that has been provided with respect to the project;
(s) the intersection of sex and gender with other identity factors; and
(t) any other matter relevant to the impact assessment that the Agency requires to be taken into account.

Drafts of these documents will be posted on the IA Registry for public comment and the Agency may take them into account in the final Notice of Commencement. These Agency Tailored Guidelines and Agency Plans provide the only opportunity for the Indigenous Groups to affect the design of the IA process. The Agency will determine the scoping of Federal IA Factors including the extent of their relevance to the IA, with the exception of the italicized factors above.

The Minister can, until the Agency issues a Notice of Commencement, veto an IA of the project if they are of the opinion the project represents unacceptable impacts, or a federal authority indicates it will not give a required approval - this is in effect a public controversy test. The Proponent will have 3 calendar years to prepare an Impact Statement for the project, in any format they choose but there must be a cross-reference to the sections in the Agency Tailored Guidelines.

Impact review mechanisms in the IAA are: Agency Review, Review Panel, Joint Review Panel, CER Review Panel and Canadian Nuclear Safety Commission [CNSC] Review Panel, which we collectively describe as "IA Tribunal."

Agency Review: This is the default process where Agency conducts an IA considering the Federal Impact Factors in accordance with the Tailored Guidelines and Agency Plans and prepare a Final Report to the Minister for a Decision within a pre-set Agency time limit of up to a maximum of 300± days. The Agency must ensure the public is provided an opportunity to participate meaningfully in the IA and publish a Draft Report in the IA Registry for comment, and provide the Final Report with recommendations for project approval with potential approval conditions and a summary of public comments, for Project approval Decisions.

Review Panel and Joint Review Panel: The Minister may, within 45± days of the Agency posting a Notice of Commencement, direct a Review Panel to conduct the IA if it is in the public interest to do so and that determination must include: the extent of adverse environmental effects of the project and public concerns as to those effects; opportunities to cooperate with other jurisdictions; and adverse impacts on aboriginal rights. The Minister may enter into an agreement with any other Provincial government or qualified Indigenous Governing Body [IGB] in a Joint Review Panel

Agreement [JPA], unless the project is regulated by the CER or CNSC, and the Agency will set a deadline not to exceed 600± days from the Notice of Commencement for a Panel Report.

Panel Review CER or CNSC: The Minister must direct a Panel review for a Project activities regulated by the CER or the CNSC, and the Agency will establish a deadline from the Notice of Commencement not to exceed 300± days, although that may be extended to 600± days with that extension governed by consideration of: the extent of adverse environmental effects of the project and public concerns as to those effects; opportunities to cooperate with other jurisdictions; and adverse impacts on aboriginal rights. That deadline must include provisions to allow the Agency time to post its recommendation on conditions in the Panel Report

Panel Review Terms of Reference and Appointments: The Minister must, within 45± days from the Notice of Commencement, establish the Panel's Terms of Reference [TOR] that must include consideration of the Federal IA Factors, approve any JPA and TOR, and the Agency must appoint one or more qualified members of the Panel: for a Panel Review a Chair or Co-chair and at least one other member. The TOR for CER and CNSC panel reviews will be jointly developed by the Agency and the regulator; must include consideration of Federal IA Factors as well as regulatory requirements, with Member appointments from at least one member from the regulators' rosters.

Panel Report Requirements: In accordance with the Agency deadlines, the Panel must conduct an IA in accordance with the Notice of Commencement, the TOR and the Proponent's Impact Statement; ensure information it uses are made available to the public; hold public hearing and prepare a Report that sets out the, in the Panel's opinion, impacts from the project, referencing any Indigenous Knowledge [IK] it was provided in confidence, or otherwise that includes the Panels' rationale, conclusions and recommendations, and submit that Report to the Minister for a decision. CER Panel Reports are referred to the Agency for commentary, with direct Crown consultation, if required, being deferred until after a Panel Report is provided. The Agency will conduct direct Crown consultation and accommodation and prepare a Report on Crown Consultation – with contesting submissions included in the package for project approval decisions.

Project Approval Decisions: The Minister must make Project Approval decisions from an Agency Review within 30± days or refer the approval to the Federal Cabinet, and Panel Review Reports must be referred to the Federal Cabinet who will make an approval decision within 90± days, this approval deadline can be extended multiple times. Project approval will be made in the public interest that is defined in the IAA as considering: the extent the project contributes to sustainability; the extent the Panel Reports consider the project's impacts adverse and significant; the implementation of mitigation measures recommended by the Report; the impact that project may have on any Indigenous group and any adverse impact that the project may have on the rights of the Indigenous peoples of Canada; and the extent the project advances or hinders Canada's environmental obligations and commitments in respect of climate change. The Minister or the Federal Cabinet can impose or revise any conditions of approval.

We have, throughout this Report, identified Indigenous concerns, including, amongst others: the lack of information and certainty in regulatory consultation; the accretional impact on aboriginal rights and title in the *Rio Tinto* (2010) decision; the compulsory participation of aboriginal groups in Crowns' consultation and participation in EA processes; the *de-facto* implications of an EA Tribunal's determinations being assessed on the reasonableness standard and the chronic underfunding of both the capacity to and participation of aboriginal groups in EA processes.

In *Yahey v British Columbia,* 2021 BCSC 1287 [*Yahey*], a recent British Columbia Trial decision, released on June 29, 2021, that resulted in a settlement. In *Yahey*, the Blueberry First Nation succeeded in getting declarations that the cumulative effects of development approvals in its Traditional Territories breached the Treaty 8 promises. This is very similar to the situation in Alberta with the cumulative effects of oil sands development approvals impacting aboriginal rights. Alberta has received the first *Yahey* action in August of 2022 from Duncan First Nation.

In *Yahey*, Justice Burke said that Treaty 8 "guarantees the Indigenous signatories and adherents the right to continue a way of life based on hunting, fishing and trapping, and promises that this way of life will not be forcibly interfered with [and] the Crown will not significantly affect or destroy the basic elements or features needed for that way of life to continue." The test for infringement of Treaty 8 rights was not the *Mikisew* test requiring extinction of Treaty rights for all of Blueberry's Traditional Territories, it remained the *Sparrow/Badger* test: while *Mikisew* was important, the duty to consult it expressed was an effort to avoid infringement of Treaty 8 rights. The consultation cases were marred by procedural and substantive defects, as they did not account for the cumulative effects of development. She said the test for infringement: is whether Blueberry's Treaty rights have been significantly or meaningfully diminished when viewed within the way of life from which they arise and are grounded. The impact of a single authorization may not have infringed Treaty 8 rights, but the cumulative effects of them did breach their rights when over 90% of Blueberry's Traditional Territories were within 500 m of an industrial disturbance.

In the course of *Yahey,* she made several evidentiary rulings: firstly, the lands taken up would not be measured by area but by those converted to zones of influence that discourage the exercise of Treaty rights. Secondly, the Plaintiff was not required to provide proof to a scientific certainty that industrial development was the sole cause of interference but only, on the balance of probabilities, that the Province's actions or inaction have caused, contributed to or resulted in an infringement. Thirdly, *Mikisew* did not set the scale at which infringement claims could be made, nor does it require a First Nation to include all of its territories and "[i]t may be that an area within its traditional territory (for example a particular watershed) is an important location for the exercise of certain rights, and that development activities planned for that location risk infringing those rights. The First Nation would be entitled to bring an infringement claim, in relation to that portion of its traditional territories" (at 592).

Justice Burke made several other declarations: British Columbia did not uphold *the honour of the Crown* in diligently implementing Treaty 8 promises, as evidenced by the failure of Provincial administrative regimes it put in place to manage, for example: oil and gas development; wildlife

management of crucial species essential to Treaty 8 harvesting rights; forestry regimes and the nascent unenforceable guidance on cumulative impacts of development. The Province had breached its *fiduciary duty* in respect of Treaty 8 rights with its discretionary control: of the power to take up lands; developing and implementing natural resource decision making structures and individual natural resource decisions given Blueberry's corresponding vulnerability, although she was careful to note this *fiduciary duty* did not compel outcomes, but it did require good faith efforts to address Blueberry's concerns over the cumulative impacts of development.

In this Report, we have commented on the frailties of the Lower Athabasca Regional Plan (2012) [LARP] covering the oil sands area. LARP is an Alberta Cabinet level Regional Land Use Plan with missing, incomplete and ineffective environmental Management Frameworks intended to assess and advise on cumulative environmental impacts, that do not address impacts on Treaty 8 rights. The development of LARP was strictly controlled by the Alberta government in accordance with its priority on oil sands development and with limited aboriginal consultation. This was evidenced in the non-binding recommendations to the Alberta Cabinet, in the *Review Panel Report 2015: Lower Athabasca Regional Plan* (June 2015) that recommended among other things development of a Traditional Land Use Management Framework into LARP. There has been no public information in the past 7 years as to any progress on this and the missing Frameworks. The *Alberta Land Stewardship Act* under which LARP was issued has a renewal provision requiring a review as to effectiveness every 10 years, and LARP approved on August 22, 2012. Alberta has announced a 10 year Review on August 26, 2022 and that is proceeding.

In conclusion, objecting to project approvals on traditional territories in Alberta continues to pose difficulties in legal and practical terms for Indigenous Peoples, proponents, governments, and Canadian society generally. There are glimmers of hope in:

a) the impact of UNDRIP and its principals in the federal and provincial jurisdictions;
b) in Alberta Regulatory tribunals incorporating of the honour of the Crown in decision making;
c) Indigenous input into project approvals if they qualify under Federal Legislation; and
d) resulting changes precipitated by the *Yahey* decision.

UNDRIP is expansive and remedial; fully implementing UNDRIP will involve re-considering the nature of Canadian law, resource development on Indigenous traditional territories, compensation for the historical dispossession of Traditional Territories, and many other matters. There have been some changes, at least in awareness, as to the societal necessity of reconciliation with Indigenous Peoples living in Canada, that has fostered slow but necessary improvements in Canadian society.

Introduction

This is the latest update to the Crowns' constitutional duty to consult Indigenous Peoples living in Canada and accommodate their interests prior to making a decision that may affect them, as implemented in Alberta. [1] The Canadian Institute of Resource Law [CIRL] has written the *Alberta First Nations Consultation & Accommodation Handbook* (2014),[2] an *Update to Alberta First Nations Consultation and Accommodation Handbook* (2016)[3] and focussing on accommodation the *Alberta Energy Projects and Indigenous Accommodation?* (2021) criticizing Alberta failures in this duty.[4] Since the 2016 Update, the legal and regulatory landscape in Alberta has not changed substantially, aside from developments in the Court of Appeal for Regulators in incorporating the honour of the Crown in their decisions, what has changed is in the area of federal jurisdiction.[5]

In this Report we will outline and analyse:

a. the potential impact of the *United Nations Declaration on the Rights on Indigenous People,* 2007 [UNDRIP] as implemented by *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [UNDRIP Act];[6]

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[1] Indigenous People living in Canada 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. We will attempt to use the preferred appellation of the relevant Indigenous Nation in English. Collectively describing the peoples involved however remains a problem, 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 living in Canada, this will be used in contrast to Indigenous law under which Indigenous Nations have, since time immemorial, governed themselves and their traditional territories. See: Michael Coyle, "Indigenous Legal Orders in Canada - a literature review" (2017) Law Publications 92 available at <https://ir.lib.uwo.ca/lawpub/92>. Historical references may require the use of now discouraged appellations and no offence is intended in this usage. Current legislation and policy have adopted the use of "Indigenous people" as a general descriptor of the holders of aboriginal rights. 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 living in Canada, as well as incurring new obligations. Current Canadian residents may not have participated in the history of Indigenous People's suppression and dispossession, *but they live in a Canadian society that has prospered on that history*.

[2] David K Laidlaw & Monique Passelac-Ross, *Alberta First Nations Consultation & Accommodation Handbook*, CIRL Occasional Paper #44 (Canadian Institute of Resources Law, Calgary, 2014) [Laidlaw & Passelac-Ross, *Handbook*] available at: <https://prism.ucalgary.ca/handle/1880/50216>.

[3] David K Laidlaw, *Update to Alberta First Nations Consultation and Accommodation Handbook*, CIRL Occasional Paper #53 (Canadian Institute of Resource Law, Calgary, 2016) [Laidlaw, *Handbook Update*] available at <https://prism.ucalgary.ca/handle/1880/109340>.

[4] David K Laidlaw, *Alberta Energy Projects and Indigenous Accommodation?*, CIRL Occasional Paper #60 (Canadian Institute of Resource Law, Calgary, 2021) [Laidlaw, *Alberta Accommodation*], at: <https://cirl.ca/sites/default/files/Occasional%20Papers/Occasional%20Paper%20%2360.pdf>.

[5] A discussion about aboriginal rights generally is found in: Alastair R Lucas & David K Laidlaw, Chapter 18, "Oil and Gas Sector Local Content Decision Processes: Canadian Indigenous Participation" in Damilola S Olawuyi, ed, *Local Content and Sustainable Development in Global Energy Markets* (Cambridge: Cambridge University Press, 2021) at 343 to 350.

[6] "Bill C-15: An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples: Implications for Alberta and Canada" CIRL Saturday Morning at the Law School Presentation on June 19, 2021 with PowerPoint slides at: <https://cirl.ca/sites/default/files/SMLS/2021/Bill C-15 Implementing Undrip.pdf>.

b. the current legislation and case-law as to the provincial and federal Crowns' duty to consult and accommodate Indigenous Peoples living in Canada [duty to consult];[7]
c. changes in Alberta with the Court of Appeal requiring Alberta Regulators to incorporate the honour of the Crown in their decisions relating to Indigenous peoples;
d. the partial integration of the duty to consult policy instrument into Environmental Assessment [EA] legislation and Environmental Tribunal(s) [EA Tribunal] decisions, judicial review of their processes and recommendations, including Federal Governor-in-Council [GIC] approvals and Provincial Executive Council [Alberta Cabinet] approvals;
e. a review of *Yahey v British Columbia*, 2021 BCSC 1287 [*Yahey*] the first successful aboriginal rights decision regarding the cumulative impacts of development approvals on Blueberry First Nations' Treaty 8 rights and traditional territories;[8] and
d. the frailties of the *Lower Athabasca Regional Land Use Plan* (2012) [LARP] under the *Alberta Land Stewardship Act*, SA 2009, c A-26.8 [ALSA] in protecting the regional environment and aboriginal rights.

This Report is current as of as of December 31, 2022 and includes Internet accessible public documents, selected journals, papers and non-confidential information in the possession of CIRL. Most current Canadian cases, and legislation can be found at <www.Canlii.org> and we may include the year of the decision as a guide to timelines in the development of aboriginal law.[9] Citations to "evergreen" documents, usually Guidance documents will attempt to reference the relevant section. We will not directly link to referenced documents, instead we will use the "at <link>" or, if there is an intervening website "available at <link>" in the footnotes.

Methodology

This Report is based on doctrinal research "which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments." [10] The doctrinal method has been described as a two-stage process as "it involves first locating the sources of the law and then interpreting and analysing the text."[11] The first step of locating the existing aboriginal law will focus on primary legal materials such as the *Constitution*, legislation and decisions from the Supreme Court of Canada with selected illustrative appeal and trial cases *as well as policy documents.* This elevation of policy documents to subjects of legal analysis is justified by noting that court cases in this area

[7] David K. Laidlaw, "Bill C-69, the Impact Assessment Act, and Indigenous Process Considerations" (15 March 2018)), online (blog): <https://ablawg.ca/2018/03/15/bill-c-69-the-impact-assessment-act-and-indigenous-process-considerations/>. The University of Calgary's Law Faculty Blog <ABLawg.ca> is a valuable current source of academic commentary on legislation, cases, policy documents, and other law related matters.
[8] Robert Hamilton & Nick Ettinger, "Yahey v British Columbia and the Clarification of the Standard for a Treaty Infringement" (24 September 2021) [Hamilton, *Yahey*], online (blog): <https://ablawg.ca/2021/09/24/yahey-v-british-columbia-and-the-clarification-of-the-standard-for-a-treaty-infringement/>.
[9] A listing of CanLii's database coverage is available at: <https://www.canlii.org/en/databases.html>.
[10] Terry Hutchinson & Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17 Deakin L Rev 83 [Hutchinson & Duncan, "Doctrinal Legal Research"] at 101, at: <https://ojs.deakin.edu.au/index.php/dlr/article/view/70/75>.
[11] *Ibid* at 110.

can follow policy.[12] The second step will involve an internal "black letter" analysis of the law from leading cases to areas of the law which remain unsettled.[13] The third step in this Research Report is, where the law is unsettled, we adopt a normative approach to suggest where the law should follow consistently with aboriginal perspectives.[14] In terms of whether the law is unsettled – we normally consider the Supreme Court of Canada's pronouncements as authoritative. The Supreme Court has traditionally limited its decisions to being fact specific. But these decisions, and speculation not necessary for the case at hand (*obiter dicta*), can guide lower courts through broadly similar situations. This gives the Supreme Court flexibility in deciding aboriginal matters. It should be noted the Supreme Court has ruled infrequently on aboriginal rights ~8% of constitutional cases. We include the Court level – on the understanding that the Supreme Court could overrule a lower court's decision, or even its own decisions in an appropriate case.

In terms of statutory interpretation Canadian courts have endorsed Elmer Driedger's "modern principle" which says: "[t]oday there is only one principle or approach, namely, the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[15] This passage has been continually cited and relied on by Canadian courts and in 1998, in *Rizzo v Rizzo Shoes Ltd*, it was formally adopted by the Supreme Court of Canada as the preferred approach.[16] This modern principle is a compendium of differing approaches combining *textural literalism*, also known as the plain meaning of legislation, and the *intentionalism* to discern the objectives of the legislation, also known as the remedial intention of the legislation.[17] Professor-*emeritus* Ruth Sullivan notes the *practice* of Canadian courts in interpreting legislation has been a pragmatic approach dependent on the context.[18] We will endeavor to elaborate on relevant context - on the understanding that Courts may limit the interpretation in a pragmatic process.

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[12] In *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*], the Court noted that a subsequent *Provincial Policy for Consultation with First Nations* (2003) was in place in British Columbia and said at 53 that "[s]uch a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers." Subsequently, all jurisdictions in Canada have adopted policy instruments with respect to Aboriginal consultation. See: Appendix 4A and 4B in Laidlaw & Passelac-Ross, *Handbook, supra* note 2 at 107 to 112. An updated list is included as Appendix A and B.

[13] The differences between an internal analysis, that is one within the law and an outside analysis are described in Hutchinson & Duncan, "Doctrinal Legal Research" *supra* note 10 at 114-115.

[14] *Ibid* at 101, Consistent with the Reform-Oriented Research, we will attempt to make those perspectives transparent because the authors are not members of an Indigenous People living in Canada.

[15] Elmer A Driedger, *Construction of Statutes* (2nd ed) (Toronto: Butterworths, 1983) at 87.

[16] *Rizzo v Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 [*Rizzo*] at 21.

[17] Ruth Sullivan, "Statutory Interpretation In the Supreme Court of Canada" (1999) 30:2 Ottawa LR 175 at 179.

[18] *Ibid* at 180, 220 and 226 to 227. Professor-emeritus Ruth Sullivan has taken up the mantle of Driedger and her text, *Sullivan on the Construction of Statutes* (6th ed) (Toronto: Lexis-Nexis, 2014) is authoritative and widely cited. This approach is not without its critics, see for example Mark Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59:4 Alta L R 920.

Internet Access by Indigenous Groups

Modern legislation has increasingly relied on the Internet for, among other things project information and public notice of decisions. This is problematic. According to The Canadian Radio-television and Telecommunications Commission (CRTC) 2020 Report,

> [i]n 2019, 87.1% of households in First Nations reserves were able to access broadband Internet services with a speed of at least 5 Mbps. Availability decreases to below half of households at speeds of 50 Mbps or faster and to less than a third at speeds of 100 Mbps or faster. Availability varied significantly across provinces and territories, with households in First Nations reserves in New Brunswick and British Columbia having the highest availability of Internet services at speeds of 50 Mbps or faster (95.3% and 70.1%, respectively), while these services were not yet available to households in First Nations reserves in the North as well as Newfoundland and Labrador.[19]

However, First Nation information was derived from Statistics Canada census surveys, including the Long Form Survey and on Indian Reserves "enumerators conducted personal interviews" in limited numbers and imputed the findings - reducing the accuracy.[20] This has direct consequences, for example, in Alberta, the Rules of Court provide a six-month limitation period for a judicial review application, and they were interpreted in *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)* (2011) to run from constructive notice by posting on the internet and not requiring personal notice of the decision being challenged. [21]

How to Use this Report

As noted in the Introduction, this is part of a series by CIRL on aboriginal consultation, we have deliberately included our prior writings in an updated summary form with details in the original for reference. New matters in this Report include:

1. United Nations Declaration on Indigenous Rights at pages 17 to 31;
2. Alberta's Métis Consultation Policy at pages 56 to 59;
3. Alberta Developments as to Honour of the Crown and Regulatory Agencies at pages 70 to 81;
4. Federal EA Legislation at pages 82 to 141;
5. *Yahey v British Columbia* (2021) at pages 142 to 169;
6. LARP – 10 year review at pages 16 to 172; and
7. Appendices.

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[19] The Canadian Radio-television and Telecommunications Commission (CRTC) 2020 Report at <https://crtc.gc.ca/pubs/cmr2020-en.pdf>, at 109 to 110.

[20] Guide to the Census of Population, 2016, Chapter 9 – Sampling and weighting for the long form at <https://www12.statcan.gc.ca/census-recensement/2016/ref/98-304/chap9-eng.cfm>, Noting that "[i]n CUs [Collection Units] where enumerators conducted personal interviews, *i.e., Indian reserve CUs* and canvasser enumeration CUs, non-response to the long-form questionnaire is accounted for by imputation."

[21] *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)* 2011 ABCA 29 [*ACFN v Alberta*] at 7, 13 and 30 to 31; leave refused [2011] SCCA No. 128.

United Nations Declaration on Indigenous Rights

The *United Nations Declaration on the Rights of Indigenous Peoples* (2007) [UNDRIP] is a compromise document, adopted by the United Nations General Assembly on Thursday, 13 September 2007[22] and "[i]t establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples."[23] It is not an International Convention or Treaty[24] but a strong declaration as to what minimal standards are necessary to protect Indigenous Peoples.[25]

UNDRIP has the potential to transform aboriginal law.[26] Indigenous claims and Court pleadings have referenced UNDRIP's draft and finalized principals together with it's predecessor the International Labour Organization's *Indigenous and Tribal Peoples Convention* (1989) (No. 169).[27]

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[22] *United Nations Declaration on the Rights of Indigenous Peoples* (2007) [UNDRIP] adopted by the United Nations General Assembly on Thursday, 13 September 2007, Res. 68, 61, UN Doc. A/RES/61/295 at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement> by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

[23] UNDRIP webpage at: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> [UNDRIP Webpage]. See Karen Engle "On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights" (2011) 22(1) EJIL 141, at: <https://academic.oup.com/ejil/article/22/1/141/436712> arguing that UNDRIP Article 46 was included to address concerns over Article 3's self-determination articulation. See also: Dwight Newman ed, *Research Handbook on the International Law of Indigenous Rights* (Cheltenham UK: Edward Elgar Publishing, 2022).

[24] In international public law there is no legal distinction between a Treaty and a Convention – both are binding agreements usually written, subject to their terms, between nation states or other subjects of international law but they may be so generally accepted that they become part of customary international law, see Garrett W Brown, *The Concise Oxford Dictionary of Politics and International Relations* (Oxford: Oxford University Press, 2018) see also *Vienna Convention on the Law of Treaties* (1969) United Nations, Treaty Series, vol. 1155, p. 331, Article 2, 1(a).

[25] Prior to Canada's adoption of UNDRIP, Nigel Bankes, "International Human Rights Law and Natural Resources Projects Within the Traditional Territories of Indigenous Peoples" (2010) 47(2) Alta L R 457 at <https://canlii.ca/t/2czb>, makes the argument at 460 "that international law prescribes standards that limit the authority of the state to grant resource rights to third parties and to approve resource projects within the traditional territories of indigenous peoples. These standards apply in addition to any that apply as a matter of domestic law by way of treaty, agreement between the state and indigenous people, or otherwise". See also: James Anaya & Robert A Williams, "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System" (2001), 14 Harv Hum Rts J 33.

[26] See e.g. John Borrows, et al. ed *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON, Canada: Centre for International Governance Innovation, 2019) [Borrows, *Braiding Legal Orders*]

[27] International Labour Organization's *Indigenous and Tribal Peoples Convention* (1989) (No. 169) at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169>. This not ratified by Canada.

Interpretive Principle – International Law

International law, in all of its forms, including UNDRIP, can be influential in interpreting Canadian law with the Supreme Court outlining this extensively in *R v Hape* (2007).[28] This was summarized by the Federal Court in *Canada (Human Rights Commission) v Canada (Attorney General)* (2012),

> [t]he Supreme Court of Canada has recognized the relevance of international human rights law in interpreting domestic legislation such as the *Canadian Human Rights Act*. The Court has held that in interpreting Canadian law, Parliament will be presumed to act in compliance with its international obligations. As a consequence, where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations. Parliament will also be presumed to respect the values and principles enshrined in international law, both customary and conventional.
>
> [352] While these presumptions are rebuttable, clear legislative intent to the contrary is required.[29]

In *Nunatukavut Community Council Inc v Canada (Attorney General)* (2015), the Federal Trial Court agreed with the general premise that UNDRIP may inform the interpretation of domestic law, however that did not apply to the duty to consult, saying:

> [104] That said, in *Hupacasath*,[30] Chief Justice Crampton of this Court stated that the question of whether the alleged duty to consult is owed must be determined solely by application of the test set out in *Haida* and *Rio Tinto*. I understand this to mean that UNDRIP cannot be used to displace Canadian jurisprudence or laws regarding the duty to consult, which would include both whether the duty to consult is owed, and, the content of that duty.
> …..
> [106] Most significantly, in this matter the NCC [*Nunatukavut Community Council Inc*] does not identify an issue of statutory interpretation. Rather, it submits that UNDRIP applies not only to statutory interpretation but to interpreting Canada's constitutional obligations to Aboriginal peoples. No authority for that proposition is provided. Nor does the NCC provide any analysis or application of its position in the context of its submissions. In my view, in these circumstances, the NCC has not established that UNDRIP has application to the issues before me, or, even if it has, how it applies and how it impacts the duty to consult in this case.[31]

Notably this was a 2015 decision, prior to the un-qualified adoption of UNDRIP by Canada.

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[28] *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 [*Hape*] at 32 to 69.
[29] *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 [*Human Rights Commission v Canada*] at 351 to 352 (citations omitted), see also 348 to 356; upheld: *Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75.
[30] *Hupacasath First Nation v Canada (Foreign Affairs),* 2013 FC 900 [*Hupacasath First Nation v Foreign Affairs*] affirmed: 2015 FCA 4 at 84 to 89.
[31] *Nunatukavut Community Council Inc v Canada (Attorney General),* 2015 FC 98 at 103 to 106, [*Nunatukavut v Canada*] NCC's position at 96. This was a challenge to a Framework for Consultation in the *regulatory permitting phase*.

Canada and UNDRIP

Canada initially voted against UNDRIP in 2007. It offered a Qualified Statement of Support (November 12, 2010) saying that UNDRIP was an aspirational document, it is non-legally binding and that it "does not reflect customary international law nor change Canadian laws."[32] On May 10, 2016 speaking at the UN Permanent Forum on Indigenous Issues, Indigenous and Northern Affairs Canada Minister Carolyn Bennett announced "[w]e are now a full supporter of the declaration, without qualification. We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution."[33]

The *Truth and Reconciliation Commission* (2015) [TRC] investigating Indian Residential Schools called for the implementation of UNDRIP as a framework for societal reconciliation (Calls to Action 43 and 44).[34] The *National Inquiry Into Missing and Murdered Indigenous Women and Girls* (2019) Calls For Justice included implementing UNDRIP (1.2(v)).[35] Canada's *Principles respecting the Government of Canada's relationship with Indigenous peoples* (2017) refer to UNDRIP and Mandate Letters to the Minister of Crown-Indigenous Relations (2019 and 2021) and the Minister of Justice and Attorney General of Canada (2019 and 2021) were directed: "to ensure passage of the co-developed legislation to implement [UNDRIP]."[36]

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[32] Qualified Statement of Support for UNDRRIP (November 10, 2010) [Qualified Statement of Support] at <https://www.rcaanc-cirnac.gc.ca/eng/1309374239861/1621701138904>.

[33] Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples (News Release - May 10, 2016 – New York, NY – Indigenous and Northern Affairs Canada) at <https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html> and Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, 2016 May 10 The Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs at <https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10-.html>.

[34] *Truth and Reconciliation Commission* (2015) [TRC] Calls to Action #43 and #44 at <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf>. The *Truth and Reconciliation Commission* website is at <https://nctr.ca/records/reports/>. The legal test for reconciliation remains embedded in aboriginal law – this was most explicit in *Manitoba Métis Federation Inc. v Canada (Attorney General*), 2013 SCC 14 [*Manitoba Métis*] at 66 saying "ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty." There is, in this formulation, a sense that legal reconciliation *is done to Indigenous Peoples*. The TRC Report's Calls to Action are addressed to all sectors of Canadian society. See: Kim Stanton, "Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission" (2017) 26 Osgoode J L & Soc Pol 21, at: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1254&context=jlsp>.

[35] National Inquiry Into Missing and Murdered Indigenous Women and Girls (2019) Executive Summary at 63, at <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Executive_Summary.pdf>.

[36] *Principles respecting the Government of Canada's relationship with Indigenous peoples* (2017) at <https://www.justice.gc.ca/eng/csj-sjc/principles.pdf> also Overview of a Recognition and Implementation of Indigenous Rights Framework (2018) at <https://www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708>.

Legal Effect of Preambles and Purpose Statements

In *Québec (Attorney General) v Moses* [37] in 2010, the Supreme Court noted that section 13 of Canada's *Interpretation Act*[38] provides "[t]he preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object…a legislative preamble will never be determinative of the issue of legislative intent since the statute must always be interpreted holistically, it can nevertheless assist in the interpretation of the legislature's intention."[39] Further, in *Moses,* legislative purpose statements were described as "[t]he most direct and authoritative evidence of legislative purpose."[40] Modern Federal legislation has referenced UNDRIP in the Preamble and the Purpose sections[41] with that legislation including identical preambles "Whereas the Government of Canada is committed to implementing UNDRIP."[42]

Canada's Incorporation of UNDRIP

Canada introduced *Bill C-15*, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, which passed the House of Commons on May 25, 2021, the Senate on June 16, 2021 and received Royal Assent on June 21, 2021 becoming *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [UNDRIP Act][43] It is a short Act of 23 Preambles, 7 sections, UNDRIP as a Schedule and is arguably limited to federal jurisdiction.[44]

Preambles

Notable Preambles in the UNDRIP Act include (numbers are for reference):

1. *Whereas the United Nations Declaration on the Rights of Indigenous Peoples provides a framework for reconciliation*, healing and peace, as well as harmonious and cooperative relations based on the principles of justice, democracy, respect for human rights, non-discrimination and good faith;

11. Whereas the Declaration emphasizes the urgent need to respect and promote the inherent

[37] *Québec (Attorney General) v Moses,* [2010] 1 SCR 557 [*Moses*] in dissent but not on this issue. See Kent Roach, "The Uses and Audiences of Preambles in Legislation" (2001), 47 McGill LJ 129.
[38] *Interpretation Act,* RSC 1985, c. I-21. The Alberta *Interpretation Act*, RSA 2000, c I-8, provides in section 12(1) "The preamble of an enactment is a part of the enactment intended to assist in explaining the enactment."
[39] *Moses, supra* note 37 at 101.
[40] *Ibid* citing *Sullivan on the Construction of Statutes 5th.*
[41] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 in the Preamble and the Purpose section 8(c) "contribute to the implementation of [UNDRIP]"; the *Indigenous Languages Act*, SC 2019, c 23, in the Preamble and Purpose section 5(g) "contribute to the implementation of [UNDRIP] as it relates to Indigenous languages".
[42] *Department for Women and Gender Equality Act*, SC 2018, c 27, s 661; *First Nations Land Management Act*, SC 1999, c 24; *Canadian Energy Regulator Act*, SC 2019, c 28, s 10; IAA; *The Budget Implementation Act*, 2019, No. 1 (S.C. 2019, c. 29, s 336) which repealed the former *Department of Indian Affairs and Northern Development,* RSC 1985, c I-6, replacing it with the *Department of Indigenous Services Act*, SC 2019, c 29, s 336 and created the *Department of Crown-Indigenous Relations and Northern Affairs Act*, SC 2019, c 29, s 337, effective July 15, 2019.
[43] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [UNDRIP Act].
[44] These are set out in the *Constitution Act,* 1867, 30 & 31 Vict, c 3 in section 91 [*Constitution Act,* 1867].

rights of Indigenous peoples of the world which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories, philosophies and legal systems, especially their rights to their lands, territories and resources;

12. Whereas the Government of Canada recognizes that all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including the right of self-government;
16. Whereas the Government of Canada acknowledges that provincial, territorial and municipal governments each have the ability to establish their own approaches to contributing to the implementation of the Declaration by taking various measures that fall within their authority;
18. Whereas the Declaration is affirmed as a source for the interpretation of Canadian law;

UNDRIP Act Sections

Section 1 provides the short title: "This Act may be cited as the *United Nations Declaration on the Rights of Indigenous Peoples Act*."

Section 2(1) provides the following definitions:

> *Declaration* means [UNDRIP] as set out in the Schedule;
> *Indigenous peoples* has the meaning assigned by the definition aboriginal peoples of Canada in subsection 35(2) of the *Constitution Act, 1982*.
> *Minister,* for the purposes of any provision of this Act, means the federal minister designated as the Minister for the purposes of that provision under section 3.

Section 2(2) provides that:

> This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

This an unusual aboriginal non-derogation clause, in the phrasing "as upholding the rights of Indigenous peoples." The change in emphasis is notable,[45] indicating the supportive nature of the legislation instead of its exemptive purpose, although there are no court decisions on this distinction as of yet.

[45] The *normal mention* in post 1982 legislation is: Nothing in this [Act] shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*. For example, section 2.1 of the *Oceans Act,* SC 1996, c 31 claimed ownership of the seabed, while the earlier *Territorial Sea and Fishing Zones Act*, RSC 1970, c T-8 passed in 1967 claimed jurisdiction out to the 12-mile limit but not ownership. See Justice Canada's discussion and request for input on whether to include these Non-Derogation Clauses in the *Interpretation Act* at Justice Canada's website, *Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act* About the Act Section, Non-Derogation Clauses, last modified 2022-10-14, online: <www.justice.gc.ca/eng/declaration/legislation.html>; Archived December 20, 2022 at: <web.archive.org/web/20221220211139/https://www.justice.gc.ca/eng/declaration/legislation.html>. [Justice Canada Implementing UNDRIP: About the Act]

Section 2(3) provides that:

> Nothing in this Act is to be construed as delaying the application of the Declaration in Canadian law.

Section 3 provides that: The Governor in Council may, by order, designate any federal minister to be the Minister for the purposes of any provision of this Act.[46] This is the Justice Minister.

Section 4 provides that:

> The purposes of this Act are to
>
> (a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and
> (b) provide a framework for the Government of Canada's implementation of the Declaration.

Section 5 provides that:

> The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.

Section 6(1) directs "The Minister must, in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve the objectives of the Declaration" [Action Plan], that must include:

> 6(2)(a) measures to
> (i) address injustices, combat prejudice and eliminate all forms of violence, racism and discrimination, including systemic racism and discrimination, against Indigenous peoples and Indigenous elders, youth, children, women, men, persons with disabilities and gender-diverse persons and two-spirit persons, and
> (ii) promote mutual respect and understanding as well as good relations, including through human rights education;
> (b) measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration; and
> 6(3) measures related to monitoring the implementation, reviewing and amending the Action Plan.

The Action Plan must be completed as soon as practicable, and in section 6(4) no later than two years after the day which the UNDRIP Act came into force, now June 21, 2023. It must be tabled in each House of Parliament then made public in sections 6(5) and 6(6).

[46] UNDRIP Act, *supra* note 43, has one regulation, *Order Designating the Minister of Justice as the Minister for the Purposes of that Act*, SI/2021-37 which designates the Minister of Justice.

Section 7 directs Annual Reports be required every June 21, [47] as to measures under section 5 - to ensure that the laws of Canada are consistent with the Declaration; and updates on the preparation and implementation of the Action Plan.

Justice Canada's Public Interpretation

Justice Canada's website entitled *Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act* [48] in subsection "The Act explained" says,

> The purpose of this Act is to affirm the Declaration as an international human rights instrument that can help interpret and apply Canadian law. It also provides a framework to advance implementation of the Declaration *at the federal level*.
>
> This Act requires the Government of Canada, in consultation and cooperation with Indigenous peoples, to:
>
> - Take all measures necessary to ensure the laws of Canada are consistent with the Declaration
> - Prepare and implement an action plan to achieve the objectives of the Declaration
> - Develop annual reports on progress and submit them to Parliament[49]

Further, in the subsection "The legislation and the Canadian's Constitutional framework" it says,

> Many of the rights affirmed in the Act are already reflected in the Constitution, notably the Canadian Charter of Rights and Freedoms and section 35 of the Constitution, which recognizes and affirms Aboriginal and treaty rights. The United Nations Declaration on the Rights of Indigenous Peoples Act does not amend the Constitution – but this legislation recognizes that the Declaration should inform how we understand and interpret the Constitution.
>
> This legislation and Canadian law recognize that international human rights instruments, like the Declaration, can be used to interpret the Constitution, which is a "living tree" that evolves over time.
>
> The Act, like other international human rights instruments or federal legislation, cannot amend or supersede the Canadian Constitution. However, they can inform how the Constitution and the law are interpreted and developed.[50]

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[47] *Annual progress report on implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act* (June 2022) at: <https://www.justice.gc.ca/eng/declaration/report-rapport/2022/pdf/UNDA_AnnualReport_2022.pdf>.

[48] Justice Canada's website is at <www.justice.gc.ca/eng/declaration/index.html>; Archived December 20, 2022 at <web.archive.org/web/20221220205033/https://www.justice.gc.ca/eng/declaration/index.html>.

[49] Justice Canada Implementing UNDRIP: About the Act: The Act explained

[50] Justice Canada Justice Canada Implementing UNDRIP: About the Act: The legislation and the Canadian's Constitutional framework

The hyperlinked *The United Nations Declaration on the Rights of Indigenous Peoples* redirects to a webpage entitled *Read the Declaration* page with unofficial translations of UNDRIP in Indigenous languages.[51]

Court Interpretations of the UNDRIP Act

Insofar as we are aware, the first decided case to consider the UNDRIP Act is the January 7, 2022, BC Trial decision in *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc* which said:

> [209] Both the provincial and federal [UNDRIP] legislation was passed after the start of the trial in this case. It is therefore not surprising that the legislation does not appear in the pleadings. It did, however, feature in the parties' final submissions at the end of the trial.
>
> [210] The [First Nation] plaintiffs say that the extent to which UNDRIP creates substantive rights is not an issue that needs to be resolved in this case. However, they also say that UNDRIP can and should be used as an interpretive tool in support of robust recognition and accommodation of Aboriginal rights enjoying recognition under s. 35(1) of the *Constitution Act, 1982*. They emphasize that s. 1(4) of [*Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 ("DRIPA")] expressly states that "Nothing in this Act is to be construed as delaying the application of the Declaration to the laws of British Columbia".
>
> [211] The [Corporate & Governments] defendants say that UNDRIP is merely an international declaration of a sort that has never been implemented as law in Canada. They point out that, on the other hand, international treaties and conventions can obtain the force of law in Canada but only when they are expressly implemented by statute. They say the recent UNDRIP legislation has no immediate impact on existing law and is simply "a forward-looking" statement of intent that contemplates an "action plan" yet to be prepared and implemented by either level of government.
>
> [212] It remains to be seen whether the passage of UNDRIP legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title. Even if it is simply a statement of future intent, I agree it is one that supports a robust interpretation of Aboriginal rights. Nonetheless, as noted above, I am still bound by precedent to apply the principles enunciated by the Supreme Court of Canada to the facts of this particular case and I will leave it to that Court to determine what effect, if any, UNDRIP legislation has on the common law. [52]

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[51] *Read the Declaration* at <https://www.justice.gc.ca/eng/declaration/read-lire.html>, includes Inuktitut (South Baffin); Inuinnaqtun; Michif (Métis); Anishinaabemowin; Plains Cree; Blackfoot; Oji-Cree; Atikamekw; Mi'kmaq and Denesuline with translations underway into other Indigenous languages. (Archived December 22, 2022 at <web.archive.org/web/20221128054652/https://www.justice.gc.ca/eng/declaration/read-lire.html>). The linked UNDRIP Webpage, *supra* note 23, only includes a translation into indigenous languages of Innu & Kanien'kéha (Mohawk).

[52] *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 [*Saik'uz First Nation v Rio Tinto*] at 209 to 212. The Plaintiffs appealed and in *Thomas v Rio Tinto Alcan Inc*, 2022 BCCA 415 (CanLII) the appeal hearing was scheduled for June 19–23, 2023 with leave granted to intervene on a limited basis for the First Nations' Nadleh Whuten; Council of the Haida Nation; the Heiltsuk Tribal Council; and Chippewas of Saugeen First Nation and Chippewas of Nawash Unceded First Nation (jointly, the "Saugeen Ojibway Nation").

As of December31,2022 there were several cases that reference the UNDRIP Act, a short summary of these are included as Appendix C, but they are not by the Supreme Court of Canada.

Honour of the Crown and UNDRIP Act

We argue the UNDRIP Act engages the *honour of the Crown,* as *Manitoba Métis* (2013) said:

> The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances": *Haida Nation*, at paras. 16 and 18. It is not a cause of action itself; rather, it speaks to how obligations that attract it must be fulfilled. Thus far, the honour of the Crown has been applied in at least four situations:
> …
> (4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty ***and statutory grants to Aboriginal peoples*** (*R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456, at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Natio*n, at para. 51; *Badger*, at para. 47). [53]

Given the emphasis on legal reconciliation as being the purpose of aboriginal rights, the characterization that UNDRIP provides a "framework for reconciliation" the implementation and interpretation of UNDRIP Act engages the honour of the Crown – requiring the Crown "to act in a way that accomplishes the intended purposes of [UNDRIP Act and UNDRIP]."

UNDRIP Act's section 4, on its face is a purpose section, which according to *Moses* is "[t]he most direct and authoritative evidence of legislative purpose."[54] Thus section 4(a) appears to be directed at the Courts with the directions in section 2(3) that "Nothing in this Act is to be construed as delaying the application of the Declaration in Canadian law." Section 4(b) appears to be directed at the Canadian government given the remaining section 5 on revising current laws; and sections 6 and 7 specifying Action Plan to implement UNDRIP and reporting. This interpretation would accord with Dreidger/Sullivan's modern principle as approved in *Rizzo*.

We suggest that the UNDRIP Act provides effectively two mechanisms, potentially complementary, for implementing UNDRIP:

- 4(a) Court driven, under section 2(3) with limited remedial powers; and
- 4(b) Government driven in consultation with Indigenous Peoples under:
  - i. section 5 by ensuring consistency of current laws; or
  - ii. section 6 by way of an Action Plan for new measures.

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[53] *Manitoba Métis, supra* note 34, at 73 [***Emphasis*** added], and 74 notes "[w]hat constitutes honourable conduct will vary with the circumstances."
[54] *Moses, supra* note 37, at 101, see also 102 as to preambles.

In either case, we suggest that Courts should consider the UNDRIP Act in a progressive fashion, particularly given the extensive Preambles, purpose section, and the requirements of the honour of the Crown and look to UNDRIP as a source of interpretation for Canada's constitution, legislative and administrative proceedings affecting Indigenous Peoples.

Justice Canada has provided funding for First Nations in Alberta for both UNDRIP Act's sections 5 and 6, and apparently remains committed to the UNDRIP Act as "a forward-looking" statement of intent that contemplates an "action plan" yet to be prepared and implemented by either level of government." As noted in Appendix C, Courts may not agree with that interpretation.

Provincial Explicit Incorporation

The UNDRIP Act appears to be restricted to Federal jurisdiction. Canada is one of ~25 federated states in the world and as noted, in the UNDRIP Act Preambles it states:

> Whereas the Government of Canada acknowledges that provincial, territorial and municipal governments each have the ability to establish their own approaches to contributing to the implementation of the Declaration by taking various measures that fall within their authority;

Provinces, as acknowledged by the UNDRIP Act Preambles, can and some have promised to incorporate UNDRIP:

- British Columbia has done so in the *Declaration on the Rights of Indigenous Peoples Act* SBC 2019, c 44. [DRIPA][55] with similar terms as the UNDRIP Act, with the addition of the ability of BC Government to enter agreements with Indigenous Governments for joint-decision making agreements or consent to the use of statutory powers;[56]
- Manitoba has the 2016, *The Path to Reconciliation Act*[57] that calls in section 4 for "[t]he minister responsible for reconciliation must guide the development of a strategy for reconciliation that (a) is to be guided by the calls to action of the Truth and Reconciliation Commission and the principles set out in UNDRIP;"

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[55] *Declaration on the Rights of Indigenous Peoples Act,* SBC 2019, c 44. [DRIPA] The BC UNDRIP website is at <https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples>. It is noteworthy that only one legislative provision has been changed despite in the 2 year history of BC's adoption of UNDRIP: see Matt Simmons, "Two years after B.C. passed its landmark Indigenous Rights act, has anything changed?" (Narwhal, 13 December 2021) at <https://thenarwhal.ca/bc-undrip-two-years/>, that was an amendment to the BC Interpretation Act to include Indigenous identity as a protected class, see BC Press Release "Province introduces legislation to uphold Indigenous rights" (November 17, 2021) at <https://news.gov.bc.ca/releases/2021AG0073-002191>.

[56] DRIPA, *ibid* sections 6 to 7. See Sam Adkins, Lisa Jamieson et al, "UNDRIP As a Framework for Reconciliation in Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects" (2020), 58(2) Alta L R 339, at 354 to 355. [Adkins et. al., "UNDRIP As a Framework"], at <https://albertalawreview.com/index.php/ALR/article/view/2621/2580>

[57] *The Path to Reconciliation Act*, C.C.S.M. C. R30.5. This is discussed at *Reconciliation Strategy* website at <https://www.gov.mb.ca/inr/reconciliation-strategy/index.html> with Annual Progress Reports.

- *Alberta's Statement on UND*RIP is an expression of renewing relationships with Indigenous peoples with no substantive content.[58] Alberta has not adopted UNDRIP directly into law or policy although it has non-binding Protocol Agreements with Indigenous Nation, that have been amended to include discussions of UNDRIP as set forth in Schedule D; and
- Northwest Territories has an UNDRIP website which indicates the Department of Executive and Indigenous Affairs will "identify, prioritize and strengthen key actions to further implement UNDRIP," [59] and outlines the creation of an action plan, intergovernmental collaboration, and mechanisms for demonstrating progress.

The balance of the Provinces and Territories have no publicly available information regarding UNDRIP implementation.[60] It should be noted that Inter-provincial and international boundary aboriginal claims have been made, as Indigenous Peoples living in Canada predated those boundaries, and the differing considerations of UNDRIP could exacerbate a resolution.[61]

Provincial Implicit Incorporation

In terms of Provincial implicit incorporation, in the 2020 Manitoba Court of Appeal case *Interlake Reserves Tribal Council Inc et al, v The Government of Manitoba*, the Assembly of First Nations [AFN] applied for intervenor status on consideration of an interim injunction for floodway construction by invoking UNDRIP among others, which AFN conceded was a novel argument. The Court, in the process of denying this said,

> …the larger problem is the submission raises the complex issue of reception of public international law into Canadian domestic law. Three reception issues flow from the submissions of the AFN.
>
> [36] The *first is the doctrine of adoption*, the question being whether aspects of the UNDRIP are already part of Canadian common law because the aspect(s) reflect(s) customary international law and there is

[58] *Action on UN Declaration on the Rights of Indigenous Peoples* at <https://www.alberta.ca/united-nations-declaration-on-the-rights-of-indigenous-peoples.aspx>.
[59] Executive and Indigenous Affairs (NWT) website <website: https://www.eia.gov.nt.ca/en/gnwt-mandate-2020-2023/united-nations-declaration-rights-indigenous-peoples-undrip>
[60] Ontario has 2019's *Bill 76, United Nations Declaration on the Rights of Indigenous Peoples Act*, being referred to the Standing Committee on General Government on March 21, 2019. This is the last status on file which was before the Ontario 42nd Parliament, 1st session, which ended September 12, 2021. The Bill has not been reintroduced.
[61] The US has changed its position in an *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples* (January 2011) to say "The United States supports the Declaration, which—while not legally binding or a statement of current international law — has both moral and political force" at <https://2009-2017.state.gov/documents/organization/154782.pdf>. In *R v Desautel*, 2021 SCC 17 [*R v Desautel*] the Supreme Court ruled that Richard Lee Desautel, a US citizen and resident who shot an elk in BC within the traditional territories of his tribe, which had been displaced to the US and was charged under the *Wildlife Act*, R.S.B.C. 1996, c. 488. He defended the charge saying he was exercising an aboriginal right to hunt. The majority of the Court agreed saying at 1, "…the central issue being whether persons who are not Canadian citizens and who do not reside in Canada can exercise an Aboriginal right that is protected by s. 35(1). For the reasons that follow, I would say yes. On a purposive interpretation of s. 35(1), the scope of "aboriginal peoples of Canada" is clear: it must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact."

> no conflicting domestic legislation (see *R v Hape*, 2007 SCC 26 at paras 35-39; and *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at paras 86-95).
>
> [37] The *second is the interpretive effects* of the UNDRIP in relation to domestic law. International human rights law can be an interpretative aid for Canadian courts both as a contextual tool and for providing support or confirmation for the result of a purposeful interpretation of the Constitution (see *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 70; and *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at paras 22-47).
>
> [38] The *third is the question regarding implementing the UNDRIP and the division of powers under the Constitution Act, 186*7. While the UNDRIP is not a treaty, the discussion in *A-G Can v A-G Ont et al*, 1937 CanLII 362 (UK JCPC), [1937] 1 DLR 673 (PC), as to how an international instrument is implemented into Canadian domestic law is important. Legislative implementation of international law is subject to the division of powers (see pp 679, 681-82; and *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 66). [62]

In terms of *adoption*, it must be remembered that the doctrine of common law aboriginal rights arose at the intersection of British Imperial practices as a reflection of *customary* imperial practices with respect to early encounters between Indigenous people and British settlers. These customary practices were fleshed out in directives to colonial governors that equated to legislation,[63] and in the ordinary course of the common law courts upheld these common practices as Imperial (now

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[62] *Interlake Reserves Tribal Council Inc et al, v The Government of Manitoba*, 2020 MBCA 126; leave refused 2021 CanLII 58912 (SCC) *Emphasis* added. [*Interlake v Manitoba*] [*Emphasis* added]

[63] Such as the *Royal Proclamation of 7 October, 1763* RSC 1985, App. II, No. 1 This is an incomplete transcription, as noted in *Report of the Royal Commission on Aboriginal People: Looking Forward, Looking Back*, Volume 1 (Ottawa: Supply and Services Canada, 1996) [RCAP] at 20-21, which included an accurate transcription in the Appendix D to Volume 1, at: <https://qspace.library.queensu.ca/handle/1974/6874> saying "[t]he most accurate text of the Proclamation is provided in Clarence S. Brigham, ed., *British Royal Proclamations Relating to America*, Transactions and Collections of the American Antiquarian Society (Worcester, Mass.: American Antiquarian Society, 1911), volume 12, pp. 212-218. [at <https://www.gutenberg.org/ebooks/46167>]." The RCAP included a discussion of the contemporaneous import of the *Royal Proclamation, 1763* at 108 to 111, including a discussion of the *Québec Act 1774*,14 Geo. III c. 83 (UK) from an Indigenous perspective that did not revoke the procedural protections of the of the *Royal Proclamation, 1763*. For discussion of the status of the various versions of the Proclamation text, see Brian Slattery, "The Land Rights of Indigenous Canadian Peoples", (D. Phil. Thesis, Oxford University, 1979) [Slattery, *Indigenous Land Rights*] at 204 available at <https://works.bepress.com/brian_slattery/24/>. The importance of this document is underscored by the incorporation of the *Royal Proclamation, 1763* into s 25 of *The Constitution Act, 1982*, however the Constitutional Documents described in section 52(2) and listed in the Schedules does not include the *Royal Proclamation, 1763*. The origin, import and continuing importance of the *Royal Proclamation, 1763* is described in Brian Slattery, "The Royal Proclamation of 1763 and the Aboriginal Constitution" at 14 in Terry Fenge & Jim Aldridge ed, *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada* (McGill-Queens University Press : Montreal, 2015) which also includes the correct form of the *Royal Proclamation, 1763* in Appendix I at 199. See also: Frank J Tough, "Aboriginal Rights Versus the Deed of Surrender: The Legal Rights of Native Peoples and Canada's Acquisition of the Hudson's Bay Company Territory" (1992), v 17 (2) Prairie Forum 225. See *contra* in Ontario *Chippewas of Sarnia Band v Canada (Attorney General)*, 2000 CanLII 16991 (ON CA); leave denied and application for motion for reconsideration of leave to appeal to the Supreme Court of Canada dismissed with costs June 13, 2002 S.C.C. File No. 28365. S.C.C. Bulletin, 2002, p. 925, although this finding has been characterized as a historic. See: *Nevsun Resources Ltd v Araya*, 2020 SCC 5, [2020] 1 SCR 166 regarding customary international law.

Canadian) common law.[64] In that common law the continuity doctrine posits that Indigenous laws in an acquired territory remain in force until replaced by specific new laws.[65] Given the pre-confederation nature of these common law aboriginal rights, it is arguable that aspects of UNDRIP reflecting them have been received or adopted into provincial law.[66]

The second issue as to the interpretative impact of UNDRIP as a human rights instrument would apply to provincial legislation unless a contrary intent was shown or inferred by the Courts.

The last question relates to the division of powers, in the *Constitution Act, 1867*.[67] Canada would be able to pass the UNDRIP Act in accordance with the head of powers in section 91(24) over "Indians, and Lands reserved for the Indians." Robert Hamilton argues that UNDRIP has provisions that fall under the provincial jurisdiction and explicit incorporation of UNDRIP in provincial legislation would be required - this could provide governments with flexibility at the cost of consistency.[68] There is an argument, in addition to the pre-confederation argument above, that *Tsilhqot'in Nation v British Columbia* (2014)[69] and *Grassy Narrows First Nation v Ontario (Natural Resources)*(2014)[70] said the doctrines of aboriginal rights, including the Crowns' duty to consult and accommodate, applied to both provincial and federal governments.[71] Arguably, aboriginal rights are an exception to long established doctrines of interjurisdictional immunity, which says Parliament and provincial legislative assemblies can only pass legislation under an

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[64] Slattery, *Indigenous Land Rights, ibid*; Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

[65] Mark D Walters, "The "Golden Thread" of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act*, *1982*" (1999) 44 McGill LJ 711 at 715, 759-52; Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727 at 738; Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can Bar Rev 196; Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 SCLR (2d) 434 and *Mitchell v MNR*, 2001 SCC 33 at 62.

[66] *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 [*Williams Lake*] the honour of the Crown was applied to pre-confederation Colony of British Columbia's *Proclamation relating to acquisition of Land, 1860* ("Proclamation No. 15"), under which "Indian settlements" were not available for pre-emption and officials responsible took no steps to protect the Village Lands from pre-emption or mark them out as a reserve - this was in the context of upholding a Specific Claims Tribunal holding that the Williams Lake Indian Band had a valid specific claim for *fiduciary* losses.

[67] *Constitution Act, 1867*, *supra* note 44, section 91 provides for federal powers and, section 92 provides provincial powers. see generally Peter Hogg & Wade Wright, *Constitutional Law of Canada* 5th ed. (Toronto: Carswell, 2007) (loose-leaf).

[68] Robert Hamilton, "The United Nations Declaration on the Rights of Indigenous Peoples and the Division of Powers: Considering Federal and Provincial Authority in Implementation" (2021), 53 UBC L Rev 1097. [Hamilton, "UNDRIP and Division of Powers"] See also: John Borrows, *Braiding Legal Orders, supra* note 26.

[69] *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 [*Tsilhqot'in Nation*].

[70] *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014] 2 SCR 447 [*Grassy Narrows*] *Grassy Narrows,* at 50 said in allowing Ontario to take up lands in Treaty No. 3, said "...this power is not unconditional. In exercising its jurisdiction over Treaty 3 lands, the Province of Ontario is bound by the duties attendant on the Crown. It must exercise its powers in conformity with the honour of the Crown, *and is subject to the fiduciary duties* that lie on the Crown in dealing with Aboriginal interests.".

[71] *Tsilhqot'in, supra* note 69, at 103 to 104, and *Grassy Narrows, supra* note 70, at 53.

available head of power in the *Constitution Act,* 1867. This is not without risks as interjurisdictional immunity is a foundational concept in Canadian constitutional law.[72]

The Appeal Court of Saskatchewan, in *Peter Ballantyne Cree Nation v Canada (Attorney General)* (2016),[73] one of a long-running dispute yet to be resolved, about flooding of Reserve lands from dams constructed on provincial lands, have interpreted these cases as allowing provincial infringement of Treaty rights subject to *R v Sparrow* (1990) justification test,[74] and relegating section 88 of the *Indian Act*[75] as legislation directed at a "regulatory gap."[76]

Municipal Incorporation

A number of Canadian municipalities have responses to TRC Calls to Action, that refer to implementing UNDRIP. In Alberta these include, Edmonton's Indigenous Framework[77] and Calgary's Indigenous Policy and Indigenous Policy Framework (2017).[78] Municipalities in other provinces have similar initiatives.[79]

UNDRIP Provisions

UNDRIP is not a Treaty or Convention: it is a Declaration of the United Nations General Assembly made in 2007. UNDRIP consists of 24 Preambles and 46 Articles of the rights of Indigenous Peoples as individuals and collectives, which as Article 43 provides are the minimum standards

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[72] Kerry Wilkins, "Life Among The Ruins: Section 91(24) After Tsilhqot'in and Grassy Narrows" (2017), 55(1) Alta LR 91 at <https://albertalawreview.com/index.php/ALR/article/view/791/783>

[73] *Peter Ballantyne Cree Nation v Canada (Attorney General),* 2016 SKCA 124; leave refused 2017 CanLII 38581 (SCC) [*Ballantyne*]; see also *McNabb v Cyr,* 2017 SKCA 27 at 16 "The Supreme Court has held that none of the ordinary commercial activities on reserve, Treaty rights, or Aboriginal rights fall within the core of s. 91(24) powers", citing *Grassy Narrows*, *supra* note 70 at 53, and *NIL/TU,O Child and Family Services Society v B.C. Government and Services Employees' Union*, 2010 SCC 45 at para 80.

[74] *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*]. The first Supreme Court case to interpret constitutional aboriginal rights, where governments could infringe aboriginal rights if there was a valid legislative objective *and* that legislation respected the unique *fiduciary obligations* due to aboriginal peoples as well as upholding the honour of the Crown at 1112 to 1119 [cited to SCR]. This was expanded in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010 [*Delgamuukw*] where the valid legislative purposes included "general development" subject to the particulars of the case.

[75] *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. First included as section 87 in the 1951 wholesale consolidation and revisions to the *Indian Act*. 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. Courts have had difficulty in interpreting section 88 consistently, see for example *R* v *Dick,* [1985] 2 SCR 309 and *contra R v Morris*, [2006] 2 SCR 915 [*Morris*].

[76] *Ballantyne, supra* note 73, at 247-262 and 244. See *Delgamuukw, supra* note 74, at 37 and 182.

[77] Edmonton Indigenous Framework available at: <https://www.edmonton.ca/city_government/initiatives_innovation/community-engagement-indigenous-framework>.

[78] Calgary Indigenous Policy and Indigenous Policy Framework (2017) available at: <https://www.calgary.ca/communities/indigenous.html>.

[79] For example: Vancouver's UNDRIP Task Force at <https://vancouver.ca/people-programs/undrip-task-force.aspx> and Toronto Indigenous Affairs Office at <https://www.toronto.ca/city-government/accessibility-human-rights/indigenous-affairs-office/>.

for the survival, dignity and well-being of the indigenous peoples. States are charged to provide effective mechanisms for prevention, and redress.

In the aboriginal consultation context, the most relevant Articles of UDRIP are Articles 19, 32 and 46. These read in English as follows:

> **Article 19**
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> **Article 32**
> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*
>
> 3. States shall provide *effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*
>
> **Article 46**
> 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
>
> 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. *The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.*
>
> 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

Free Prior Informed Consent

The concept of "free, prior and informed consent" of the Indigenous peoples concerned [FPIC], through representatives chosen by themselves in accordance with their own procedures under UNDRIP Articles 18 & 33, as an emanation of Article 3's right to self-determination, is threaded

throughout UNDRIP in Articles 10, 11, 19, 28, 29, 30, and 32. Canada's position in *Government of Canada's relationship with Indigenous peoples* (2018) is that "…the Government recognizes the right of Indigenous peoples to participate in decision-making in matters that affect their rights through their own representative institutions and the need to consult and cooperate in good faith with the aim of securing their free, prior, and informed consent." [80] That is not the same as FPIC.

As noted in *Canada's relationship with Indigenous peoples* (2018),

> The implementation of [UNDRIP] requires transformative change in the Government's relationship with Indigenous peoples. The UN Declaration is a statement of the collective and individual rights that are necessary for the survival, dignity and well-being of Indigenous peoples around the world, and the Government must take an active role in enabling these rights to be exercised.[81]

UNDRIP is expansive and remedial. Fully implementing UNDRIP may involve re-considering the entrenched definitions of Canadian territorial sovereignty; development on Indigenous traditional territories where the Crowns' duty to consult is limited to novel impacts; the return i.e. Land Back Movement, or compensation for Traditional Territories under Article 28 and many other matters. The availability of a Court declaration without the application of limitation periods under *Manitoba Métis*[82] may open up historical aboriginal lawsuits depending on the facts.[83]

Crowns' Duty to Consult and Accommodate Indigenous Peoples

Canadian Court Rulings:

The Federal and Provincial Crowns' constitutional duty to consult and accommodate aboriginal peoples when their interests are affected is well established in Canadian jurisprudence.[84] This was summarized by the Supreme Court of Canada in *Behn v Moulton Contracting Ltd* (2013):

> [27] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3

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[80] *Government of Canada's relationship with Indigenous peoples* (2018) [*Canada's relationship with Indigenous peoples* (2018)] at <https://www.justice.gc.ca/eng/csj-sjc/principles.pdf> in Principle #6 at 12. It does note the variability of the duty saying "[t]he Supreme Court of Canada has clarified that the standard to secure consent of Indigenous peoples is strongest in the case of Aboriginal title lands. … The importance of free, prior, and informed consent, as identified in the UN Declaration, extends beyond title lands."

[81] *Ibid* at 3.

[82] *Manitoba Métis*, *supra* note 34 at 133, for legislative limitations 135 to 145 and for equitable doctrines of laches 145 to 153. Kent Roach "Remedies for Violations of Aboriginal Rights" (1992) 21 Man LJ 498 at 530-31 argues that the Canadian practice of respecting Court declarations will result in some negotiated resolution.

[83] For example *Williams Lake*, *supra* note 66. See also generally: Borrows, *Braiding Legal Orders, supra* note 26.

[84] Laidlaw & Passelac-Ross, *Handbook, supra* note 2 at 2 to 12 and Chris W Sanderson QC, 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 at <https://albertalawreview.com/index.php/ALR/article/view/107/107>.

> 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 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.[85]

The *Tsilhqot'in Nation v British Columbia* (2014)[86] case, which granted the first Court declaration of constitutional aboriginal title on a territorial basis for the semi-nomadic Tsilhqot'in Nation, in accordance with the requirements of *Delgamuukw v British Columbia* (1997)[87] raised concerns over previously approved projects saying,

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[85] *Behn v Moulton Contracting Ltd*, [2013] 2 SCR 227, 2013 SCC 26 [*Behn*]. The claimants failed to prove that the relevant Aboriginal community authorized them to represent them, at 30 to 31, with the claim ultimately dismissed on grounds of abuse of process, at 37 to 42, rendering the explication of the duty to consult *obiter*.

[86] *Tsilhqot'in Nation, supra* note 69.

[87] *Delgamuukw, supra* note 74, required at 143: the land must have been occupied prior to the assertion of sovereignty: occupancy may be demonstrated in a number of ways, dwellings, cultivation, to regular use of definite tracts of land to harvest resources; if no direct evidence of occupation at the assertion of sovereignty, then present occupation may be used, provided there is continuity between present and pre-sovereignty occupation; and at the assertion of sovereignty, occupation must be exclusive. The possibility of shared territory was possible but ultimately returned the matter to trial because of pleading errors and evidentiary issues as the trial court had improperly excluded the Plaintiff's oral history evidence. See Bruce G Miller, *Oral History On Trial: Recognizing*

> [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.[88]

Properly speaking this duty to consult is a subset of the "the right of all persons under Canadian law to be dealt with the Crown in a manner that is procedurally fair and reasonable and in accordance with the common law procedural and substantive elements on administrative law."[89] With regard to aboriginal peoples, this duty has additional sources, such as the Crown's fiduciary relationship with aboriginal peoples,[90] the need to justify infringements of Aboriginal rights under subsection 35(1) of the *Constitution Act, 1982*,[91] and the honour of the Crown, which underly the duty to consult and all manner of governments' relationship with aboriginal peoples.[92]

Origins of the Duty to Consult

The duty to consult was found in the 2004 Supreme Court case of *Haida*: the Haida Nation had asserted rights and aboriginal title to their traditional territory and British Columbia [BC] did not

Aboriginal Narratives In The Courts (Vancouver: University of British Columbia Press, 2011) and David Milward "Doubting what the Elders have to say: A critical examination of Canadian judicial treatment of Aboriginal oral history evidence" (2010) 14 Int'l J Evidence & Proof 287.

[88] *Tsilhqot'in Nation, supra* note 69 at 92. Sharon Mascher, "Today's Word on the Street – "Consent", Brought to You by the Supreme Court of Canada" (ABLawg, 8 July 2014), at <https://ablawg.ca/2014/07/08/todays-word-on-the-street-consent-brought-to-you-by-the-supreme-court-of-canada/>.

[89] Thomas Isaac & Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41 Alta L Rev 49 at <https://albertalawreview.com/index.php/ALR/article/view/494/487> at 57.

[90] *Guerin v. The Queen,*[1984] 2 SCR 335 at 376.

[91] *Sparrow*, *supra* note 74 at 1109. "There is no explicit language in [section 35 of the Constitution Act, 1982] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. *Rights that are recognized and affirmed are not absolute*.

[92] *Manitoba Métis, supra* note 34 at 65 to 80.

consult the Haida Nation prior to the transfer and revision of a Tree Farm License to Weyerhaeuser Company Limited.[93] Haida Nation protested saying they should have been consulted.[94]

The Supreme Court said the duty to consult and accommodate [duty to consult] is grounded in the *honour of the Crown* which, was "always at stake in its dealings with Aboriginal peoples,"[95] and arises "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."[96] The assertion of sovereignty gives rise to "an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation."[97] In the Supreme Court of Canada's view, "[t]reaties serve to reconcile pre-existing aboriginal sovereignty with assumed Crown sovereignty, and to define aboriginal rights guaranteed by section 35 of the *Constitution Act, 1982*."[98] Inasmuch as section 35 is a promise of rights recognition, the Crown must "act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate."[99] The Court said, "the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution."[100]

As to third party proponents, "[t]he Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. … However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated."[101]

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[93] At the time, the Haida Nation had not commenced a lawsuit to claim aboriginal title of their territory: those proceedings were launched on November 14, 2002 but the trial decision, *Council of the Haida Nation v. Minister of Forests*, 2000 BCSC 1280 [*Haida* Trial] said at para 6 (f) "In February 1995, the Haida Nation filed a petition challenging the validity of the replacement of T.F.L. 39 that became effective March 1, 1995. On November 7, 1997, the Court of Appeal held that the Aboriginal title claimed by the Haida Nation, if it exists, would constitute an encumbrance on the Crown's title to timber, within the meaning of s. 28 of the *Forest Act* (now s. 35). That litigation was never formally concluded." The *Haida* Trial decision said the province had a moral duty to consult with the Haida Nation but not a legal duty at 61, and the BC Court of Appeal in 2002 BCCA 147 at 60 held that there was a legal duty to consult on the province *and* the third-party licensee Weyerhaeuser Company Limited.

[94] *Haida*, *supra* note 12 at 14. The Court stated that an ordinary interlocutory injunction would be an inappropriate remedy given aboriginal rights were merely asserted. Injunctions remain available for a breach of aboriginal rights at 56.

[95] *Ibid* at 16-17.

[96] *Ibid* at 32.

[97] *Ibid.*

[98] *Ibid*. Further Negotiations take time and use of a resource in the interim may, if claims are established, risk depriving "the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable" at 26 to 27 and at 33 "[w]hen the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable."

[99] *Ibid*.

[100] *Ibid*. Further, "Reconciliation 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*."

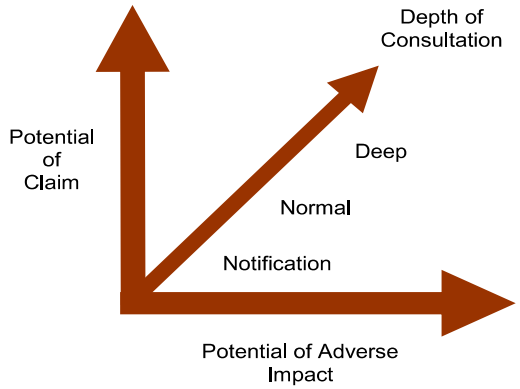
[101] *Ibid* at 53.

The Trigger of the Duty

The duty to consult is triggered at a low threshold: "the duty arises 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."[102]

Variable Scope and Content of the Duty to Consult

The content of the duty varies according to the strength of the claim and the seriousness of the potential adverse impact on the aboriginal right at stake. In *Haida,*



BC's Interim Updated Procedures for Meeting Legal Obligations When Consulting First Nations (07 May 2010)

> [a]t one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. […] At the other end, lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required […] Between these two extremes of the spectrum just described, will lie other situations.[103]

Haida involved deep consultation which "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision."[104] BC had never consulted the Haida Nation prior to the transfer of the Tree Farm License and the Court directed additional consultation.

Taku River

In the companion case of *Taku River Tlingit First Nation v British Columbia (Project Assessment Director* (2004)[105] BC had satisfied the duty to consult in a lengthy (42-month) provincially mandated environmental assessment process for a mining road that the Taku River Tlingit First Nation participated in.[106] The Court found that significant accommodation measures were

[102] *Ibid* at 35.
[103] *Ibid* 43-45.
[104] *Ibid* at 44.
[105] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 BC [*Taku River*]
[106] The TRTFN disagreed with the approval and sued. At trial in *Taku River Tlingit First Nation v Ringstad*, 2000 BCSC 1001 the Chambers judge ruled at 135, that consultation was required as the denial was improper on common law administrative principles and under a statutory interpretation of *Environmental Assessment Ac*t, RSBC 1996. On appeal *Taku River Tlingit First Nation v. Ringstad,* 2002 BCCA 59 at 89, in a split decision, the BC Court of Appeal

incorporated into the Project Approval Certificate,[107] and went on to say that the Project approval was only one of the additional steps in the process saying "that some outstanding [Taku River Tlingit First Nation] concerns could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning."[108]

Indigenous Difficulties: Taku River in the Duty to Consult

In *Taku River,* the duty to consult aboriginal peoples could be satisfied by:

- their participation in the legislated EA process for project approval that provided *in substance* an appropriate level of consultation and accommodation [*substantial consultation*] – this is the is the basis for incorporating aboriginal consultation into project EA, with the premise that direct Crown consultation with aboriginal groups will fill any gaps;
- "at the broader stage of treaty negotiations" and "in the development of a land use strategy" [*complementary consultation*] – this is an amorphous concept implying ongoing or promised future negotiations; and[109]
- after Project approval "throughout the permitting, approval and licensing process, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate" [*regulatory consultation*] – this is an unknown, given the lack of publicly accessible guidance as to the implementation of the duty to consult in the regulatory process.[110]

This is problematic. Where the EA Tribunal has delegated a significant matter to *regulatory consultation,* for example, in the EA of Ridley Island Project (2011) the Proponents would develop and operate a potash export terminal, and the potential environmental effects included impacts on aboriginal fishing rights from the disposal at sea of dredged material. [111] The Agency did not decide that issue and deferred it to subsequent licencing processes administered by Environment and Climate Change Canada [ECCC], which gave permission to dispose dredged material at a cheaper

held that there was duty to consult and accommodate beyond what they agreed was the satisfactory administrative process (reversing the Chambers judge on that point).

[107] *Taku River*, supra note 105 at 44, the Supreme Court said: "The majority report thoroughly identified the TRTFN's concerns and recommended mitigation strategies, which were adopted into the terms and conditions of certification. These mitigation strategies included further directions to [Project Proponent] Redfern to develop baseline information, and recommendations regarding future management and closure of the road."

[108] *Ibid* at 46.

[109] *Ibid*.

[110] *Ibid* at 45 to 46.

[111] Ridley Island Project # 47632 at <http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=47632>. See: "Proposed New Disposal at Sea Sites for Canpotex Potash Export Terminal, Ridley Island" (October 2011), at: <http://www.ceaa-acee.gc.ca/050/documents_staticpost/47632/53481.pdf> at 1. Three disposal options were identified: Site A: used 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 ECCC's designated disposal site.

site, not the ECCC approved site.[112] This is puzzling as the EA for the Pacific NorthWest LNG Project (2013) did direct dredged material dumping to the ECCC approved site.[113] The requirement for Regulatory Plans in the Tailored Guidelines in federal IA may improve this.

Mikisew (2005) Treaty Rights

In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*) (2005) the Supreme Court extended the Crown's duty to consult to a Treaty context.[114] The written text of Treaty No. 8 promised that, in return for the surrender of their title, the First Nations would have the

> …right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as before described, … and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[115]

In *Mikisew*, the court noted that "the clause governing hunting, fishing and trapping cannot be isolated from the Treaty as a whole, but must be read in the context of its underlying purpose, as intended by both the Crown and the First Nations peoples" and that purpose was to ensure that "the same means of earning a livelihood would continue after the treaty as existed before it."[116] Further, in discussing *Badger* it said, "*Badger* recorded that a large element of the Treaty 8 negotiations were the assurances of continuity in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation."[117] In *Mikisew* the Court said: "it was contemplated by all parties that 'from time to time' portions of the surrendered land would be 'taken up' and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap [livelihood rights], and placed in the inventory of lands where they did not."[118] There were no mechanisms in the Treaty to regulate the "taking up" of surrendered lands, however "the Crown was and is expected to manage the change honourably."[119] There was no need

[112] "Environmental group wants health risks for Prince Rupert harbour dredging explored" (February 12, 2016), *CBC News* at <http://www.cbc.ca/news/canada/british-columbia/environmental-group-wants-health-risks-for-prince-rupert-harbour-dredging-explored-1.3444529>.
[113] Pacific NorthWest LNG Project Decision Statement (2017) Conditions 6.28 and 6.29, at: <https://www.ceaa.gc.ca/050/documents/p80032/115669E.pdf>. Other projects have received guidance – for example, the Department of Fisheries and Oceans [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)* 2015 FC 492 at 63 to 66. Consistent with the lack of information that *Protocol* is no longer available.
[114] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*), 2005 SCC 69 [*Mikisew*].
[115] *Ibid* at 2 [Emphasis in original decisions].
[116] *Mikisew*, *supra* note 114 at 29 to 30, *Grassy Narrows*, *supra* note 70 describes these as harvesting rights at 11.
[117] *Ibid* at 47. See also *R v Badger*, [1996] 1 SCR 771 [*Badger*]
[118] *Mikisew*, *supra* note 114 at 30. As noted "The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, 'the same means of earning a livelihood would continue after the treaty as existed before it' (p. 5)". This is from the Report of Commissioners for Treaty No. 8 (22nd September, 1899) at <https://www.rcaanc-cirnac.gc.ca/eng/1100100028813/1581293624572#chp2>.
[119] *Ibid* at 31.

to invoke *fiduciary* duties as the *honour of the Crown* infuses both Treaty negotiations and interpretation giving rise to the duty to consult and accommodate.[120]
In a Treaty context the government is presumed to be aware of the existence of the treaty rights, therefore the duty to consult will be triggered by the potential adverse impact of contemplated government action on those rights: "[t]he flexibility lies not in the trigger […] but in the variable content of the duty once triggered."[121] In the case of Treaties, the particular context of the Treaty will dictate the scope of consultation, and in *Mikisew*, the Supreme Court considered the specificity of the promises made, the nature of the particular Treaty right, the seriousness of the impact of the Crown's proposed action, and history of dealings.[122]

The Court acknowledged the need to assess the impacts on Treaty rights not in terms of the extensive surrendered territory but in relation to the specific reality of the Mikisew Cree First Nation [Mikisew],[123] the Court said, "[t]he meaningful right to hunt is not ascertained on a treaty-wide basis (all 840,000 square kilometers of it) but in relation to the territory over which a First Nation traditionally hunted, fished and trapped, and continues to do so today."[124] The potential for Treaty infringement resulting from the Crown's steady "taking up" of land was acknowledged.[125] In *Mikisew* the proposal was to "to build a fairly minor winter road on surrendered lands where the Mikisew harvesting rights are expressly subject to the Provincial "taking up" limitation"[126] resulting in the duty consult at the lower end of the spectrum. Even at the lower end, this meant that the Crown was required to give notice to the Mikisew, to provide information about what the Crown knew of the anticipated adverse impacts, "to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights".[127] Parks Canada had managed the consultation process poorly as it, in effect,

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[120] *Ibid* at 51.
[121] *Ibid* at 34.
[122] *Ibid* at 63. See Jimmie R Webb "Unfinished Business: The Intent of the Crown to Protect Treaty 8 Livelihood Interests (1922-1939)", in Marc G Stevenson & David C Natcher, eds, *Planning Co-Existence – Aboriginal Issues in Forest and Land Use Planning* (Edmonton: CCI Press, 2010) at 61-80 and Frank J Tough "The Forgotten Constitution: *The Natural Resources Transfer Agreements* and Indian Livelihood Rights, CA.1925-1933" (2004) 41(4) Alta L Rev 999 at <https://albertalawreview.com/index.php/ALR/article/view/1316/1305>.
[123] *Mikisew*, supra note 114 at 3, "The fact the proposed winter road directly affects only about 14 Mikisew trappers and perhaps 100 hunters may not seem very dramatic (unless you happen to be one of the trappers or hunters in question) but, in the context of a remote northern community of relatively few families, it is significant" and at 47: "Twenty-three square kilometers alone is serious if it includes the claimant's hunting ground or trapline."
[124] *Ibid* at 48. Consultation is not required for all signatories to a Treaty, just the project affected First Nations (at 55). The distinction as to current use may not be clear as the cyclical nature of Indigenous harvesting involves allowing certain hunting grounds to "rest and recover" for a period of time - Indigenous Nations could still be "currently using" that fallow territory.
[125] *Ibid* at 48. Justice Binnie said: [i]f the time comes that in the case of a particular Treaty 8 First Nation, "no meaningful right to hunt" remains over its traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response. See: *Yahey v British Columbia,* 2021 BCSC 1287 [*Yahey*] below for clarification of this standard.
[126] *Mikisew*, supra note 114 at 64.
[127] *Ibid* at 64.

considered the Mikisew as no more than a public "stakeholder" in not providing them a separate process, and the Court ordered additional consultation with the Mikisew.[128]

The duty to consult is engaged with respect to Crown lands but can extend to privately owned land in certain circumstances.[129] As noted in *Haida* the boundaries of this doctrine remain open.[130] The honour of the Crown can apply to Modern Treaties, as it cannot be contracted out of despite the express intentions, as it is an overarching constitutional principle.[131]

Indigenous Difficulties in Causal Connection: Rio Tinto

The duty to consult will not be engaged if there is no causal connection between the proposed decision and aboriginal rights or title based on *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* (2010) where the Court said,

> [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.[132]

The duty to consult being limited to novel impacts in *Rio Tinto* is problematic: novel project impacts on aboriginal rights may be minor and disregarded and this accretional impact will cumulatively limit areas where aboriginal rights can be exercised, e.g. "death by a thousand cuts."

This decision has led to projects being classified as a "greenfield" or "brownfield" projects with implied lower consultation obligations. For example, Northern Gateway pipeline project was a "greenfield project" that involved, for the most part, consultation on *new impacts* on aboriginal

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[128] *Ibid* at 4, and 9 to 13, 65 to 68.
[129] *Hupacasath First Nation v British Columbia (Minister of Forests),* 2005 BCSC 1712 [*Hupacasath v Forests*] at 153, 181, 198 to 200 and at 318 to 323. See *contra*: *Paul First Nation v Parkland (County),* 2006 ABCA 128, at 14.
[130] *Haida*, *supra* note 12, at 45.
[131] *Behn, supra* note 85 at 27, see *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Beckman*] at 61.
[132] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*] at 45 to 49, and 53. The first element, included Crown knowledge at 40 to 41, the second element, included a decision that engages a potential Aboriginal right at 42 to 44. *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 55 to 65) with the answer found in the governing legislation. Nigel Bankes, "The Supreme Court of Canada clarifies the role of administrative tribunals in discharging the duty to consult" (ABlawg, 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/>.

interests along the route.[133] Trans Mountain Expansion Project in contrast was a "brownfield project" that involved, for the most part, following the existing disturbances of pipeline right-of-way along the route,[134] limiting consultation to minimal new impacts on aboriginal interests.

This implicit or sometimes explicit suggestion that the exercise of aboriginal rights require undisturbed land has troubling implications. Firstly, there are differences between disturbances: for example, clearings in a forest whether natural or man-made can assist in exercising aboriginal rights, even when the edge effects impinge those rights. This is not to say that disturbances can somehow "benefit" treaty rights in increased game availability as that measure does not take into account other environmental impacts such as increased access by non-Indigenous hunters and environmental distortions of natural predation cycles. The point is that treaty rights can be exercised on disturbed land, albeit at some lower level and that exercise requires consultation.

Secondly, given the limited definition of reclamation in Canadian law and policy, that once extractive activities cease, reclamation of affected areas to viable and, wherever practicable, self-sustaining ecosystems that are compatible with a healthy environment and with human activities.[135] In the journal Restoration Ecology, the authors proposed a model for *ecological restoration*, noting that *rehabilitation* and *reclamation* are historically associated with mining while Indigenous models of *restoration* includes human aspects, "[r]ehabilitation, reclamation, and restoration can be thought of as a continuum of outcomes from the least to the most similar to the predisturbance ecosystem."[136] The standard definition of "environment" in Canadian legislation is compositional and bereft of a human aspect and sustainability qualifiers.[137] The

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[133] Northern Gateway's route described in Volume 1 of the Proponent's EIS (May 27, 2010) at 8-3 "Approximately 516 km of the [right of way] will be in Alberta, with about half on Crown land and half on private land. Approximately 656 km of the [right of way] 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>.

[134] Trans Mountain's route is described in Volume 1- Summary at <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2385938/B1%2D1_%2D_V1_SUMM_%2D_A3S0Q7.pdf?nodeid=2385048&vernum=-2> at 13 at pages 1-3 and 1-4 "Trans Mountain plans to minimize the potential environmental and negative socio-economic effects of the Project through paralleling existing linear facilities, where possible. Over the entire length of new buried pipeline segments associated with the Project, the proposed pipeline corridor is adjacent to the existing TMPL easement for 722 km (73 per cent of the total length) and parallels other existing rights-of-way for a total of 170 km (17 per cent of the total length). Only 98 km (10 per cent of the total length) will be within a new pipeline 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.

[135] This standard of reclamation, in the mining context is based on the Whitehorse Mining Initiative (WMI) Leadership Council Accord definition. The WMI was controversial, it was required to provide a Report to government in a year, the Executive Council rejected proposals from the working group on the environment and prepared their own definition. See: Mary Louise McAllister & Cynthia Jaqueline Alexander, "The Whitehorse Mining Initiative" (Briefing Papers, IRDC, 1999) at <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/27174/118549.pdf?sequence=1&isAllowed=y>.

[136] Laura L Jackson, Nikita Lopoukhine, Deborah Hillyard, "Ecological Restoration: A Definition and Comments" (1995) Vol 3 (2) Restoration Ecology 71 at 75.

[137] For example: *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, section 3(1) defines "*environment* [to] means the components of the Earth and includes (a) air, land and water; (b) all layers of the atmosphere; (c) all organic and inorganic matter and living organisms; and (d) the interacting natural systems that include components referred to in paragraphs (a) to (c)."

qualifier as to practicality is interpreted in economic terms and limited to the removal of infrastructure, contaminants and re-planting for "natural restoration." It is unclear when the carrying capacity for a region to enable aboriginal rights exercise will be restored.

Thirdly, if land is subject to a temporary surface disturbance such as time limited access licence, does the expiry of that licence result in the lands reverting to a category where First Nations may exercise their aboriginal rights?

Aboriginal consultation on previously disturbed areas has been extinguished in some consultation policies, for any disturbance for all times.[138] The IAA limited to "designated projects" defined in the *Physical Activities Regulations* that requires among others a "new right of way" requiring 75 km of previously undisturbed land. It should be noted that claims to aboriginal title are not limited to undisturbed land.

Meaningful Consultation: Haida, Taku River & Mikisew

In *Haida* BC did not consult the Haida Nation[139] but the Court said in all cases "the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances."[140] In the process, *Haida* said,

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a *meaningful process of consultation*. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to *a meaningful process of consultation*. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, *despite meaningful consultation*, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 2003 BCSC 1422, 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.[141]

In *Taku River,* the province had a duty to consult, it did so, and made accommodations that were unsatisfactory for TRTFN. The Province was not under a duty to reach agreement, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.[142]

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[138] For example, Alberta's Consultation Policy in Laidlaw, *Handbook Update, supra* note 3 at 24.
[139] *Haida*, *supra* note 12 at 79.
[140] *Ibid* at 41.
[141] *Ibid* at 42. [*Emphasis* added]
[142] *Taku River*, supra note 105 at 22. The factors in this included: the TRTFN was involved from the start, funded by the province, the project proponent had met with them extensively and commissioned a third party study as a result of their concerns, as did the BC Environmental Assessment Office using an expert approved by the TRTFN at 37.

In *Mikisew*, Justice Binnie refers back to Justice Finch's statement in *Halfway River First Nation v British Columbia (Ministry of Forests)*[143] as what constitutes adequate consultation:

> [t]he Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.[144]

Recent Modern Treaties [Land Claim Agreements], primarily in Northern Canada, include and define aboriginal consultation and accommodation, with these definitions supplemented by principles of Treaty interpretation including honour of the Crown.[145] For example, the Yukon's *Umbrella Final Agreement* (1993) and other Modern Treaties define consultation as follows:

> "Consult" or "Consultation" means to provide:
> (a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
> (b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and
> (c) full and fair consideration by the party obliged to consult of any views presented.[146]

BC's Consultation Policy emphasizes the iterative nature of consultation where an exchange of views can result in new additional considerations or changes to the depth of consultation.[147] This is also recognized in the Federal Policy[148] but Alberta's Consultation Policy does not include this, although the Alberta Guidelines reserve the Aboriginal Consultation Office's [ACO] power to increase the duration of consultation.[149]

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[143] *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 [*Halfway River First Nation*] at 160.
[144] *Mikisew*, supra note 114 at 64 [Emphasis in original].
[145] *Rio Tinto, supra* note 132 considered a Modern Treaty. See: *First Nation of Nacho Nyak Dun v Yukon*, [2017] 2 SCR 576, 2017 SCC 58. [*Nacho Nyak Dun*], Sara Jaremko, The Peel Watershed Case: Implications for Aboriginal Consultation and Land Use Planning in Alberta (2017), CIRL Occasional Paper #56 (Canadian Institute of Resource Law, Calgary, 2017) at <https://cirl.ca/sites/default/files/Occasional%20Papers/Occasional%20Paper%20%2356.pdf>
[146] This definition has become common in Modern Treaties, for example in the *Gwich'in Comprehensive Land Claim Agreement* (1992) Chapter 2 definition and the *Maa-nulth First Nations Final Agreement* (2009) at 283-284.

[147] Interim Updated Procedures for Meeting Legal Obligations When Consulting First Nations (07 May 2010) [BC Consultation Policy] at <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/legal_obligations_when_consulting_with_first_nations.pdf> at 15 saying "The suggested or anticipated level of consultation may change as new information about the First Nation's claimed or proven aboriginal rights (including title) or treaty rights, or about the potential impacts, emerges through the consultation process."

[148] Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (March 2011) [Federal Consultation Policy] available at <https://www.rcaanc-cirnac.gc.ca/eng/1100100014664/1609421824729> at 52 to 53.
[149] Laidlaw & Passelac, *Handbook, supra* note 2 at 33 to 34, and Laidlaw, *Handbook Update, supra* note 3 at 65.

Meaningful consultation requires an exchange of views – a "dialogue requirement." This has been recently been emphasized in Federal Court of Appeal in the 2016 decision *Gitxaala Nation v. Canada* rejecting the Governor-In-Council's [GIC] approval of Northern Gateway.[150] The majority in *Gitxaala* held that the relevant legislation comprised a complete code with the GIC being the ultimate decision maker[151] and focused on direct Crown consultation in Phase IV, after the receipt of JRP Report prior to GIC approval, saying, among other things:

- the JRP 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… [those that] must be considered in an environmental assessment are a small subset of the subjects that make up Canada's duty to consult;"[152]
- aboriginal groups wanted the legislated deadlines extended, the Court found this appropriate and within Canada's power, but there was no evidence that Canada sought such an extension;[153]
- direct Crown consultation on many issues fell short and Canada's consultation representatives testified they were: tasked with information gathering; not authorized to make decisions as they were required to complete the Crown Consultation Report by April 16, 2014;[154]
- Canada's efforts were, "[m]issing was a real and sustained effort to pursue meaningful two-way dialogue. Missing was someone from Canada's side empowered to do more than take notes, someone able to respond meaningfully at some point;"[155]
- the lack of dialogue was exacerbated by Canada's refusal to communicate any information as to Canada's assessment of the strength of aboriginal claims – the Court stressed Canada was not required to release its legal analysis[156] but that information must be disclosed to determine the scope of consultation;[157]

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[150] *Gitxaala Nation v. Canada*, [2016] 4 FCR 418, 2016 FCA 187; leave denied 2017 CanLII 5370 [*Gitxaala*].
[151] *Ibid* at 155 and 139 to 140. The administrative standard of reasonableness applied to the GIC and its formal decision met that standard at 145 and 154 to 156. This also meant judicial review of Panel and NEB decisions were unavailable. This decision was criticized in Martin Olszynski, "Northern Gateway: Federal Court of Appeal Applies Wrong CEAA Provisions and Unwittingly Affirms Regressiveness of 2012 Budget Bills" (ABLawg post July 5, 2016) <https://ablawg.ca/2016/07/05/northern-gateway-federal-court-of-appeal-wrong-ceaa-provisions/>.
[152] *Ibid* at 240. The Court turned to the process used by Canada, who advised that 45 days of consultation meetings would take place and aboriginal groups were to provide written answers to 3 questions: firstly, did the Report properly state your concerns, secondly, did the Report address some/all of your concerns and was their unaddressed concern and how do you recommend they be addressed, i.e. accommodation measures
[153] *Ibid* at 246 to 251. The Court commented that a pre-planned, organized process of Phase IV consultation would have allowed Canada to receive all relevant views, discuss and consider them, provide any necessary explanations and, if appropriate, make suitable recommendations to the GIC within 45 days. By and large, many of the First Nations' concerns were specific, focused and brief; Canada's actions in response equally could have been specific, focused and brief at 252 to 253.
[154] *Ibid* at 263 to 264. The GIC needed to make a decision by June 17, 2014 as the legislated deadline.
[155] *Ibid* at 279. The Court said "we are satisfied that Canada failed in Phase IV to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the material concerns raised."
[156] *Ibid* at 300. Saying "We do not accept that privileges in this case barred Canada from disclosing factual information relevant to the consultation process."
[157] *Ibid* at 224. In law, the extent and strength of the claims of affected First Nations affect Canada's level of obligation to consult and, if necessary, accommodate. It also defines the subjects over which dialogue must take

- that assessment was not disclosed, "[r]ather, the highest level of government directed that information vital to the assessment of the required depth of consultation not be shared with any First Nation;"[158] and
- finally once the duty to consult is acknowledged, a failure to consult cannot be justified by moving directly to accommodation. To do so is inconsistent with the principle of fair dealing and reconciliation.[159]

Clearly a *meaningful process of consultation* is required, as is good faith on both sides but agreement is not required, in contrast to FPIC in UNDRIP. This continued failure of the Crowns to fulfill their consultation obligations has been frustrating for all parties.

Indigenous Issues: Compulsory Participation in EA

As a reciprocal obligation, the duty to consult requires good faith negotiations and aboriginal groups are compelled to participate unless they wish to have no input on the Crowns' decision. Once a Proponent decides to develop a project on traditional lands, if an EA is required, aboriginal participation in the EA is compulsory as that information will be used, in part, to satisfy the Crowns' constitutional duty to consult and aboriginal groups cannot frustrate that process.[160] While unsatisfactory, participating in an EA with the possibility of resulting conditions can, at best, be a proxy for aboriginal groups' direct management of projects on their traditional territories.

The Duty to Accommodate: Negotiating Infringement

The obligation to "substantially address Aboriginal concerns" or to "seriously consider and demonstrably integrate" these concerns into a proposed decision leads the substantive component of the duty to accommodate. The Supreme Court has always insisted that consultation will not always lead to accommodation, only if "required" or "appropriate."[161] It has also stated that "consultation that excludes from its outset any form of accommodation would be meaningless."[162]

In *Haida*, "meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations."[163] Even pending resolution of a claim, "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."[164]

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place: a broad and strong claim to rights and title over an asserted territory means that broad subjects within that territory must be discussed and, perhaps, must be accommodated.

[158] *Ibid* at 305.

[159] *Ibid* at 308, *Mikisew*, supra note 114 at 54

[160] *Haida*, *supra* note 12 at 42, citing *Halfway River First Nation*, *supra* note 143 where *Halfway* cited *Ryan v Schultz*, 1994 CanLII 181 (BC CA) at 161. See also: *Brokenhead Ojibway First Nation v Canada (Attorney General)*, 2009 FC 484 at 42.

[161] *Haida*, *supra* note 12 at 47: "the effect of good faith consultation may be to reveal a duty to accommodate."

[162] *Mikisew*, supra note 114 at 54, *Gitxaala*, *supra* note 150 at 308.

[163] *Haida*, *supra* note 12 at 46.

[164] *Ibid* at 47 [emphasis added].

The Court commented on the need to seek "compromise in an attempt to harmonize conflicting interests and move further along the path of reconciliation" and this is a balance of competing interests as "[b]alance and compromise are inherent in the notion of reconciliation." [165]

Accommodation measures will be negotiated and this choice has the support of the Courts, as *Haida* said "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests." [166] Court supervision of accommodation was attempted in *Hupacasath v Forestry* (2005)[167] with the appointment of a mediator for a two years, to oversee those negotiations but an extension was denied.[168]

The Supreme Court did not foreclose the possibility that consent may be required in cases of established rights saying: "[t]he Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case."[169] In a Treaty context, the Treaty rights are established rights acknowledged by the Crown and the types of accommodation measures that may be required to protect these rights are potentially different in nature and scope. The assertion that the duty to consult does not give Aboriginal peoples a "veto" has become common place – and is misleading.[170] The Supreme Court's has said:

- in *Sparrow* that constitutional protection of aboriginal rights is not absolute;[171]
- in *Haida*, that the consultation process "does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim;" and[172]
- in *Beckman*, the Court acknowledged the difference between "the procedural protection of consultation" and "the substantive right of accommodation," but when the only option for accommodation was to cancel the non-aboriginal licence in question (which had minimal impact) it said "the First Nation does not have a veto over the approval process." [173]

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[165] *Ibid* at 49 to 50.
[166] *Ibid* at 14. Laidlaw, *Alberta Accommodation, supra* note 4 at 5 to 8. See also: Elizabeth Cassell, *The Terms of our Surrender Colonialism, Dispossession and the Resistance of the Innu* (London: Institute of Commonwealth Studies, 2021)
[167] *Hupacasath v Forestry, supra* note 129 at 320 to 326.
[168] *Ke-Kin-Is-Uqs v British Columbia (Minister of Forests)* (2008), 2008 BCSC 1505 at 259 to 260. See also *Saik'uz First Nation v Rio Tinto, supra* note 52 at 654 to 660, citing *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2018 BCSC 633; affirmed 2021 BCCA 155 at 158 to 174. [*Ahousaht*]
[169] *Haida*, *supra* note 12 at 48.
[170] Aside for *Behn, supra* note 85 which as discussed was *obiter.*
[171] *Sparrow*, *supra* note 74 at 1109, "There is no explicit language in [*Constitution Act, 1982*, section 35] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. *Rights that are recognized and affirmed are not absolute*."
[172] *Haida*, *supra* note 12 at 48.
[173] *Beckman, supra* note 131 at 14 saying "The First Nation goes too far, however, in seeking to impose on the territorial government not only the procedural protection of consultation but also a substantive right of accommodation. … This overstates the scope of the duty to consult in this case. The First Nation *does not have a veto over the approval process*. No such substantive right is found in the treaty or in the general law, constitutional or otherwise."

In *Beckman* it said "[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." [174]

Court Remedies

Indigenous peoples can, as a last resort, bring Court proceedings if they are dissatisfied with the results of a project approval affecting their lands. In *Haida* the Court said that, when government's conduct is challenged on the basis of an allegation that it failed in its duty to consult and accommodate, that conduct may be brought to court for to review. [175] In those proceedings analogies from administrative law were applicable and the standard for review focused on the process. If "the government misconceive[s] the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where 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."[176]

In *Haida,* BC had never consulted the Haida Nation and the Court directed additional negotiation.[177] In *Mikisew,* Court ruled that any consultation that excludes from the outset any form of accommodation would be meaningless and directed additional negotiations.[178]

Courts have consistently confined themselves, when a breach of the Crowns' duty to consult is established, to ordering further consultation with the same Crown that misapprehended "the seriousness of the claim or impact of the infringement."[179] Establishing the Crowns' failure to consult, rests on aboriginal claimants, involving detailed, expensive legal reviews of government actions – all of which, if successful will only result in Court ordered additional negotiations.[180]

Limitations on Judicial Review

Judicial review proceedings to assess the Crowns' fulfillment of the duty to consult must be brought within a limited time period, for example section 18.1 of the *Federal Courts Act* specifies a 30 day time limit once notified. [181] In Alberta, the *Rules of Court* provide a six-month limitation period for a judicial review application: these were interpreted in *ACFN v Alberta* (2011) to run

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[174] *Ibid* at 81. See generally: Laidlaw, *Alberta Accommodation, supra* note 4.
[175] *Haida*, *supra* note 12 at 60.
[176] *Ibid* at 63.
[177] *Ibid* at 77. The Court speculated that the strength of the Haida Peoples' claims would mandate some accommodation but that was not part of the ruling.
[178] *Mikisew*, supra note 114 at 16 at 54. The Minister was directed to re-negotiate in accordance with the decision at 69.
[179] For example in Alberta: *Siksika First Nation v Alberta (Director Southern Region Environment),* 2007 ABCA 402; Québec: *Kruger inc c. Première nation des Betsiamites*, 2006 QCCA 569; and *Gitxaala*, *supra* note 150.
[180] The majority of aboriginal litigation is focussed on the duty to consult, see: Lynda M Collins & 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 <https://canlii.ca/t/2cxs> at 989-991.
[181] *Federal Courts Act*, RSC 1985, c F-7.

from constructive notice by posting on the internet and not requiring formal notice of the decision being challenged.[182] Many Indigenous Nations lack the capacity to respond to the increasing number of notices of development and approvals within these timelines.

Consultation Policies as Substitute Legislation

In *Haida*, the Supreme Court noted that it was open for governments where appropriate to develop "regulatory schemes to address the procedural requirements appropriate to different problems at different stages … reducing recourse to the courts."[183] This has not happened.
The Crown can "delegate procedural aspects of consultation to industry proponents seeking a particular development,"[184] although the "legal responsibility for consultation and accommodation rests with the Crown."[185] The Court said this could not be an unstructured discretionary process, citing the earlier decision in *R v Adams* in 1996, where the Court warned governments "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of specific guidance."[186]

In *Haida*, the Court noted that a subsequent *Provincial Policy for Consultation with First Nations* (2003) directing provincial consultation was in place in British Columbia and "[s]uch a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers."[187] In *Taku River*, the Crown satisfied the duty to consult in the course of a legislated EA hearing. This has led every Canadian jurisdiction to adopt policy instruments for aboriginal consultation, based on project-based EA, to inform the Crowns' fulfillment of the duty to consult and aboriginal peoples.[188]

Consultation Policies and Environmental Assessment

All Canadian Consultation Polices incorporate an Environmental Assessment [EA] process. An EA process is defined as a systematic analysis of the potential impacts of a proposed project on

[182] *ACFN v Alberta*, *supra* note 21 at 7, 13 and 30 to 31. Alberta *Rules of Court* at <https://www.canlii.org/en/ab/laws/regu/alta-reg-124-2010/> at 3.15(2).
[183] *Haida*, *supra* note 12 at 51.
[184] *Ibid* at 53.
[185] *Ibid* at 53.
[186] *R v Adams*, [1996] 3 SCR 101 [*Adams*] at 51-52.
[187] *Haida*, *supra* note 12 at 51. See also *Taku River*, supra note 105.
[188] Lorne Sossin & Charles W. Smith, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts In Regulating Government" (2003) 40 Alta L Rev 867 <https://albertalawreview.com/index.php/ALR/article/view/1344/1333> at 869. These are statements of government policy intended to constrain or guide public servants in the exercise of their discretion; see also Laidlaw & Passelac-Ross, *Handbook*, *supra* note 2 at 9 and 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 1 at <https://static1.squarespace.com/static/610855af3be40c6cab4ff38e/t/616dc9f527b81b1acb77214c/1634585077879/2_volume_13_ariss.pdf>.

the natural and human environment to obtain project approval in the public's best interest.[189] The environment is a shared jurisdiction with federal and provincial legislation, further complicating aboriginal consultation and accommodation.[190]

While wildlife harvesting has long been regulated,[191] the rise of environmental concerns in the 1970s led every jurisdiction to pass policies and legislations for environmental protection and environmental impact assessment under their respective powers.[192] Environmental protection legislation generally involves prohibitions on emissions into the environment or elements of the environment, unless a licence is granted by government departments with inspection, investigative and prosecution powers for unlicensed discharges.[193]

Indigenous Input to EA Design

Aboriginal groups have limited input into EA design processes, as they are governed by legislation and government consultation policies, with the premise being that an EA Tribunal cannot decide aboriginal rights and title.[194] There is a split in the jurisprudence on participation of aboriginal groups in the design of the consultation process:

- British Columbia: *Gitxsan* said "the first step of a consultation process is to discuss the process itself,"[195] and in *Huu-Ay-Aht*, "[t]he Crown is obligated to design a process for consultation that meets the needs for discharge of this duty before operational decisions are made."[196]

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[189] "Public interest" was initially considered the protection of the environment, transitioning to sustainable development during the 1980s: John Edward Glenn, *Decision-Making Regimes Governing Environmental Assessment in Canada* (1992) at <http://publications.gc.ca/collections/collection_2018/acee-ceaa/En107-3-14-1992-eng.pdf>.

[190] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 1992, see: James Daschuk & Gregory P Marchildon, "Historical Chronology of the Oldman River Dam Conflict", (2006) Institutional Adaptation to Climate Change (IACC) Working Paper at <https://www.parc.ca/mcri/pdfs/HistoricalChronologyoftheOldmanRiverDamConflict.pdf>.

[191] John Donihee, *The Evolution of Wildlife Law in Canada* Occasional Paper #9 (Calgary, Canadian Institute of Resources Law, 2000) at 7 to 12 at <https://canlii.ca/t/t2p1>.

[192] Stepan Wood, Georgia Tanner & Benjamin J. Richardson, "What Ever Happened to Canadian Environmental Law?" (2010), 37 Ecology LQ 981 at <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1000&context=scholarly_works>

[193] *Canadian Environmental Protection Act*, 1999, SC 1999, c 33. Specific components of the environment may be addressed in other legislation for example the *Fisheries Act*, RSC 1985, c F-14, section 36 (3) says "no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish." [HADD]

[194] *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189 at 93, 97 to 98 [*Innu of Ekuanitshit*]; leave refused 2015 CanLII 10578 (SCC). The Courts upheld Crown consultation with the Ekuanitshi Innu, in part based on potential *regulatory consultation* following project approval, even though the Ekuanitshi Innu, were unable to come to terms with the government proponent Nalcor to enable them to conduct TLU studies that may have established aboriginal title in the project area, at 114 to 118.

[195] *Gitxsan First Nation v British Columbia (Minister of Forests)*, 2002 BCSC 1701 at 8.

[196] *Huu-Ay-Aht First Nation v British Columbia (Minister of Forests)* (2005), BCSC 1121 at 113 [*Huu-Ay-Aht*].

- Alberta: *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;" [197] and
- Federal Court: In *Gitxaala Nation v. Canada* (2016) cited *Cold Lake* in rejecting aboriginal arguments that the Crown consultation process had been imposed on them.[198]

EA legislation will normally define environmental effect as changes in the environment affecting "the current use of lands and resources for traditional purposes" [CULTP] as a misleading shorthand for aboriginal rights.[199] The legislatively mandated process of requiring public and aboriginal input on the mandate of EA tribunals will rarely give rise to any changes in that mandate, in part because they are expressed in general language that has been standardized over the years. The new IAA Planning Phase in the Tailored Guidelines may provide opportunities to affect the design of an IA.

De-Facto Determination of Aboriginal Rights and Title

The aboriginal mandate of EA Tribunals and in JRP Agreements [200] has become fixed with the consideration of aboriginal groups' submissions restricted to information related to the nature and scope of asserted or established aboriginal and the potential adverse environmental effects that the Project may have on them.[201] This gives rise to two concerns for Indigenous groups:

Firstly, challenging an EA Tribunal's interpretation of its aboriginal mandate during or after the EA process, poses difficulties for aboriginal groups. These difficulties exist 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 formal Crown approval; and
- additional crown consultation may be deferred to the regulatory consultation.

This allows latitude for strict interpretation of their mandate by EA Tribunals as their recommendations are a part of decision which could be "fixed" in subsequent Crown processes.[202]

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[197] *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 39.
[198] *Gitxaala*, *supra* note 150 at 203. It noted evidence of changes in the Draft to Final JRP Agreement for aboriginal concerns.
[199] *Canadian Environmental Assessment Act*, SC 1992, c 37, [CEAA-1992], s 2(1)(b)(iii); *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 5 [CEAA-2012], s 5(1)(c)(iii); and *Impact Assessment Act*, SC 2019, c 28 [IAA] s 2 (c)(ii), limited to effects within federal jurisdiction.
[200] See for example # 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 and #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.
[201] *Innu of Ekuanitshit*, *supra* note 194 at 93, 97 to 98.
[202] *Métis Nation of Alberta Region 1 v Joint Review Panel*, 2012 ABCA 352 [*Métis Nation v JRP*] at 14, 20 to 21.

For example, the Proponents' failure to adequately consult and accommodate Aboriginal groups had long been a complaint in the EA of Jackpine Mine,[203] and three Aboriginal groups filed Notice of Questions of Constitutional Law [NQCL] under the *Administrative Procedures and Jurisdiction Act*[204] on October 1, 2012. The JRP Panel issued its ruling October 26, 2012, saying the Panel did not have the express grant of statutory authority to consider the adequacy of Crown consultation,[205] and 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.[206] The Alberta Court of Appeal rejected an application for leave 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.[207]

Secondly, inasmuch as the Crowns' duty to consult and accommodate processes are assessed on a reasonableness standard, the practical compulsory participation by aboriginal groups in EA pose difficulties for them. While legally EA Tribunals cannot determine the existence of aboriginal rights and title, EA decisions on the underlying claim(s) will carry weight in current and future decision making including Treaty negotiations, and Court decisions. 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 within the project area. In this way, from a practical point of view, EA Tribunal decisions *de facto* determine constitutional aboriginal rights and title of Aboriginal groups on the lower reasonableness standard, not the legal standard as to the balance of probabilities.

Historical Treaty Rights v Aboriginal Rights

Canadian treatment of historical land surrender Treaty rights and aboriginal rights does not appear to differ. It should. Historical Treaty rights to a livelihood are qualified by the terms of the Treaty

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[203] As demonstrated by the Fort McMurray #468 First Nation's letter (October 2, 2008) at <http://www.ceaa-acee.gc.ca/050/documents/46952/46952E.pdf>.
[204] *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3, ss 10 to 14. [APJA] Notice of Questions of Constitutional Law [NCQL] are limited "to the applicability or validity of an enactment…or [ii] a determination any right" in s 10(1)(d).
[205] 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 initial Prosper/Brion decision by Alberta in Laidlaw & Passelac-Ross, *Handbook, 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. See generally: Kirk Lambrecht, "Constitutional Law and the Alberta Energy Regulator" (2014) 23 Const. F. 33.
[206] Panel Ruling October 26, 2012 at <http://www.ceaa-acee.gc.ca/050/documents/p59540/83073E.pdf> at 1-2.
[207] *Métis Nation v JRP, supra* note 202 at 20; leave refused, 2013 CanLII 18847 (SCC).

in that they can only be exercised on visibly unoccupied lands and are subject to those lands being "taken up" for other purposes in the Treaty.[208] However, in areas without treaties, aboriginal rights are not qualified other than under the *Sparrow/Delgamuukw* justificatory tests, but in EA they are effectively treated as equivalent to Treaty livelihood rights being subject to re-location in the region. For example, in the EA of the *Labrador-Island Transmission Link Project*[209] the Comprehensive Screening Report [CSR] said the Project is located on unsurrendered asserted aboriginal title and areas of aboriginal rights, said:

> [t]he Agency has concluded that the Project may affect the exercise of asserted Aboriginal rights within the project area … The location of the Project may mean that Aboriginal users may be displaced from their preferred areas for hunting of certain species and for gathering. However, to date the Agency has not received information from Aboriginal groups that leads it to conclude that the general availability of resources in the regional study area, which are traditionally used by Aboriginal people, would diminish as a result of the Project. Notably, alternative locations surrounding the transmission corridor would remain available for affected Aboriginal groups to carry out traditional activities. [210]

The availability of surrounding territories is meaningless if asserted or established aboriginal rights do not carry not only the preferred means of exercise, but also preferred locations.[211] From an Indigenous perspective the aboriginal right to hunt on alternate lands would be meaningless, not only would additional travel be required but hunting grounds (*ushak* - place of species abundance for the Innu) could be very small, with complex ecosystems easily disturbed by the Project.[212] Likewise preferred livelihood sites in Treaty areas would, if direct compensation or replacement

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[208] *Badger*, supra note 117 at 75-79. This was in the context of *The Natural Resource Transfer Agreement (Alberta)* [NRTA], was implemented by corresponding Provincial legislation, *An Act respecting the transfer of the Natural Resources of Alberta*, SA 1930, c 21 and Federal Legislation, *An Act respecting the transfer of the Natural Resources of Alberta*, SC 1930, c 3. Amended by *The Natural Resources Transfer (Amendment) Act, 1938*, SC 1938, c 36. The Memorandum of Agreement is attached as a Schedule to those Acts. The corresponding Alberta legislation is, *An Act to Ratify a certain Agreement between the Government of the Dominion of Canada and the Government of the Province of Alberta*, SA 1938, c 14. Paragraph 12 of the NRTA provided: "12. In order to secure to the Indians of the Province *the continuance of the supply of game and fish for their support and subsistence*. Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof. provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year o*n all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access*." This had been interpreted as negating commercial hunting in return for an expanded territory outside of the Treaty's surrendered lands in *Frank v The Queen*, [1978] 1 SCR 95, and *R v Horseman*, [1990] 1 SCR 901 [*Horseman*].

[209] Labrador-Island Transmission Link Project # 51746 [Labrador-Island Transmission] The Project Home Page at <http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=51746>.

[210] Labrador-Island Transmission CSR, at 17 at <https://www.ceaa-acee.gc.ca/050/documents/p51746/90383E.pdf>.

[211] Such as in *Adams, supra* note 186*,* where aboriginal rights could be exercised in specific locations.

[212] ITK Report entitled "Innu Environmental Knowledge of the Mishta-shipu (Churchill River) Area of Labrador in Relation to the Proposed Lower Churchill Project" (ITKC Report) at 45, included in Nalcor's Application (EIS) as Appendix 10-1 at <http://www.ceaa-acee.gc.ca/050/documents/55069/55069E.pdf> at 10-468.

lands were included as an accommodation measure, attract higher compensation.[213] The reception of ITK in the new federal Impact Assessment Process may correct this understanding.

Project Based Consultation in EA

A project based EA approval process has 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,[214] or other government measures to satisfy Indigenous peoples' concerns; and this leads to a distortion of consultation by proponents' efforts for accommodation, usually by monetary overpayment;[215]
- 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 interests may lead to the denial or nullification of them;[216] and
- "strategic decisions" such as land use strategies, forestry allocations, or other policies or legislation affecting aboriginal interests are not included in project EA, and although EA Tribunals make recommendations as to creating these, they are usually ignored. [217]

Alberta's Non-Participation

Alberta has a policy of declining government accommodation measures by not participating in project EA. For example it declined to participate in the Jackpine Panel Hearings as a matter of policy,[218] with this non-participation policy originating in the Public Hearings #37519 Joslyn North Mine Project (January 27, 2011).[219] Thus, in the Jackpine Mine Panel Report (2013) their

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[213] See generally: Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Saskatoon: Purich, 2001) and Sam Adkins and Bryn Gray et al. "Calculating the Incalculable Principles for Compensating Impacts to Aboriginal Title", 54(2) Alta Law Review 351.

[214] For example, David Laidlaw and Monique M. Passelac-Ross, "Sharing Land Stewardship in Alberta: The Role of Aboriginal Peoples" (2012) Canadian Institute of Resources Law Occasional Paper No 38, [Laidlaw and Monique Passelac-Ross, Sharing Land Stewardship] at:<https://canlii.ca/t/t2q0>.

[215] Laidlaw & Passelac-Ross, *Handbook*, *supra* note 2 at 36. See generally: Jennifer Mills, "Destabilizing the Consultation Framework in Alberta's Tar Sands" (2017) 51:1 Journal of Canadian Studies 153.

[216] Laidlaw & Passelac-Ross, *Handbook*, *supra* note 2 at 31 to 32, See for example: Peter Duinker & Lorne Greig "The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment" (2006) 37 Environmental Management 153 at <https://oaia.on.ca/wp-content/uploads/2020/11/The-Impotence-of-Cumulative-Effects-Assessment-in-Canada-Ailments-and-Ideas-for-Redeployment_Webinar-II-2020_OAIA.pdf>; and 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) at 9 to 13, at: <https://macdonaldlaurier.ca/files/pdf/Noble_Aboriginal%233Study_FinalWeb.pdf>.

[217] Laidlaw, *Alberta Accommodation*, *supra* note 4 at 60.

[218] 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 participation queried Alberta, who remained firm in this position, and refused 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>.

[219] 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>. Notably the Joslyn Panel Report included recommendations for governments - which were ignored.

findings that the only appropriate mitigation measures would be conservation offsets, ought to have required Alberta, in upholding the honour of the Crown, to provide conservation offsets under the logic of *Mikisew,*[220] but Alberta's non-participation frustrated this.

Cumulative Impacts in Alberta: LARP, CEA, AMERA and JOSM

As noted in the Jackpine Panel Report (2013) the cumulative effects of development, which are a constant concern of aboriginal peoples, were to be addressed principally by The Lower Athabasca Regional Plan (2012) [LARP] but also regional monitoring initiatives.[221] LARP and oil-sands monitoring initiatives are piece-meal at best and a mess at worst.[222] We argue the LARP and oil-sands monitoring do not adequately protect aboriginal rights or the environment.[223]

Constitutional Complexity

Canada, Provinces, Territories, Modern Treaties with Self-Government Agreements, and Indigenous Governments have different policies and legislated EA processes that have similar but differing environmental protections and assessment regimes that require a complex web of intra-governmental substitutional and cooperation processes in an effort to avoid duplication.[224]

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[220] *Mikisew*, supra note 114.

[221] Jackpine Mine JRP Report at <https://iaac-aeic.gc.ca/050/documents/p59540/90873E.pdf> and Errata #1 (August 9, 2013) at <https://iaac-aeic.gc.ca/050/documents/p59540/92893E.pdf> [Jackpine Mine JRP], included recommendations that Alberta continue to work toward timely completion of the LARP's biodiversity management framework 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. The Jackpine Mine # 59540 IAA website is at: <https://iaac-aeic.gc.ca/050/evaluations/proj/59540>.

[222] Joshua G Cronmiller & Bram F Noble, "The discontinuity of environmental effects monitoring in the Lower Athabasca region of Alberta, Canada: institutional challenges to long-term monitoring and cumulative effects management" (2018) 26 Environ Rev 169 at <https://tspace.library.utoronto.ca/bitstream/1807/86178/1/er-2017-0083.pdf>, Monique G Dubé, Jenna M Dunlop, et al "History, overview, and governance of environmental monitoring in the oil sands region of Alberta, Canada" (2021) 18(2) Integrated Environmental Assessment and Management 319 at <https://setac.onlinelibrary.wiley.com/doi/epdf/10.1002/ieam.4490>. A list of Oil sands monitoring: scientific papers and presentations, post 2012 is at <https://www.canada.ca/en/environment-climate-change/services/oil-sands-monitoring/scientific-papers-presentations.html>.

[223] David Laidlaw, "Lower Athabasca Regional Plan 10-Year Review" (October 12, 2022: Ablawg.ca) at <https://ablawg.ca/2022/10/12/lower-athabasca-regional-plan-10-year-review/>; "Lower Athabasca Regional Plan 10-Year Review Part 2: Alberta's Regional Plan Development (October 26, 2022: Ablawg.ca) at <https://ablawg.ca/2022/10/26/lower-athabasca-regional-plan-10-year-review-part-2-albertas-regional-plan-development/>; and "Lower Athabasca Regional Plan 10-Year Review Part 3: LARP's Management Frameworks" (December 20, 2022: Ablawg.ca) at <https://ablawg.ca/2022/12/20/lower-athabasca-regional-plan-10-year-review-part-3-larps-management-frameworks/>, collectively [Laidlaw, "LARP – 10 year Review"]

[224] *Moses*, *supra* note 37 where James Bay Agreement (1976) was interpreted to allow a Québec EA and a Federal one at 53 to 55. One arrangement is establishing joint review panels by agreement; however substitution agreements can be challenged: *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34.

This raises issues, for example, the Athabasca Cree First Nation [AFCN] applied to the Federal Court to set aside the joint Decision approving the Jackpine Mine Expansion in *Adam v Canada (Environment)*[225] and the Court noted that the ACFN's issues were within *provincial jurisdiction* and 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."[226]

Tsilhqot'in Nation said that the honour of the Crown applies to both the federal and provincial governments. The possibility of differing views on the duty to consult between federal and provincial governments was raised as a possibility in the 2016 Queen's Bench decision of *Fort Chipewyan Métis Nation of Alberta Local #125 v Alberta*.[227]

This complexity hinders aboriginal reconciliation, frustrating proponents' whose projects may be held up awaiting Crowns' consultation efforts which the proponent cannot control – let alone the continuing failure of the Crowns' to satisfy the duty to consult.

Impact Benefit Agreements

In response, industry may enter into confidential private Impact Benefit Agreement's [IBA] which we have discussed extensively in 2021's *Alberta Accommodation*.[228] IBAs are developed in response to a complex set of economic and social issues where development takes place within traditional aboriginal territories, which 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."[229] Normally IBAs are negotiated with confidentiality clauses, given Canada's Own Source Revenue Policies that deduct IBA benefits from inadequate normal funding.[230] However these may be reconsidered in light of the 2022 Alberta Court of Appeal's decision in *Benga Mining Limited v Alberta Energy Regulator* where these confidentiality clauses

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[225] *Adam v Canada (Environment)*, 2014 FC 1185.
[226] *Ibid*.
[227] *Fort Chipewyan Métis Nation of Alberta Local #125 v Alberta*, 2016 ABQB 713 in *obiter* at 472 to 475.
[228] Laidlaw *Alberta Accommodation, supra* note 4 at 66 to 70.
[229] Steven Kennett, *A Guide to Impact and Benefits Agreements* (Calgary: Canadian Institute of Resources Law, 1999) at 1 and 7. Older CIRL publications are not online but can be ordered from CIRL. See also definition in: Clinton Westman & Tara Joly, Taking Research Off the Shelf: Impacts, Benefits, and Participatory Processes around the Oil Sands Industry in Northern Alberta - Final Report for the SSHRC Imagining Canada's Future Initiative" (2017) [Westman, "Taking Research off the Shelf"] at 24 to 25, download PDF at <http://artsandscience.usask.ca/news/files/205/Taking_Research_off_the_Shelf_Joly_and_Westman_KSG_report.pdf>.
[230] Own-source revenue for self-governing groups [OSR] at <https://www.rcaanc-cirnac.gc.ca/eng/1354117773784/1539869378991>. Proponents share the same concerns, as OSR policies would be an indirect development tax raising the cost of access. Normal funding is deliberately inadequate, given the government functions Indigenous Communities are required to provide, such as health care, education, social services etc. see: Pamela D Palmater, "Stretched Beyond Human Limits: Death By Poverty in First Nations" (2011), Nos. 65/66 Can Rev Soc Policy 112 and Omolara Odulaja, & Regine Halesth, *The United Nations Sustainable Development Goals and Indigenous Peoples in Canada*. (Prince George, BC: National Collaborating Centre for Aboriginal Health, 2018) at: <http://www.nccah-ccnsa.ca/docs/determinants/RPT-UN-SDG-IndPeoplesCanada-Halseth-Odulaja-EN.pdf>.

led to non-disclosure of the IBA terms, [231] although the Federal Court of Appeal's 2022 decision *Canada (Environment and Climate Change) v Ermineskin Cree Nation*, in a similar IBA non-disclosure, said at 8 "[t]he jurisprudence now extends the duty to consult to include economic rights and benefits closely related to and derivative from Aboriginal rights."[232] As we noted, some studies showed, with an IBA, a 12.7 per cent improvement on Community Wellbeing scores.[233]

Corporate Response to TRC Call to Action# 92 and Indigenous Partnerships

The Truth and Reconciliation Commission Call to Action #92 in 2015,[234] calls upon the corporate sector in Canada to adopt *UNDRIP*, including commitments to consultation, relationship building, economic and job opportunities, and internal education. Corporate response to this continues to develop. There is a substantial and growing volume of consideration by all manner of corporate entities and organizations relating to these commitments.[235]

Responses range from informal, for example a statement on a website, or detailed Reconciliation Action Plans (either on a "good neighbour" basis or to obtain, a self-described "social-licence")[236] to highly structured, for example corporate compliance with the UN Global Compact, which involves a voluntary commitment to support UN goals.[237] However, specific implementation of even those structured commitments is necessarily variable and non-prescriptive.[238] Alberta does not require a proponent to follow these corporate policies, and Alberta Consultation Policy overrides Indigenous Consultation Protocols.[239]

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[231] *Benga Mining Limited v Alberta Energy Regulator*, 2022 ABCA 30; leave denied 2022 CanLII 88699, 2022 CanLII 88693, and 2022 CanLII 88683 (SCC) [*Benga Mining v AER*] discussed below.

[232] *Canada (Environment and Climate Change) v Ermineskin Cree Nation*, 2022 FCA 123 [*Canada v Ermineskin*] where an IBA was discussed, but not in evidence at 5 to 9.

[233] Drew Meerveld, *Assessing Value: A Comprehensive Study of Impact Benefit Agreements on Indigenous Communities of Canada* (MA Thesis, UOttawa, 2016) at 15, available at <https://ruor.uottawa.ca/handle/10393/34816?mode=full>. Indigenous Community Wellbeing scoring systems are controversial, see for example: Noah Laser Cannon, *Performing Indigenous Well-Being: Historical and Political Geographies of Canada's Community Well-Being Index* (Msc Geography Thesis, Concordia University, 2020) at <https://spectrum.library.concordia.ca/id/eprint/986656/1/Cannon_MSc_S2020.pdf>.

[234] TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: TRCC, 2012, 2015) online:<https://nctr.ca/records/reports/>

[235] For example, the Progressive Indigenous Relations certification program in corporate training programs

[236] See for example: Clark Wilson, "Reconciliation Plans for Businesses" (11 August 2020), online: Clark Wilson (articles) <https://www.cwilson.com/reconciliation-plans-for-businesses/>

[237] As discussed in Alberta Energy, *Public Inquiry into Anti-Alberta Energy Campaigns* by J Stephens Allan (Edmonton: Alberta Energy, 30 July 2021), available at: <https://open.alberta.ca/publications/public-inquiry-into-anti-alberta-energy-campaigns-report#detailed> [also known as the *Allan Inquiry*] at 617

[238] UN Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous* Peoples 2013), online: <https://www.unglobalcompact.org/news/711-12-02-2013>. See Katherine Wheatley & Joanne Lau, *Business and Reconciliation: An Update Exploring the Performance of Public Companies in Canada*, (Canada: Reconciliation and Responsible Investment Initiative March 2021), online: <https://reconciliationandinvestment.ca/wp-content/uploads/2021/03/SHARE-RRII-Business-and-Reconciliation_Final-1.pdf>

[239] The Consultation Policy (and Metis Policy) state: "Alberta acknowledges that some First Nations [and Métis Communities] have developed their own consultation protocols. Alberta encourages proponents to be aware of these protocols, but does not require proponents to comply with them while consulting with First Nations. In cases of conflict between a First Nation's [or Métis] consultation protocol and this *Policy* or the [*Guidelines*] the

Indigenous groups may also enter direct agreements on the subject with levels of government. A few Alberta examples of Indigenous Consultation Protocols and governmental agreements that have been publicly available either directly from the Indigenous group or included in public regulatory filings are listed in Schedule D to this Report.

Actual partnership between Indigenous Group in industrial projects is a developing model for "economic reconciliation" that is fostered in Alberta. On September 28, 2022, Alberta announced[240] that a consortium of 23 Indigenous groups, backed by the Alberta Indigenous Opportunities Corporation (AIOC) as well as private investors, was buying a minority share ($1.12 billion or 11.57%) in seven regional Enbridge pipelines. The investment was touted as a new and precedent-setting model for economic prosperity for the Indigenous groups.[241] AIOC supports investments by Indigenous groups into large projects in natural resources, agriculture, telecommunications and transportation, with a minimum investment of $20 million. Instead of or rather, in addition to consultation with the Indigenous groups by a project proponent, through partnership, the Indigenous groups have more direct control over the projects in accordance with the corporate for-profit capitalism model.

Alberta's Approach to Consultation for Indigenous Peoples

Alberta developed its original First Nations Consultation Policy in 2005[242] and replaced it in August 2013 with *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Managemen*t (2013)[243] and *The Government of Alberta's Guidelines on*

Policy and [*Guidelines*] will prevail." (Alberta Consultation Policy at 7. Métis Consultation Policy at 7)

[240] Alberta, News Release, "AIOC backs largest Indigenous energy partnership" (28 September 2022), online: Alberta <https://www.alberta.ca/release.cfm?xID=84699338AE5E8-C5F5-BF29-E8F5013CA0B399BE>. See also Lisa Johnson, "Indigenous communities to buy stake in seven Alberta Enbridge pipelines", *Edmonton Journal*, (28 September 2022), online: Edmonton Journal <https://edmontonjournal.com/news/local-news/indigenous-communities-enbridge-laud-landmark-partnership>

[241] *Ibid*.

[242] *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (2005) shortly after the Supreme Court handed its *Haida* and *Taku River* decisions, but before the release of the *Mikisew* decision. This was followed by the release on September 1, 2006 of a set of *First Nations Consultation Guidelines*, subsequently updated on November 14, 2007 the *Alberta's First Nations Consultation Guidelines on Land Management and Resource Development* (2007) providing additional details regarding the specific consultation processes that applied in each of four key government departments. Neil Reddekopp's paper the "Theory and Practice in the Government of Alberta's Consultation Policy" (2013) 22 Constitutional Forum constitutionnel 48, at 55 to 56 argues this 2005 change disrupted the political and practical rapprochement between industry and Indigenous Groups regarding development.

[243] *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Managemen*t (2013) available at <https://open.alberta.ca/publications/6713979>. [First Nations Consultation Policy] The Policy was amended on April 1, 2020 to add to the end of the first paragraph of the Introduction, the following sentence: "Additionally, the provincial government strives to ensure First Nations have the chance to benefit from economic development opportunities and to enjoy Alberta's prosperity." See: Laidlaw & Passelac-Ross, Handbook, *supra* note 2.

Consultation with First Nations on Land and Natural Resource Management (2014) which provided a Matrix of inadequate consultation timelines.[244]

Alberta's Métis Consultation Policy & Métis Guidelines

The Alberta government has developed *The Government of Alberta's policy on consultation with Metis settlements on land and natural resource management* (2015)[245] and *The Government of Alberta's Guidelines on Consultation with Metis Settlements on Land and Natural Resource Management* (2016)[246] in identical terms as the Alberta's First Nations Consultation Policy, aside from the historical context.[247]

The Métis Consultation Policy equates First Nation Treaty Rights as Harvesting Rights as follows "Alberta recognizes that some *Metis Settlement members* use the land for harvesting (fishing, hunting, and trapping for food).[248] These activities are practiced on unoccupied Crown lands or other lands to which Metis Settlement members have access for such purposes in accordance with applicable federal and provincial legislation and in accordance with any applicable existing Aboriginal rights within the meaning of section 35 of the *Constitution Act, 1982*." [249]

The Métis Settlement Councils of Buffalo Lake, East Prairie, Elizabeth, Fishing Lake, Gift Lake, Kikino, Paddle Prairie and Peavine Métis Settlement are entitled to consultation if their members exercise harvesting rights or traditional uses in accordance the *Métis Harvesting in Alberta Policy*

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[244] *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management* (28 July 2014) [Alberta Guidelines], available at <https://open.alberta.ca/publications/3775118-2014>. See Laidlaw, Handbook Update, *supra* note 3 at 3, generally at 39 to 53 and specifically in the *Consultation Process Timeline Critique* at 48 to 49. The Alberta Guidelines were amended in December 2019 to change the flowchart and requirement for Level 1 consultation review by the First Nation of 5 working days of the Proponents' written Record of Consultation *only* if they the First Nation had responded within 15 working days of the Level 1 Notification, effectively narrowing the already inadequate consultation process.

[245] *The Government of Alberta's policy on consultation with Métis settlements on land and natural resource management*, (2015) [Métis Consultation Policy] available at <https://open.alberta.ca/publications/policy-on-consultation-with-metis-settlements-2015#summary>. This Policy was amended on April 1, 2020 to add to the first paragraph of the Introduction, the following: "Additionally, the provincial government strives to ensure Métis Settlements have the chance to benefit from economic development opportunities and to enjoy Alberta's prosperity."
[246] *The Government of Alberta's Guidelines on Consultation with Metis Settlements on Land and Natural Resource Management* (2016) [Métis Guidelines] available at <https://open.alberta.ca/publications/guidelines-on-consultation-with-metis-settlements-2016>. The Métis Guidelines were amended in December 2019 to change the flowchart and requirement for Level 1 consultation review by the Métis Settlement of 5 working days of the Proponents' written Record of Consultation *only* if they the Métis Settlement had responded within 15 working days of the Level 1 Notification effectively narrowing the existing inadequate consultation process..
[247] E.g. Métis Consultation Policy refers to the defunct *Aboriginal Consultation Levy Act*, SA 2013, c A-1.2.
[248] Métis Consultation Policy at 1 "In 1938, twelve Metis Settlements were formed through the Metis Population Betterment Act. Four of these Settlements were later dissolved in the 1950s and 1960s. The *eight remaining Metis Settlements* are unique, vibrant, Alberta communities" *and only these Métis Settlements are entitled to be consulted.*
[249] Métis Consultation Policy, *supra* note 254 at 2.

(2018).[250] The Métis Harvesting Policy demarcates 4 overlapping Harvesting Areas in Alberta[251] – excluding the southern portions of Alberta, where there were no acknowledged Métis settlements in accordance with the appeal decision of *R v Hirsekorn* (2013).[252]

The Métis Harvesting Policy requires Métis Harvesters to partially satisfy the *R v Powley* (2003)[253] tests to establish a right to harvest, as phrased in the Métis Harvesting Policy:

1. Self-identify as Métis and state for how long they have self-identified;
   - This can be shown by, one of the following things:
     - Membership in the Métis Nation of Alberta (MNA), or
     - Membership to a Métis Settlement or a Métis settlement card, or
     - A statutory declaration confirming self-identification.
2. Show an ancestral connection to the Métis Harvesting Area in Alberta they are applying for:
   - With a genealogical history, including where ancestors lived and when they lived there and *applicants must show a pre-190*0 connection to the relevant Métis Harvesting Area.
3. Show a contemporary connection to the same Métis Harvesting Area;
   - This is shown by:
     - Showing a current address in the Métis Harvesting Area or describing your acceptance by and involvement in the Metis Harvesting Area.[254]

[250] Métis Harvesting in Alberta Policy (2018) available at <https://open.alberta.ca/publications/metis-harvesting-in-alberta-policy-2018> [Métis Harvesting Policy]

[251] Métis Harvesting Policy's Area A in Northwest Alberta, Area B in Northeast Alberta, Area C in Central Alberta that overlaps portions of Area A and B and Area D in Central Alberta that overlaps portions of A, B and C with maps at 2 to 8 respectively.

[252] *R v Hirsekorn*, 2013 ABCA 242 [*Hirsekorn*]; leave refused 2014 CanLII 2421 (SCC), said at 8 "The evidence supports the conclusion that no Métis community, however defined, had sufficient presence in that area [Cypress Hills] leading up to the time of effective control. …. The evidence also supports the conclusion that effective control for the purpose of the *Powley* test occurred in 1874. A purposive approach to deciding whether a practice is integral to a distinctive culture poses the question: did the historic Métis community include the particular area within its ancestral lands or traditional hunting territory? In this case, the answer is no."

[253] *R v Powley*, 2003 SCC 43 [*Powley*] at 31 to 33, that of (1) self-identification, (2) evidence of ancestral connection to a historic Métis community and (3) acceptance by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed.

[254] Métis Harvesting Policy, *supra* note 250 at 6. Also called "credible assertion" status. As noted in *Métis Nation of Alberta Association Fort McMurray Métis Local Council 1935 v Alberta*, 2021 ABQB 282 at 10 "Other than s. 35(1) itself, the operation of the Credible Assertion Process is not presently grounded in any statute. Instead, it is grounded in a number of policy documents. These policies include a public document entitled *Métis Credible Assertion: Process and Criteri*a, and an internal document entitled *Métis Credible Assertion Internal Process* which guide the operation of the processes before SPI [Strategic Engagement and Policy Innovation branch of Indigenous Affairs]. Another policy document entitled *Aboriginal Consultation Office Métis Organization Statement of Concern Internal Process* guides the processes to be applied by the ACO. In brief overview, these policies provide that it is SPI, and not the ACO, that is to determine whether or not a Métis organization has made a "credible assertion" of aboriginal rights. As the title of the Credible Assertion Process suggests, SPI does not require a Métis organization seeking recognition as a rights-bearing community to conclusively establish that it meets the criteria in *R v Powley*, 2003 SCC 43. Rather, such an organization is only required to raise a "credible assertion". This standard requires an organization to provide "some information" on all aspects of the *Powley* test."

In terms of non-Settlement Métis in Alberta there is a conflict as to proper representatives for consultation, in part due to the inevitable confluence of aboriginal rights and consultation,[255] between the Métis Nation of Alberta Society, Métis Settlement Councils[256] and non-settlement Métis communities.[257] The Notley government was working towards a Regional Policy for Métis Harvesting Rights when the Kenney government canceled this in favour of the established credible assertion policy as detailed in the 2022 Kings Bench decision in *Métis Nation of Alberta Association v Alberta (Indigenous Relations*),[258] the cancellation decision will be appealed with a decision due in 2023.[259] The Supreme Court's 2016 declaration in *Daniels v. Canada (Indian Affairs and Northern Development)*[260] as to the Métis peoples being subjects of Federal jurisdiction under section 91(24) of the *Constitution Act,* 1867 brings additional complications.

Regardless of who is to be consulted, the First Nation Consultation Policy and Métis Consultation Policy, and their Guidelines are identical and we will refer to them as Alberta's Consultation Policy. CIRL has written extensively about the inadequacies of Alberta's approach to the Crowns' constitutional duty to consult and accommodate Indigenous peoples living in Canada and concluded that Alberta's approach is fundamentally flawed.[261]

Alberta's Consultation Policy

It is difficult to understate the damage that Alberta's Consultation Policy has engendered with Indigenous Peoples in both the development, content and operation. Alberta's Consultation Policy, overrides any Indigenous Group's Consultation Protocol, and states that Alberta will only consult with Indigenous Group on "decisions relating to land and natural resource management."[262] This means Alberta will *only* consult on:

- *strategic decisions* that may adversely impact the area in which Indigenous Treaty rights and

[255] See generally, Catherine Bell & Paul Seaman, "A New Era for Métis Constitutional Rights? Consultation, Negotiation and Reconciliation" (2014), 38(1) Man LJ 29 at <https://canlii.ca/t/7bz> [Bell, New Era]. As to Non-Settlement Métis in Alberta see: Moira Lavoie, "The Right to be Heard: Representative Authority as a Requirement in Enforcing Métis Consultation" (2019), 56(4) Alta LR 2009 at <https://albertalawreview.com/index.php/ALR/article/view/2549/2516> wherein she criticizes the ACO's requirement for evidence of representative capacity that was upheld in *Fort Chipewyan Métis Nation of Alberta Local #125 v Alberta*, 2016 ABQB 713.
[256] A partial history of Métis in Alberta is in Fred Martin, *Federal and provincial responsibility in the Métis settlements of Alberta* (1988) (DIAND: Claims and Historical Research Centre, 1988) at <https://publications.gc.ca/collections/collection_2018/aanc-inac/R32-425-1988-eng.pdf>.
[257] Fort McKay Metis Nation is the first Métis Community to obtain community credible assertion status, their website is at <http://fortmckaymetis.com>.
[258] *Métis Nation of Alberta Association v Alberta (Indigenous Relations*), 2022 ABQB 6 [*MNAA v Alberta*]
[259] *Métis Nation of Alberta Association v Alberta (Indigenous Relations)*, 2022 ABCA 250
[260] *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99 [*Daniels*]
[261] In 2014 with Laidlaw & Passelac-Ross, *Handbook*, *supra* note 2; the 2016 Laidlaw, *Handbook Update*, *supra* note 3 and most recently in 2021 in Laidlaw, *Alberta Accommodation*, *supra* note 4.
[262] Alberta Consultation Policy, *supra* note 243 at 1. This "refers to provincial Crown decisions that directly involve the management of land, water, air, forestry, or fish and wildlife."

traditional uses that are currently exercised on Crown lands (provincial or federal);[263] and
- *projects decisions* relating to oil and gas, forestry, and other forms of natural resource development *limited* to considering matters related to land, water, air, forestry or fish that may adversely impact Indigenous Treaty/Harvesting rights and traditional uses that are currently exercised on Crown lands (provincial or federal), for example an approval governed by an energy enactment alone will not require Indigenous consultation.[264]

Alberta will not consult on leasing and licensing of rights to provincial Crown minerals;[265] accessing private lands to which First Nations do not have rights of access; policy matters unrelated to land and natural resource management, and in emergencies.

Treaty and harvesting rights are defined as the right to hunt, fish, and trap for food, on unoccupied Crown lands and other lands to which Indigenous members have a right of access for such purposes[266] and "traditional uses" are stated to be Indigenous customs or practices on the land that are not Treaty or harvesting rights, including burial grounds, gathering sites, and historical or ceremonial locations and do not refer to proprietary interests in the land. This distinction is legally questionable as traditional uses would, in Alberta's definition, qualify as site-specific aboriginal rights in *R v Adams*,[267] and although their site specific nature would carry possessory rights they could be overridden by taking up the tracts in question as allowed in the Numbered Treaties.

Alberta Consultation Office

The Alberta Consultation Office [ACO], is a branch of Alberta's Indigenous Affairs Ministry will, once presented with a complete proposal conduct, within 10 working days a "pre-consultation assessment" to classify the potential effects of requested Crown actions on Treaty rights and traditional uses into one of 4 categories: Level "0" being no adverse impacts and no notification,

[263] These are defined as "provincial regulations, policies, and plans when those plans involve decisions related to land, water, air, forestry or fish" but no process is provided.
[264] The AER, under the Second Consultation Direction and JOP#2 will not require Indigenous consultation for: applications in respect of an energy resource activity that is governed by an energy enactment alone.
[265] Unless those lands are located within the boundaries of a Métis Settlement where they will be subject to the *Metis Settlements Act*, RSA 2000, c M-14 with the Co-Management Agreement (1990) forming Schedule 3, this Co-Management Agreement was amended in 2013 at <https://msgc.ca/wp-content/uploads/2020/01/Co-Management-Amendment-Agreement-June-3-2013.pdf>. See: Wayne N Renke, Alberta's Métis Settlements and the Co-Management Agreement, 2014 23-2 *Constitutional Forum* 5, at <https://canlii.ca/t/t0gw> and generally, Laidlaw and Passelac-Ross, *Sharing Land Stewardship, supra* note 214 at 13 to 18.
[266] The Alberta government's understanding of Treaty rights is impoverished, Treaty rights to hunt, fish and trap are restricted to food is erroneous and appears to flow from the *minority* opinion in *Badger supra* note 117 at s 2 & 7 that claimed that Treaty 8 had merged with the *NRTA 1930*, found in *Constitution Act, 1930*, RSC 1985, App II, No 25, Schedule 2 Article 12; while the majority *expressly rejected* the "merger and replacement" interpretation and held that, as a promise of a means to earn a livelihood, geographic limitation in Treaty 8 was interpreted to allow hunting on all lands *not* taken up under the Treaty "and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting" at 58. Likewise, Treaties have been interpreted as negating commercial hunting in return for an expanded territory outside of the surrendered lands, in *Frank v The Queen*, [1978] 1 SCR 95, and *R v Horseman*, [1990] 1 SCR 901, see also *Mikisew*, supra note 114.
[267] See *Adams, supra* note 186. Alberta's definition of importance would qualify as aboriginal rights in accordance with *R v Van der Peet*, [1996] 2 SCR 507 and *R v Sappier; R v Gray*, 2006 SCC 54 [*Sappier; Gray*].

although this determination may be challenged in court.[268] ACO has discretionary power to consider the proposed activity as having been adequately covered by a previous consultation and has either minor or no subsequent changes. ACO determines the Level of consultation required:

Figure 1: Framework for assessing scope of impacts and determining depth of consultation

Sensitivity of the location (based on Treaty rights and traditional uses)	**High**	Level 2 – standard	Level 3 – extensive	Level 3 – extensive
	Moderate	Level 2 – standard	Level 2 – standard	Level 3 – extensive
	Low	Level 1 – streamlined	Level 1 – streamlined	Level 2 – standard
Nature of the project		**Low impact**	**Moderate impact**	**High impact**

As supplemented by Sector Specific Matrices detailed in the Guidelines,[269] with Schedule A of the containing a categorization as follows:

Low Impact: These activities are typically short duration (less than 2 years), small in size (less than 5 ha), and have low or limited environmental impacts.	**Level 1 – Streamlined Consultation**
Moderate Impact: These activities are typically moderate in duration (more than 2 years), moderate in size (greater than 5 ha), and have moderate environmental impacts.	**Level 2 – Standard Consultation**
High Impact These activities are typically long in duration (more than 10 years), large in size and scale or complexity, have extensive environmental impacts, and include approvals from multiple regulatory authorities.	**Level 3 – Extensive Consultation - and - Level 3 – Extensive Consultation with EIA**

Indigenous groups receive written notification of the project and Level of consultation from the Proponents and must provide an initial response within 15 (Level 1 & 2) or 20 (Level 3) working days respectively, and if there is no response or they do not raise any concerns, consultation will

[268] *Athabasca Chipewyan First Nation v Alberta*, 2018 ABQB 262; upheld 2019 ABCA 401.

[269] The above image is from the Alberta Guidelines, *supra* note 244 at 14, with the following table from Laidlaw, *Handbook Update*, *supra* note 3 at 45. There is a limited ACO discretion to extend the timelines or elevate the Level of Consultation. The Sector Specific matrices include Appendix A – Required Consultation; Appendix B – Sector-Specific Activities That May Not Require Consultation Appendix C – Non Sector-Specific Activities That Do Not Require Consultation but are not comprehensive, for example they do not include hydro-electric dams. Appendix C in the Sector Specific guidelines specify activities which will not require consultation including: activity that is regulated by a Code of Practice; a short-term diversion of water; temporary, short-term access to public land; maintenance that does not incur additional surface disturbance; or renewals.

be considered complete. Consultation must be completed in 15 (Level 1) to 20 (Level 2) working days and 60 working days for Level 3 Extensive (or at least substantially underway), and Level 3 Extensive Consultation with EA completed within the *regulatory timelines*.

Consultation will involve the Proponent engaging in a "dialogue" with affected Indigenous Groups by way of telephone, email or meetings, with both parties are expected to work together in good faith to discuss potential mitigation strategies to avoid or minimize the impacts to Treaty rights and traditional uses. These may include amending project plans to accommodate site-specific concerns and to reduce or change the potential impact on areas used for exercising Treaty rights and traditional uses.[270] If the parties agree to a mitigation strategy, the proponent will need to confer with ACO, which will then work with regulators to determine whether the proposed strategy could result in unintended regulatory complications.

If no agreement is reached, the proponent will submit its written consultation records to the ACO and Indigenous Groups, and ACO will determine the adequacy of Crown consultation, *usually* before a Crown decision is made within 10 (Levels 1 & 2) to 20 (Level 3) working days. It is noteworthy that Level 1 – Streamlined consultation and Level 2 – Standard consultation provide only 5 additional working days to complete. All of these timelines are inadequate.

Alberta's Consultation Policy makes no mention of the issue of cumulative impacts of projects,[271] a major concern for Indigenous Groups brought forward repeatedly during legal challenges,[272] regulatory proceedings and in consultation processes.[273] Alberta's position is that cumulative impacts of resource developments are dealt with in cabinet level Regional Plans such as LARP.

Adequacy of Alberta Crown Consultation

The adequacy of the Alberta's Crown consultation is given to the ACO, who would under, a Ministerial Aboriginal Consultation Direction provide advice to the AER and other regulators as to the satisfaction of that duty in accordance with Alberta's Consultation Policy.[274] The ACO has

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[270] Private proponents will be limited in their inability to provide government only accommodation measures and consequently "pay off" Indigenous Groups to obtain their consent – distorting the process.

[271] An accessible description of cumulative impacts is contained in Richard R Schneider, *Alternative Futures: Alberta's Boreal Forest at the Crossroads* (Edmonton: Federation of Alberta Naturalists & Alberta Centre for Boreal Research, 2002) Ch 5 at 63-81. Development has continued unchecked since 2002.

[272] The Beaver Lake Cree Nation claims that the cumulative effects of development in its traditional territory have deprived its members of any meaningful Treaty No 6 harvesting rights. In *Lameman v Alberta*, 2012 ABQB 195 pleadings respecting some 19,000 authorizations were struck on the basis, among others, that the resultant litigation would be unwieldy at 66-67.

[273] For example the Alberta Treaty Chiefs (2010) Position Paper at Appendix 3 in the Laidlaw & Ross, *Handbook*, *supra* note 2.

[274] These directives were authorized under section 67 of REDA, the current directive for First Nations is from both the Department of Energy Ministerial Order 105/2014 & Department of Environment & Sustainable Resource Development Ministerial Order 53/2014 (October 31, 2014). The current directive for Métis Settlements is from both Department of Energy Ministerial Order 39/2016 and Department of Environment and Parks Ministerial Order 16/2016 (March 30, 2016) Issues with these directives were canvassed in Giorilyn Bruno, "Section 67 of the

a website including Alberta's Consultation Policies. [275] There are Joint Operating Procedures between the AER and ACO for First Nations consultation,[276] Joint Operating Procedures for Métis Settlements consultation with the AER on energy resource activities,[277] and as well as related Bulletins.[278] There is no enforcement to require regulators to comply with ACO determinations.

The ACO, has adopted a proponent led model with proponents providing an electronic project description to the ACO in accordance with *The Government of Alberta's Proponent Guide to First Nations and Metis Settlements Consultation Procedures* (2019).[279] The ACO advises proponents on a project basis: if consultation was required on a pre-consultation assessment, and if so, gives advice on which Indigenous people were to be consulted and on Levels of consultation were required. The Proponents would then notify the Indigenous peoples, obtain their responses, if any and endeavor to address their concerns within set timelines dependent on the Level of consultation specified by the ACO. Thereafter the ACO would assess the adequacy of the written consultation records submitted by the Proponent within set timelines and provide directions to the AER as to the adequacy of that consultation. It is notable that private proponents are unable to provide government only accommodation measures.

We expressed capacity concerns for the ACO, given the burdens on them and this has been born out, for example "[i]n 2018-19, the ACO reviewed over 9,000 pre-consultation assessments and almost 4,000 adequacy assessments for land and natural resource development. There are currently 5,000 files underway. It is possible for a file to take years to move from a pre-consultation assessment to an adequacy assessment." [280] This number translates into 4,000 or more consultations, swamping Indigenous Consultation Offices with scant resources. The Indigenous Relations Ministry provides an Indigenous Consultation Capacity Program [ICCP] of $22M in 2019-2020, for "all Indigenous communities who participate in Alberta's consultation process [as]

Responsible Energy Development Act: Seeking a Balance Between Independence and Accountability" (2015) 52:4 Alta L R829, 2015 CanLIIDocs 98, <https://canlii.ca/t/6x3>.

[275] ACO has website at <https://www.alberta.ca/indigenous-consultations-in-alberta.aspx>.

[276] AER, *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities*, October 31, 2018 [JOP #2] at <https://static.aer.ca/prd/documents/actregs/JointOperatingProcedures.pdf>.

[277] AER, *Joint Operating Procedures for Metis Settlements Consultation on Energy Resource Activities*, October 31, 2018 [JOPM] at <https://static.aer.ca/prd/documents/actregs/JointOperatingProcedures_MetisSettlements.pdf>.

[278] Bulletin 2015-04& Release of the Joint Operating Procedures for First Nations Consultation on Energy Resource Activities, Including New Application Requirements; Bulletin 2015-10: Joint Operating Procedures for First Nations Consultation on Energy Resource Activities – Delay in Implementing New Application Requirements Bulletin 2015-20: Release of Revised Joint Operating Procedures for First Nations Consultation on Energy Resource Activities.

[279] *The Government of Alberta's Proponent Guide to First Nations and Metis Settlements Consultation Procedures* (2019) available at <https://open.alberta.ca/publications/goa-proponent-guide-to-first-nations-and-metis-settlements-consultation-procedures-2019>. These were amended in 2019 and *The 2019 proponent guide: overview of changes* (2019) is available at the same website.

[280] Annual Report Indigenous Relations (2018-2029) [Annual Report Indigenous 2018-2019] at 24; at <https://open.alberta.ca/dataset/1b41f6c4-cbbb-43d9-9879-17f33a22f8bf/resource/bd2fe0c0-62ab-42f1-82ef-329a7f7e59fc/download/indigenous-relations-annual-report-2018-2019-web.pdf>.

an annual core funding allotment to assist with consultation-related activities."[281] Even with proponent funding, which is not always provided – this is wholly inadequate.[282]

Alberta's Regulators: Alberta Energy Regulator

The *Responsible Energy Development Act* [REDA][283] in 2012, created an industry funded corporation with rule making powers as the Alberta Energy Regulator [AER] that would have approval jurisdiction over upstream energy resource activities[284] including environmental aspects.[285] The AER replaced the Energy Resources Conservation Board [ERCB] but continued its practice of restricting public input to land owners directly and adversely affected by the energy project – effectively denying input from advocacy groups and Indigenous peoples.[286] Section 21 of REDA removed the jurisdiction of the AER to assess the adequacy of Crown consultation with Indigenous peoples.[287] The AER maintains a comprehensive website.[288] The AER cannot approve a project without considering the input of the ACO, although there is no enforcement mechanism.[289] It describes the role of the AER in relation to other regulators:

> The AER has jurisdiction under the Responsible Energy Development Act (REDA) for the entire life cycle of upstream energy resource development in the province, including upstream oil, natural gas, oil sands, and coal activities. The AER combines regulatory functions of its

[281] Annual Report Indigenous Relations (2019-2020) [Annual Report Indigenous 2019-2020] at page 53 at <https://open.alberta.ca/dataset/1b41f6c4-cbbb-43d9-9879-17f33a22f8bf/resource/788aac8c-c1a2-478c-b698-6db609b7ebb3/download/ir-annual-report-2019-2020.pdf>. This is the most current information but how this was distributed is not publicly available. This was however only 0.0038% of Alberta's non-renewable resource revenues which totaled $5.9 billion in the 2019-20 fiscal year at page 15 in Annual Report Energy (2019-2020) at <https://open.alberta.ca/dataset/cbd7147b-d304-4e3e-af28-78970c71232c/resource/4da34006-a913-46e7-b7cc-eb8d66e2e999/download/energy-annual-report-2020-2021.pdf>. In 2018-2019 ICCP totalled ~$14 M see Annual Report Indigenous 2018-2019 at 27. There is information on Alberta: Indigenous Consultation Capacity Program (ICCP) (2016) with process information available at <https://open.alberta.ca/publications/first-nations-consultation-capacity-investment-program>.

[282] See Laidlaw, *Alberta Accommodation, supra* note 4 at 44 to 51.

[283] *Responsible Energy Development Act,* SA 2012, c R-17.3 [REDA]. Effective June 17, 2013 Order in Council (OC 163/2013). It is a public agency under *Alberta Public Agencies Governance Act*, SA 2009, c A-31.5 [APAGG].

[284] Defined in section 1(1)(j) as including the *Coal Conservation Act*, RSA 2000, c C-17; *Gas Resources Preservation Act*, RSA 2000, c G-4; *Geothermal Resource Development Act*, SA 2020, c G-5.5; *Oil and Gas Conservation Act*, RSA 2000, c O-6; *Oil Sands Conservation Act*, RSA 2000, c O-7; *Pipeline Act*, RSA 2000, c P-15; and *Turner Valley Unit Operations Act*, RSA 2000, c T-9.

[285] These were contained in the *specified enactments* defined in section 1(1)(s) as including the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [EPEA]; *Public Lands Act*, RSA 2000, c P-40; *Water Act*, RSA 2000, c W-3 and Part 8 of the *Mines and Minerals Act*, RSA 2000, c M-17 dealing with Exploration.

[286] Indian Reserves or Métis Settlements in close proximity i.e. within 2000 metres of the project would have the opportunity to participated in a public hearing, if it filed a Statement of Concern [SOC] and if the AER exercised its discretion to hold one. Responsible Energy Development Act General Regulation, Alta Reg 90/2013, Section 3.2 also AER Rules of Practice Alta. Reg 99/2013.

[287] REDA section 21 said "The Regulator [AER] has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*."

[288] The AER's comprehensive website is <https://www.aer.ca>.

[289] In accordance Ministerial Direction FN section 7 and JOP #2, section 4.1, 4.4 and 4.4.1 and Ministerial Direction M section 7 and JOPM sections 4.1, 4.4 and 4.4.1, however none of these require the AER to comply with the ACO.

> predecessor, the Energy Resources Conservation Board (ERCB), with those regulatory functions previously undertaken by Alberta Environment and Parks (AEP) under the specified enactments (*Public Lands Act*, *Mines and Minerals Act* (Part 8), *Water Act*, and the *Environmental Protection and Enhancement Act* [EPEA]) in respect of energy resource activities. Section 21 of REDA precludes the AER from determining the adequacy of consultation. [290]

Guidance for AER practices under the specified enactments follow from other regulators.[291] The AER makes all applications public, usually for 30 days to encourage public participation but that is limited to those "directly and adversely affected by a proposed project."[292]

Other Alberta Regulators

One of the benefits we identified in the 2014 *Handbook* was the centralization of aboriginal consultation into the ACO.[293] However, as we noted in the 2016 *Handbook Update,* with the release of the Guidelines in 2015 that centralization was partially undone,[294] except for the AER.

The Guidelines, changed the role of the ACO to provide consultation management services to meet the needs of Alberta, First Nations, the AER, and project proponents which now included a list of government departments with responsibilities related to Crown land and natural resources [Responsible Departments].[295] Depending on the case, any or all of the following may apply: Responsible Departments work with the ACO;[296] they may carry out the procedural aspects of consultation activity; they may act as a project proponent; or they may delegate the procedural aspects of consultation."[297] The Guidelines said at page 8 that "[t]he ACO or applicable GoA ministry must directly carry out substantive aspects of consultation."

Alberta Environment and Protected Areas Director's Approval

The Ministry of Environment Protected Areas [AEP] is responsible for administering the *Environmental Protection and Enhancement Act* [EPEA][298] providing for an Alberta EA process

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[290] AER, "Environmental Protection and Enhancement Act", online: <https://www.aer.ca/regulating-development/project-application/application-legislation/environmental-protection-and-enhancement-act>
[291] Specified Enactment Directions available at <https://www.aer.ca/regulating-development/rules-and-directives/specified-enactment-directions>.
[292] AER Public Notice of Application webpage at <https://webapps.aer.ca/pnoa>. REDA section 32.
[293] Laidlaw & Passelac-Ross, *Handbook*, *supra* note 2 at 18, 37 to 38.
[294] Laidlaw, *Handbook Update, supra* note 3, at 25 to 28.
[295] *Ibid* at 26, including: Alberta Environment and Sustainable Resource Development (ESRD), now Alberta Environment and Protected Areas (AEP) at 28 to 29; Alberta Culture, Historic Resource Management Branch at 29 to 30; Alberta Tourism, Parks and Recreation now AEP at 30; Alberta Municipal Affairs at 30 to 31; Alberta Transportation now Alberta Transportation and Economic Corridors at 31; and Alberta Infrastructure at 31.
[296] Presumably under some Cross-Ministry Agreements referred to in page 25 of Laidlaw, *Handbook Update*, *supra* note 3, although there remains no public information about these arrangements.
[297] Laidlaw, *Handbook Update* at 26
[298] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [EPEA], and certain project requiring approvals under the *Water Act*, RSA 2000, c W-3. The AEP's Environmental approvals and assessment website is dated and available at <https://www.alberta.ca/environmental-assessment-process.aspx>. The EPEA binds the

in Part 2 for certain activities, however for energy resource activities, the AER would have jurisdiction over the EPEA.

Under the EPEA, the Director is a Ministerial appointment, responsible for directing an EA under section 44 and there are multiple Directors and each has discretion to order an EA in sections 41 and 43.[299] Under the *Environmental Assessment (Mandatory and Exempted Activities) Regulation* the attached Schedule 1 contains Mandatory Activities that require an EA and Schedule 2 contains Exempted Activities.[300] The relevant Director has the discretion to direct an EA, if the proposed project does not fit within the specified categories or is listed under Exempted Activities, depending upon the environmental impacts.[301] The Minister may also order an EA in section 47.[302]

The EA process begins when the Proponent, on application under the regulations by electronic means only,[303] or other person notifies the Director of a proposed project.[304] The Director maintains a public Registry of proposed projects subject to an EA.[305] The Director may require

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Crown in section 3, and under section 3.1 "the Minister or the Director, … must act in accordance with any applicable ALSA regional plan." The EPEA has an attached Schedule of Activities, the Activities Designation Regulation, Alta Reg 276/2003 for a long list of activities as well as Codes of Practice.

[299] Director defined in EPEA section 1(r), and multiple Directors for regions in Alberta may appointed in section 25.

[300] Environmental Assessment (Mandatory and Exempted Activities) Regulation, Alta Reg 111/1993. [EA Schedule]

[301] The Director under EPEA section 44(1)(b) may make a decision that the potential environmental impacts of the proposed activity warrant further consideration under the EA process considering the factors in section 44(3) including : "(a) the location, size and nature of the proposed activity; (b) the complexity of the proposed activity and the technology to be employed in it; (c) any concerns in respect of the proposed activity that have been expressed by the public of which the Director is aware; (d) the presence of other similar activities in the same general area; (e) any other criteria established in the regulations; (f) any other factors the Director considers to be relevant." Notably these impacts do not expressly include aboriginal rights.

[302] EPEA section 47 provides "If the Minister is of the opinion that an environmental impact assessment report is necessary because of the nature of a proposed activity, the Minister may by order in writing direct the proponent to prepare and submit the report in accordance with this Division, notwithstanding that (a) the Director has not ordered an environmental impact assessment report, or (b) the proposed activity is the subject of an exemption under regulations under section 59(b).

[303] Approvals and Registrations Procedure Regulation, Alta Reg 113/1993 [AEP Approval Regulation] section 3. Environmental Protection and Enhancement Act Approvals and Codes of Practice Electronic Document Submission Protocol at <https://www.alberta.ca/assets/documents/ep-epea-approvals-codes-of-practice-electronic-documentation-submission-protocol.pdf> and Acceptable Formats for EPEA Approval and Code of Practice Records and Submission Coordinates at <https://www.alberta.ca/assets/documents/ep-epea-approval-acceptable-formats.pdf>.

[304] Normally the Proponent will submits a *Project Summary Table* in a downloadable form at <https://www.alberta.ca/environmental-assessment-process.aspx#jumplinks-0> that includes the "Nearest First Nation Reserve(s) and Métis Settlements (name and km)" and Map under the *Environmental assessment program: preparing a project summary table* (2017) available at <https://open.alberta.ca/publications/preparing-a-project-summary-table>.

[305] Environmental Assessment Regulation, Alta Reg 112/1993 [EA Regulation] The Public Registry is divided into Environmental Impact Assessments – Historical projects at <https://www.alberta.ca/environmental-impact-assessments-historical-projects.aspx> and Environmental Impact Assessments – Current projects at <https://www.alberta.ca/environmental-impact-assessments-current-projects.aspx>.

additional disclosure from the Proponent to assess the necessity of an EA in EPEA section 44(2).[306] There are several possible outcomes:

1. The Director may, if the proposed project includes all Exempted Activities, determine that an EA is not required in section 44(1)(b)(ii) and notify the proponent to start regulatory applications; or [307]
2. If the Director determines, under 44(1)(b)(i) that the potential environmental impacts of the proposed activity warrant further consideration under the EA process, the Director shall provide written notice to the proponent,[308] and requiring the Proponent to give public notice in section 44(5) according to the regulations.[309] Under 44(6) any member of the public can register written Statements of Concern if they are directly affected by a proposed activity within 30 days or such or any longer period as given in the Proponent Public Notice and the Director cannot make a final decision until then. [310] The Director is responsible for developing a Screening Report in section 45(1)(a), in accordance with the regulations[311] to ascertain whether an EA is required in section 45(1)(b).
   a) After the Screening Report, under section 45(4) if the Director determines an EA is required the Director will notify the proponent to prepare an environmental impact assessment report in accordance with the regulations; or
   b) Under section 45(3), if the Director determines a EA is not required it shall notify the proponent as to the registration requirements and may refer any information to the Director responsible for issuing the approvals or registration – as well as notifying persons with Statements of Concern.[312]

If the Director or Minister[313] directs an EA the Proponents will prepare a Draft Terms of Reference [TOR] document for the Director's approval under section 48 of the EPEA. The Alberta EA

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[306] AEP Approval Regulation section 3 details the required application information including in 3(1)(q) "a description of the public consultation undertaken or proposed by the applicant;" notably section 3(2) provides that "The Director may waive any of the requirements of subsection (1)(a) to (q) if the Director is satisfied that a requirement is not relevant to a particular application or that it is appropriate for other reasons to waive the requirement." It appears from the *Project Summary Table* that the Director has waived this requirement.
[307] EPEA section 44(4)(b) says "The Director shall notify the proponent… (b) orally or in writing of a decision made under subsection (1)(b)(ii)." This determination is subject to reasonable interpretation by the Director, see *Alexis v Alberta (Environment and Parks),* 2020 ABCA 188; leave refused 2020 CanLII 92502 (SCC). See also: Nigel Bankes, "The Discipline of Vavilov? Judicial Review in the Absence of Reasons" (Ablawg, May 12, 2020) at <https://canliiconnects.org/en/commentaries/70662>. See: Jason Unger, A Guide to Public Participation in Environmental Decision-Making in Alberta, Environmental Law Centre of Alberta, 2009 CanLIIDocs 269, at <https://canlii.ca/t/2ff> Figure J at 207, as noted this is a reproduction of EA process, the most current version is archived from March 25, 206 at <https://web.archive.org/web/20160325210932/http://environment.gov.ab.ca/info/library/6964.pdf> and Linda McKay-Panos, Public Access to Information in the Oil and Gas Development Process, Canadian Institute of Resources Law, 2007 CanLIIDocs 528 at <https://canlii.ca/t/t2s2>.
[308] EPEA section 44(4)(a).
[309] EA Regulation section 2 information required; and 3 directs public notice. [Proponent Public Notice]
[310] EPEA section 44(6). See also section 73, 77, 99(1)(a)(i) & (ii), and 127 of the EPEA.
[311] EA Regulation section 4(1), section 4(2) maintains the Screening Report in the registry, see 45(2) EPEA.
[312] EA Regulation section 5(2). This could lead to an appeal to the Environmental Appeals Board's [EAB].
[313] Director: EPEA sections 44(1)(1)(a), or 45(1)(b) and 45(4); and Minister in section 47.

Process Guide makes reference to the Draft TOR requiring the proponent to prepare "a First Nations Consultation Plan [with the assistance of the ACO in accordance with Guidelines]" that must be approved by the consultation adviser before the process can move ahead."[314] The Director will direct publication of the Draft TOR for public comment; and after consideration and any amendments publish the Final TOR.[315] The Proponent will prepare an Environmental Impact Assessment [EIS] in accordance with section 49 of the EPEA, which includes at 49(l) "the manner in which the proponent intends to implement a program of public consultation in respect of the undertaking of the proposed activity and to present the results of that program."[316] This draft EIS, in section 50, will be submitted to the Director for review ,[317] who may require from the Proponent addition information in section 51; and once the Director determines completeness, direct publication in section 52 of the final EIS.

The Director must, under section 53, direct the EIS to the appropriate regulatory agencies for determination as to the public interest in approving the project, either to:

- AER if the project involves their jurisdiction;[318]
- Alberta Utilities Commission if the project involves their jurisdiction;[319]
- Natural Resource Conservation Board [NRCB] if the project involves their jurisdiction;[320] or
- AEP Minister, together with other information and recommendation the Director considers appropriate.[321]

The AEP Minister may, in section 54(1), if the project is governed by the *Water Act*[322] direct the Proponent to apply for approval, or notwithstanding any other EPEA provisions refer the proposed activity to the Alberta Cabinet with the recommendation they designate this as a "reviewable project" within the meaning of the *Natural Resources Conservation Board Act.*[323]

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[314] Alberta EA Process Guide at 2.
[315] EPEA section 48 and EA Regulations 6 and 7 for final TOR. There are standardized TOR for in-situ, oil sands mining, and coal mining projects that can be modified, available at <https://open.alberta.ca/publications/4903130>.
[316] EPEA section 49. This presumably would include a separate process for Indigenous groups.
[317] This is described in the Alberta EA Process Guide as a Technical Review at 2 to 3, focussing on satisfying the TOR – although depending on the location federal officials may be consulted.
[318] EPEA section 53(a); See above.
[319] EPEA section 53(a); See below.
[320] EPEA section 53(b); See below.
[321] EPEA section 53(c).
[322] *Water Act*, RSA 2000, c W-3, which may require EA in accordance with the EPEA.
[323] EPEA section 54(2). See below. The Minister has residual powers in section 54 to direct, with recommendations to "to any person, the Government, a Government agency, a government of another jurisdiction or an agency of that government that may be dealing with the proposed activity."

Natural Resource Conservation Board

The *Natural Resources Conservation Board Act*[324] established the Natural Resource Conservation Board [NRCB]. In section 12 the NRCB is responsible for review of projects in section 4:

(a) forest industry projects;
(b) recreational or tourism projects;
(c) metallic or industrial mineral projects;
(d) water management projects;
(e) any other type of project prescribed in the regulations (there are none); and
(f) specific projects prescribed by the [Alberta Cabinet].

It holds public hearings but those are limited to persons "directly affected by the proposed project" which hinders environmental advocacy expressing their concerns. The NRCB is a quasi-judicial regulatory agency that describes its status and relationship with Indigenous engagement as follows:

> As a quasi-judicial and regulatory agency, the NRCB conducts public interest reviews of proposed natural resource projects under the *Natural Resources Conservation Board Act*, considering social, environmental, and economic effects. Projects that may impact Aboriginal and treaty rights trigger the Crown duty to consult and accommodate Indigenous groups. The Supreme Court of Canada decisions in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*., (Chippewas) and *Clyde River (Hamlet) v Petroleum Geo-Services Inc*., confirmed that regulatory tribunals like the NRCB may help fulfill the Crown's duty to consult with Indigenous groups. [Alberta] has stated that it may rely upon the NRCB's review process to partially or completely fulfil the government's duty to consult and accommodate.
>
> The [ACO] works with Alberta government ministries and regulators to ensure that the Government of Alberta's duty to consult is met, providing a recommendation to the government on the adequacy of the consultation. However, the ACO does not provide a recommendation or advice to the NRCB. The NRCB does not assess the adequacy of the government's direct Indigenous consultation. Instead, the NRCB satisfies itself that the government consultation process is sufficiently advanced to allow the NRCB review process to proceed.
>
> The NRCB has revised its pre-hearing, hearing, and decision-making procedures to ensure they align with the Alberta government's duty to consult and accommodate Indigenous groups.[325]

These points are reiterated and elaborated in the "Indigenous Consultation and Participation in Natural Resource Development Project Reviews under the Natural Resources Conservation Board

[324] *Natural Resources Conservation Board Act*, RSA 2000, c N-3 [NRCBA] The NRCB is bound by Regional Plans under *Alberta Land Stewardship Act*, SA 2009, c A-26.8 [*ALSA*] in section 2, binds the Crown in section 3 and in section 15 remuneration of Board members only is governed by APAGG and regulations thereunder.
[325] NRCB, "Indigenous Engagement" at <https://www.nrcb.ca/natural-resource-projects/indigenous-engagement>.

Act: Fact Sheet,"[326] as well as the "Intervener Funding: Process Guide," [327] and "The Board Review Process Under the NRCBA: Process Guide."[328]

Alberta Utility Commission

The Alberta Utility Commission [AUC] is established under the *Alberta Utility Commission Act*[329] that regulates "Alberta's investor-owned electric, gas, water utilities and certain municipally owned electric utilities," as well as "routes, tolls and tariffs of energy transmission through utility pipelines and electric transmission and distribution lines," and "provides an adjudicative function for issues arising in Alberta's electric and natural gas markets."[330] AUC only holds hearings for those persons that may "directly and adversely affect the rights of a person" in section 9(2).[331] The AUC's website contains a section on Indigenous Engagement[332] that states that the AUC is empowered to consider the satisfaction of Alberta's duty to consult. [333]

The AUC rules delegates the duty to consult to project proponents and is addressed in AUC Rule 007: Applications for Power Plants, substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines in Appendix A1 and specifically A1-B.[334] Rule 007 requires a Participant Involvement Program [PIP] with guidelines for Indigenous consultation depending on the project prior to making an application.[335]

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[326] Indigenous Consultation and Participation in Natural Resource Development Project Reviews (September 2022) at: <https://www.nrcb.ca/public/download/files/216588>.
[327] *Intervener Funding Process Guide* - Version 2.2 (2020), at <https://www.nrcb.ca/public/download/files/67139>.
[328] The Board Review Process Under the NRCBA: Process Guide v2.1 (2018) at <https://www.nrcb.ca/public/download/files/74480>.
[329] *Alberta Utility Commission Act*, SA 2007, c.A-37.2 [AUCA], section 6(2) says the AUC is a public agency under APAGG and section 8.1 says the AUC must comply with Regional Plans under ALSA. AUC's website is at <https://www.auc.ab.ca>.
[330] AUC, "Who we regulate," available at: <https://www.auc.ab.ca/who-we-regulate-directory/>.
[331] AUCA section 22(1). See: *Pembina Institute for Appropriate Development v Alberta (Utilities Commission)*, 2011 ABCA 302; and Energy Resources Conservation Board Rules of Practice, Alta Reg 252/2007, section 10.
[332] AUC Indigenous Engagement at: <https://www.auc.ab.ca/indigenous-engagement-directory/>.
[333] AUC Duty to consult at <https://www.auc.ab.ca/duty-to-consult/>. See: *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, [2017] 1 SCR 1099 [*Chippewas of Thames*].
[334] Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations, Hydro Developments and Gas Utility Pipelines (September 1, 2021) [AUC Rule 7] at: <https://www.auc.ab.ca/Rule-007/>. The AUC will decide on adequacy of the application prior to considering it.
[335] AUC Rule 7 section 2 with the PIP requirements Appendix A1 and A1-B for Indigenous consultation. The ACO is referenced 13 time in Rule 7 with the normal reference being: "If the government of Alberta, through the Aboriginal Consultation Office (ACO) or otherwise, directed consultation with an Indigenous group for related approvals (i.e., *Public Lands Act*, *Water Act*, *Environmental Protection and Enhancement Act*, *Historical Resources Act*, *Government Organization Ac*t, etc.) the applicant must provide a copy of the pre-consultation assessment, the adequacy assessment and the specific issues and response table (if prepared). If the government of Alberta, through the ACO or otherwise, indicated that a pre-consultation assessment is not required, the applicant must provide a copy of that direction. If advice from the government of Alberta has not been obtained, the applicant must provide justification for its decision to not seek advice."

Environmental Appeals Board

The Environmental Appeals Board's [EAB] website outlines pertinent legislation:[336]

> The Environmental Appeals Board is governed by Part 4 of the *Environmental Protection and Enhancement Act* (EPEA), Part 9 of the *Water Act*,[337] Section 42 of the *Emissions Management and Climate Resilience Act* (EMCRA),[338] and Schedule 5 of the *Government Organization Act.*[339] The regulations which apply directly to the Board include the Environmental Appeal Board Regulation,[340] and the Environmental Protection and Enhancement (Miscellaneous) Regulation.[341]

Details of the role and constitution of the EAB were outlined by the Alberta Court of Appeal in 2020 in *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, as:

> [126] The [EAB] is not a regulator like some of the Province's energy boards. The [EAB] is essentially an independent commission of inquiry reporting to the Minister. Vis-à-vis what are known as specified activity approvals, the [EAB] has one function and one function only and that is to hear appeals by parties directly affected by Directors' decisions (s 90(2)). The Board reports to the Minister what it hears and makes non-binding recommendations (s 99(1)). Under the *Environmental Protection and Enhancement Act* the Minister, assisted by his Directors, is the regulator. The Board was established to provide the Minister with independent and expert advice with respect to such regulation by reporting to the Minister a summary of the representations which were made to it and any recommendations it might have as a result of those representations (s 99(1)). [342]

Under the *Designation of Constitutional Decision-Makers Regulation*[343] under the *Administrative Procedures and Jurisdiction Act*,[344] the AUC and AER are listed in Schedule 1 as having jurisdiction to determine "all questions of constitutional law." EAB and NRCB are not included in the table. All of these regulators are bound by the relevant Regional Plans under ALSA.

Honour of the Crown and Regulatory Agencies

Nothing has changed in Alberta's approach to consultation,[345] although there are developments in the *honour of the Crown* doctrine at the Alberta Court of Appeal for regulatory agencies.

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[336] EAB website <http://www.eab.gov.ab.ca/index.htm>. EAB, *Legislation* at: <http://www.eab.gov.ab.ca/legislation.htm>.
[337] *Water Act*, RSA 2000, c W-3. [*Water Act*]
[338] *Emissions Management and Climate Resilience Act*, SA 2003, c E-7.8.
[339] *Government Organization Act*, RSA 2000, c G-10.
[340] *Environmental Appeal Board Regulation*, Alta Reg 114/1993.
[341] *Environmental Protection and Enhancement Act (Miscellaneous) Regulation*, Alta Reg 118/1993.
[342] *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, 2020 ABCA 456 at 126.
[343] *Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006.
[344] *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3 [APJA].
[345] See: Voices of Understanding: Looking through the window (AER: November 2017) at <https://static.aer.ca/prd/documents/about-us/VoiceOfUnderstanding_Report.pdf> and What We Heard: Indigenous and Environmental NGO Focus Testing, 2016 (AER: September 2017) at <https://static.aer.ca/prd/documents/about-us/WhatWeHeard_FocusTesting.pdf> but there is no evidence that Alberta's practice has changed.

Fort McKay First Nation v Prosper Petroleum Ltd

In the April 4, 2020 decision in *Fort McKay First Nation v Prosper Petroleum Ltd*,[346] the Court of Appeal[347] concluded that the AER has an obligation to take into account the honour of the Crown of Alberta when deciding whether to recommend approval of a new oil sands project under s 10 of the *Oil Sands Conservation Act*.[348]

The AER had "approved an application by Prosper Petroleum Ltd (Prosper) in June 2018 for the Rigel bitumen recovery project (Project), which would be located within 5 kilometers of the FMFN's Moose Lake Reserves. The AER approval is subject to authorization by the Lieutenant Governor in Council (Cabinet), which has yet to be granted."[349] In the majority's decision Fort McKay First Nations [FMFN] was described:

> [6] Due to the extensive industrial and resource development surrounding Fort McKay, FMFN is concerned that the ability of its members to pursue their traditional way of life in the Moose Lake Area has been severely and adversely affected by the cumulative effect of oil sands development in the surrounding area. The record shows that 70% of FMFN's traditional territory is leased for oil sands purposes: Lagimodiere Report, p. 3, AEKE Tab 31, A165. The FMFN's traditional territory has been described as "the *most* severely affected of all First Nations by oil sands development in the region": Review Panel Report 2015, p. 156, AEKE Tab 11, A50, emphasis in original.[350]

The FMFN began negotiating with Alberta in 2001 for protection in a Moose Lake Access Management Plan [MLAMP] seeking a 10 km buffer zone around the Moose Lake Reserve intended to be incorporated as a Sub-regional Plan in the planned LARP – Alberta denied this and implemented LARP. In August 2013, FMFN applied for a review of LARP and The Review Panel Report (June 2015) found that the LARP did not take "…adequate measures to protect the Applicant's Treaty and Aboriginal rights, Traditional Land Use and culture. In fact, it has done quite the opposite ... in the not-too-distant future, FMFN will not be able to utilize *any* of their Traditional Land because of industrial development activities."[351] This led to Premier Jim Prentice

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[346] *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 [*Fort McKay v Prosper*] See: Nigel Bankes, "The AER Must Consider the Honour of the Crown" (April 28, 2020, ABlawg post) [Bankes, "AER and Honour of the Crown"] at <https://ablawg.ca/2020/04/28/the-aer-must-consider-the-honour-of-the-crown/>

[347] The panel included Justice Barbara Lea Veldhuis, Justice Jo'Anne Strekaf with Justice Sheila Greckol concurring in the result in a separate decision offering guidance to the AER as to the application of the honour of the crown.

[348] *Oil Sands Conservation Act*, RSA 2000, c O-7 [OSCA].

[349] *Fort McKay v Prosper, supra* note 346 at 2.

[350] *Ibid* at 6 & 7. A March 2010 report commissioned by FMFN and submitted to a Joint Review Panel established in 2012 as part of the AER process for a separate project proposed by Shell Canada was also submitted to the AER in its consideration of the Rigel Project at issue in this appeal. This report spoke to the need for "the mitigation and accommodation of cumulative effects … beyond the project-level": Fort McKay Specific Assessment, Disturbance and Access: Implications for Traditional Use, p. 61. The Joint Review Panel found that the cumulative effects of oil sands development on the First Nation's cultural heritage are "already adverse, long-term, likely irreversible and significant": 2013 ABAER 011 at 1741. However, the Panel found that these cumulative effects could not be addressed within the context of the project-specific AER review process at 1720.

[351] *Fort McKay v Prosper, supra* note 346 at 11.

and Chief Boucher signing a Letter of Intent in March 2015 contemplating a Draft MLAMP to be approved by March 2016 but in the *interim* "the portion of the Access Management Plan within 10 kilometers of the Moose Lake Reserves was to be completed by September 30, 2015."[352] The MLAMP was still subject to ongoing negotiation[353] when the AER was approved the Project,[354] it noted that Cabinet approval would be required to authorize the Project, saying that "Cabinet is the most appropriate place for a decision on the need to finalize the MLAMP."[355]

Leave to appeal was granted in accordance with REDA section 45(1),[356] and the majority said the applicable standard of review was correctness.[357] The majority made several statements:

> [39] Tribunals have the explicit powers conferred upon them by their constituent statutes. However, where empowered to consider questions of law, tribunals also have the implied jurisdiction to consider issues of constitutional law as they arise, absent a clear demonstration the legislature intended to exclude such jurisdiction: [Rio Tinto] at para 69. This is all the more so where the tribunal is required to consider the "public interest": *ibid* at para 70. In such circumstances, the regulatory agency has a duty to apply the Constitution and ensure its decision complies with s 35 of the *Constitution Act, 1982*: *Clyde River (Hamlet) v Petroleum Geo-Services Inc*., 2017 SCC 40 at para 36, [2017] 1 SCR 1069 [Clyde River]. As the Supreme Court has noted, "[a] project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest": *ibid* at para 40. The tribunal cannot ignore that aspect of its public interest mandate.
>
> [40] It follows from a review of its constituent legislative scheme that *the AER has the implied jurisdiction to consider issues of constitutional law as they arise in its proceedings*. As discussed further below, that jurisdiction is explicitly removed where the adequacy of Crown consultation is concerned: REDA, s 21. However, *issues of constitutional law outside the parameters of*

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[352] *Ibid* at 13.
[353] Ultimately, agreement was reached in 2021 and the MLAMP (February 2021) available at <https://open.alberta.ca/publications/moose-lake-access-management-plan> It does not include a total ban on developments within the 10km buffer-zone instead allowing 15% of developable area or 15,537 ha with no development within 1 km of the Moose Lake Reserve. At page 9 it says "This plan will initially be implemented as policy prior to its recommended incorporation into LARP." It does not appear to be included yet.
[354] *Fort McKay v Prosper, supra* note 346 at 21, The Court said that the AER held hearings in which the FMFN was a participant, and ruled on issues to be resolved, which did not include: "1. The adequacy of Crown consultation. The AER has no jurisdiction with respect to assessing the adequacy of Crown consultation. 2. The adequacy of LARP and any existing subregional plans under LARP. 3. MLAMP does not exist as a subregional plan and consideration of it is not within the panel's mandate. 4. Cumulative effects unrelated to the effects that might be caused by the Rigel Project. 2018 ABAER 005 at 16 (AER Decision)."
[355] *Ibid* at 27, citing AER Decision 182.
[356] *Fort McKay First Nation v Prosper Petroleum Ltd*, 2019 ABCA 14, with the question framed at 60: "Did the AER commit an error of law or jurisdiction by failing to consider the honour of the Crown and, as a result, failing to delay approval of the Project until the First Nation's negotiations with Alberta about the MLAMP are completed?"
[357] *Fort McKay v Prosper, supra* note 346 at 29 the Court said: "As this is a statutory appeal brought pursuant to s 45(1) of REDA, the standard of review to be applied to the question of law on which permission to appeal was granted is correctness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at 37." Bankes, AER and Honour of the Crown, *supra* note 346 commented on this at page 3 in the PDF noting "There is nothing particularly controversial about this although it is interesting to note that the Court reached this conclusion on the more general basis of the appeal provision that governs judicial supervision of the AER rather than on the basis that the question raises issues of constitutional law."

> *consultation remain within the AER's jurisdiction, including as they relate to the honour of the Crown*. Section 21 of REDA does not prevent the AER from considering other relevant matters involving Aboriginal peoples when carrying out its mandate to decide if a particular project is in "the public interest".
>
> [41] Nor is the AER confined to considering "questions of constitutional law" as that term is defined in the *Administrative Procedures and Jurisdiction Act*, RSA 2000 c A-3 [APJA]. Section 11 of APJA provides that "a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so". In the case of the AER, it has been given the jurisdiction to determine "all questions of constitutional law" (*Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006, s 2 and Schedule 1), subject to notice requirements being complied with under s 12 of APJA. However, not all constitutional issues that arise in an AER hearing will fall within the definition of "questions of constitutional law" in the APJA, meaning that the AER will at times be asked to consider constitutional issues for which it has not received formal notice under APJA.[358]
>
> [42] In other words, a statute like the APJA should not be read as confining the AER's jurisdiction to consider constitutional issues as they relate to the "public interest" … Indeed, the AER itself acknowledges its responsibility to address such issues, having considered under "the public interest" the potential adverse impacts of the Project on Aboriginal rights under s 35 of the *Constitution Act, 1982*. This broad jurisdiction to consider treaty rights outside the scope of the APJA is itself recognized in Ministerial Order (Energy 105/2014 and ESRD 53/2014).
>
> [43] The AER therefore has a broad implied jurisdiction to consider issues of constitutional law, including the honour of the Crown, as part of its determination of whether an application is in the "public interest". The question raised by this appeal is whether the AER should have considered the honour of the Crown in relation to the MLAMP negotiations as part of this assessment.[359]

The Court of Appeal then overruled the AER's interpretation of its mandate, saying:

> [57] Section 21 does not prevent the AER from considering relevant matters involving aboriginal peoples when carrying out its mandate to decide if a particular project is in the public interest. The issues raised here are not limited to the adequacy of the consultation on this Project, but raise broader concerns including the Crown's relationship with the FMFN and matters of reconciliation. These issues engage the public interest and their consideration is not precluded by the language of s 21.[360]

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[358] The APJA , *supra* note 344, said in 10(d) "question of constitutional law" means (i) any challenge, by virtue of the Constitution of Canada or the Alberta Bill of Rights, to the *applicability or validity of an enactment* of the Parliament of Canada or an enactment of the Legislature of Alberta, or (ii) a determination of any right under the Constitution of Canada or the Alberta Bill of Rights. See: Laidlaw, *Alberta Accommodation* at 57 to 58.
[359] *Fort McKay v Prosper, supra* note 346 at 39 to 43.
[360] *Ibid* at 57, although the Court qualifies this finding in 58 saying "..the AER erred in concluding that s 21 of REDA prevented it from considering whether the MLAMP process was relevant to assessing whether the Project was in the public interest …While that provision removes the adequacy of Crown consultation from the AER's jurisdiction, the issues raised here are not so limited."

Further, AER's interpretation of section 7(3) of LARP[361] was in error "when it concluded that it applied to the MLAMP [negotiating] process."[362] Finally, the Court noting that REDA gave the AER a broad mandate to consider the public interest, including adherence to constitutional principles like the *honour of the Crown*, and "[t]o the extent the MLAMP negotiations implicate the honour of the Crown and therefore need to be considered as part of the "public interest", the AER was under a statutory duty to consider that issue."[363] The need for subsequent Cabinet approval does not provide the AER a reason to decline consideration of the MLAMP negotiations as they implicate the honour of the Crown.[364] In the result, the Court of Appeal vacated the AER's decision and directed the AER to reconsider the issue on a full record.[365]

OSCA sections 10 and 11 dealing with Cabinet approval of oil sands facilities was subsequently changed on October 6, 2020[366] to not require approval by Cabinet – leaving the AER as the sole decision maker. This creates a problem for the AER in determining what commitments or promises from Alberta to Indigenous Groups would qualify as engaging the honour of the Crown.

One answer may be to require evidence, of a separate commitment such as the Letter of Intent in this case or even a promise, as in *Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*, where "the promise given by Alberta to the First Nations in July 2005 when the land was transferred to Parks from Sustainable Resource Development. At that time Alberta promised to protect the activities of gathering medicines, berry picking, sweat lodges and fishing within the Recreational Area for the First Nations." [367] Another may be to consider the Treaty alone or at least its implementation as being a promise engaging the honour of the Crown, as suggested in Justice Greckol's concurring judgement in *Fort McKay v Prosper*, citing well established Supreme Court jurisprudence she noted that, the honour of the Crown is a constitutional principle which governs the relationship between Aboriginal peoples and the Crown.[368] Reconciliation of these

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[361] *Ibid* at 59 "The AER is required to "act in accordance with any applicable ALSA regional plan": REDA, s 20. The LARP is the applicable ALSA regional plan for the area where the Project is proposed. Section 7(3) of the LARP states: Notwithstanding subsections (1) and (2), a decision-maker or local government body must not adjourn, defer, deny, refuse, or reject any application, proceeding or decision-making process before it by reason only of (a) the Crown's non-compliance with a provision of either the LARP Strategic Plan or LARP Implementation Plan, or (b) the incompletion by the Crown or any body of any direction or commitment made in a provision of either the LARP Strategic Plan or LARP Implementation Plan."

[362] *Ibid* at 60 to 61.

[363] *Ibid* at 65.

[364] *Ibid* at 66. Prosper argued "that only final decisions can be reviewed and likens the decision of the AER to the National Energy Board (NEB), whose recommendations to Cabinet are said not to be amenable to judicial review: *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153 at paras 170-203, leave to appeal to SCC refused, 38379 (2 May 2019). However, as FMFN points out, the decision of the AER regarding whether the Project is in the public interest is, unlike an NEB recommendation, a final decision subject to statutory appeal." Court was careful to say in 64 that "This is not to say that Cabinet cannot also take such matters into account when considering whether to authorize the Project, but that does not relieve the AER of its responsibility."

[365] *Ibid* at 70 to 71. See also Laidlaw, *Alberta Accommodation, supra* note 4, footnotes at 6 and 58

[366] *Red Tape Reduction Implementation Act, 2020*, SA 2020, c 25, s 12. This may also be a response to the *Gitxaala*, *supra* note 150 decision where the GIC was the decision maker.

[367] *Cold Lake, supra* 197 at 20. This remains the only successful case in Alberta where the government's conduct was called into question in failing to fulfill the duty to consult and accommodate Indigenous Peoples.

[368] *Fort McKay v Prosper, supra* note 346 at 73, paraphrased with citations omitted.

opposing realities is the ultimate purpose of the honour of the crown and is also enshrined in section 35 of the *Constitution Act, 1982*.[369] Noting that *Mikisew* was a case involving the Crown's ability to "take up" land under Treaty 8 where "[t]he implementation of Treaty 8 was said to "demand a process by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not)", the content of which was dictated by the duty of the Crown to act honourably,"[370] she said,

> ..the question is not whether the so-called Prentice Promise must itself attract the label "solemn obligation" or "solemn promise", or even whether it is sufficiently exacting to preclude any development in the Moose Lake area. The question, rather, is whether it was made in furtherance of the Crown's obligation to protect FMFN's rights under Treaty 8. If so, then it can properly be said to fall within treaty implementation as a measure designed to ensure the Crown's obligations are fulfilled.[371]

Noting that First Nations that adhered to Treaty 8 gave up vast territories in exchange for guarantees, among others the right to a livelihood in the continuation of the rights to hunt, fish and trap, promises which were essential in signing the Treaty that contained a solemn ongoing, promise that was "easy to fulfill initially but difficult to keep as time goes on and development increases."[372] Alberta was on notice that cumulative effects of development posed difficulties in fulfilling the Treaty promises to maintain the effective right to hunt, beyond the project based approval process – and thus MLAMP negotiations, while not mandated by Treaty 8, are an effort to uphold Treaty 8 promises which engaged the honour of the Crown.[373] Finally,

> [83] Nor would it be an answer to say – as both Prosper and Alberta have suggested – that FMFN's concerns could instead be addressed in its treaty infringement claim against the Crown. The honour of the Crown has as its ultimate purpose the reconciliation of Aboriginal interests with Crown sovereignty. It is engaged prior to treaty infringement (Mikisew 2018 at para 67) and seeks to protect Aboriginal rights from being turned into an empty shell. Whether or not the treaty rights of FMFN have been infringed remains to be seen. Regardless, the Crown must deal honourably with First Nations in negotiations designed to stave off infringement. The honour of the Crown may not mandate that the parties agree to any one particular settlement, but it does require that the Crown keep promises made during negotiations designed to protect treaty rights. It certainly demands more than allowing the Crown to placate FMFN while its treaty rights careen into obliteration. That is not honourable. And it is not reconciliation.

Justice Greckol's judgement acknowledges the cumulative impacts of developments as affecting Treaty rights harvest but she is careful to say that the honour of the crown does not require any

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[369] *Ibid* at 74, paraphrased with citations omitted.
[370] *Ibid* at 75. She discussed *Manitoba Métis*, *supra* note 34 at 76.
[371] *Ibid* at 77. The majority were not adverse to Justice Greckol's interpretation of the constitutional principles involved as their discussion in 53 to 55 demonstrates, indeed they noted that FMFN urged that interpretation on them at 56 – however they deliberately chose to consider this a matter of the statutory jurisdiction of the AER under *Vavilov*, *supra* note 357.
[372] *Fort McKay v Prosper, supra* note 346 at 78 to 81. The quote is at 80.
[373] *Ibid* at 82.

specific measures from Alberta. The AER, as a statutory regulator cannot provide government only accommodation measures, for example replacement territories or new Reserves.

AltaLink Management Ltd v Alberta (Utilities Commission)

In October 15, 2021 the Alberta Court of Appeal issued *AltaLink Management Ltd v Alberta (Utilities Commission)* [374] with the majority overruling a decision by the Alberta Utilities Commission [AUC] when it "committed a legal error by failing to take into account all relevant factors that determine whether a sale is in the public interest."[375] It varied an AUC decision by ordering the transferees be allowed to include the incremental audit and hearing costs in their respective tariff applications and recover them from ratepayers in the usual course.[376]

AltaLink had obtained all the necessary approvals to construct and operate a "240 kilovolt transmission line between Pincher Creek and North Lethbridge along a course crossing both the Piikani Indian Reserve 147 and the Blood Indian Reserve 148."[377] The approval of the crossing of their reserves was conditional on an option to obtain 51% ownership interest in the line, after construction and opening. The line became operational in 2010, and the Piikani Nation and the Blood Tribe exercised these options, AltaLink Limited Partnership transferred ownership of the transmission line on each reserve to the new limited partnerships with the corporate representative of the Piikani Nation and Blood Tribe acquiring a fifty-one percent interest.[378] Alta Management Ltd. [Alta Management], as general partner of AltaLink Limited Partnership, PiikaniLink Limited Partnership and KainaiLink Limited Partnership filed transfer applications with AUC on April 27, 2017 seeking approval for the transfer, this would create a new transmission facility operator, subject to the regulatory regime, sought approval of the tariffs in for the years 2017 and 2018.[379]

The AUC had applied the standard "no-harm" test that weighs the positive and negative impacts of a transaction on ratepayers to determine if the transfer was in the public interest. In the course of this decision the AUC disregarded the lower construction costs of the line over the Reserves, estimated to be $32 M, saying the no-harm test was forward looking and the evidence of intangible benefits of Indigenous Groups participation in the sector was insufficient. It approved the transfer on condition that the transferees could not include the "incremental annual audit fees paid to external auditors and hearing costs that would not arise if [Alta Management] continued to operate the assets estimated to be $35,000 and $25,000 respectively for each of PiikaniLink Limited

[374] *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342 [*AltaLink v AUC*]. See Kristen van de Biezenbos, "Alberta Court of Appeal Rules on Role of Honour of the Crown and Reconciliation in AUC Rate Applications" (October 26, 2021), ABlawg, at <http://ablawg.ca/wp-content/uploads/2021/10/Blog_KVDB_AUC_Reconciliation.pdf>.
[375] *AltaLink v AUC, supra* note 374 at 1 and 11. The Court noted that this was the first ruling of the AUC of its kind. The majority included Justice Jack Watson and Justice Thomas W. Wakeling, with Justice Kevin Feehan, concurring in the result and elaborating when the AUC had to consider the honour of the Crown or reconciliation.
[376] *Ibid* at 1 and 11. It cited *Vavilov, supra* note 357, in footnote to say "[a]n appeal court may substitute its view for those of the original adjudicator on questions of law."
[377] *AltaLink v AUC, supra* note 374 at 14 to 24.
[378] *Ibid* at 28 to 29.
[379] *Ibid* at 30 to 33.

Partnership and KainaiLink Limited Partnership, [that] would recur each year and be recovered from ratepayers as part of the partnerships' tariffs as transmission facility operators."[380]

Alta Management sought leave to appeal, which was granted.[381] The Appeal Court considered the applicable statutes the *Public Utilities Act*;[382] *AUC Act*[383] and *Electric Utilities Act*[384] and said there was no legislative basis for the AUC's strict no-harm test to be forward looking,

> [y]he Commission erred in considering only forward-looking benefits. There is no legislative basis for this strict forward-looking approach, nor a rationale for adopting it as an absolute rule beyond identifying the proposed transfers as the proper focus of a sale and transfer application. The context for a proposed transfer may, to the extent it includes potential harms or benefits, be a relevant factor that is properly considered in an application to approve the transfer.[385]

Further, "a broader view of the no-harm test and the public interest is appropriate. It includes any factors the Commission considers relevant to the transfer and sale application, whether those factors arise before or after the application."[386] It did acknowledge that a that a forward-looking focus will result in consideration of all the relevant public interest factors most of the time," [387] but the relevant benefits of this project included, among others: economic activity on Reserves would be encouraged; job opportunities on Reserves will encourage residents to take advantage of educational opportunities, there being a strong correlation between levels of education and rates of unemployment which is not conducive to healthy communities; meaningful employment keeps

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[380] *Ibid* at 36 to 41.

[381] Pursuant to *Alberta Utilities Commission Act*, SA 2007, c A-37.2 section 29 [*AUC Act*]. Leave was granted by Justice Jo'Anne Strekaf in *AltaLink Management Ltd. v Alberta Utilities Commission*, 2019 ABCA 482, at 15 on two questions: "Did the AUC improperly fetter its discretion when considering the transfers by applying the "no-harm" test? & Did the AUC err by failing to consider all relevant factors?"

[382] *Public Utilities Act*, RSA 2000, c P-45, section 101(2) prohibiting transfers without AUC permission.

[383] *AUC Act,* section 17(1), which said the AUC must "give consideration to whether construction or operation of the proposed … transmission line … is in the *public interest*, having regard to the *social and economic effects of the [transmission line] and the effects ... on the environment*".

[384] *Electric Utilities Act*, SA 2003, c E-5.1, section 121(2)(b) which said "[w]hen considering whether to approve a tariff application the [AUC] must ensure that …(b) the tariff is not unduly preferential, arbitrarily or unjustly discriminatory or *inconsistent with or in contravention of this or any other enactment or any law*."

[385] *AltaLink v AUC, supra* note 374 at 54. It criticized the AUC's decision at 55 saying "The Commission misfired when it characterized the cost savings solely from the initial construction phase as irrelevant. The manner in which this project was built necessarily involved a real prospect of forward-looking savings. There were predictable lower maintenance costs for this shorter and more accessible route. Moreover, the integration of the First Nations' corporations as operators linked to the larger grid also offered the prospect of further benefits over time as technology improves and the needs of the rate-paying population increase (as, for example, with electric vehicles) potentially involving increased requirements for operational capacity of the system. The benefit for the environment is also ongoing, and not frozen in the past. The Commission, in effect, rejected as speculative the suggestion that the comparatively modest incremental hearing and audit costs would be offset by these future benefits predictably linked to the how the lines were placed and constructed. Seen in this light, the fact that the placement and construction was in the past is not on its own a basis to disregard the predictable future benefits."

[386] *Ibid* at 57. In 56 the Court noted other decisions where the AUC recognized the benefits and value of fostering relationships between utility providers and First Nations and had allowed utilities to recover from ratepayers the costs associated with furthering those relationships giving the example of TransAlta's First Nation Advisory Committee expenses being included in tariffs.

[387] *Ibid* at 58.

families together and thriving and a central component of a community that is a safe place in which to reside; and education and jobs must be the central component of any long-range plan that Indigenous community leaders construct to improve the quality of Reserve life. [388] With this disposition, the majority declined to rule on the constitutional issues.[389]

Justice Feehan affirmed the majority decision, since much of the argument was focussed on the *honour of the Crown* and the necessity of reconciliation he wrote a concurring judgement to clarify the circumstances the AUC has a duty to consider them,[390] beginning by canvassing the same constitutional principles, albeit in greater detail and differing wordings than in *Fort McKay v Prosper*, [391] which he cited the decision as confirming that the AER had the authority to consider the honour of the Crown as a matter of public interest.[392] Justice Feehan interpreted the rationale in *Fort McKay v Prosper* to say,

> [t]he Court said the honour of the Crown is always at stake in the Crown's dealings with Indigenous collectives, and gives rise to different duties in different circumstances, in this case through addressing how treaty obligations must be fulfilled: "the honour of the Crown infuses the performance of every treaty obligation, and stresses the ongoing relationship between the Crown and First Nations brought on by the need to balance the exercise of treaty rights with development ...": para 54. In a concurring decision, Greckol JA cautioned that the honour of the Crown requires it to take a broad and purposive approach to interpreting promises made to Indigenous collectives and act diligently to fulfill those promises to avoid leaving Indigenous peoples with an "empty shell" of a promise: para 76.[393]

Justice Feehan concluded with respect to the *honour of the Crown*,

> In summary, the [AUC] is required to fulfill duties flowing from the honour of the Crown and act consistently with the honour of the Crown whenever it engages with Indigenous collectives. The Crown and its authorized governmental entities, including the Commission, are required at all times to act honourably in relations with Indigenous collectives, addressing how Crown obligations must be fulfilled in keeping with the unique relationship between Canada and its original inhabitants. This responsibility is to be understood generously and purposively, not narrowly or technically, as each interaction must be approached individually and flexibly, varying as necessary with the situation in which it is engaged.[394]

As to reconciliation, Justice Feehan says defines reconciliation as referring to "the "work in progress" of rebuilding the relationship between Indigenous peoples and the Crown following historical and continuing injustices by the Crown against Indigenous peoples: …. Reconciliation

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[388] *Ibid* at 59 to 75. Other notable "benefits" include at 64 "We should support Indigenous communities that want to participate in mainstream commercial activities;" at 72 "Indigenous communities represent an untapped labour source for Indigenous and non- Indigenous enterprises. The potential benefits that may be derived from the increased utilization of this pool of talent are considerable;" and at 75 "A diverse workforce benefits society."
[389] *Ibid* at 79. The relevant statutes had included the *Constitution Act, 1982, supra* note 1.
[390] *AltaLink v AUC, supra* note 374 at 81 to 85.
[391] *Ibid* at 86 to 104.
[392] *Ibid* at 100.
[393] *Ibid* at 101.
[394] *Ibid* at 112.

is concerned with establishing respectful and healthy long-term relationships among Aboriginal and non-Aboriginal peoples moving forward."[395] He notes that "[w]hile reconciliation underlies the honour of the Crown and section 35 rights, it is a distinct concept that exists separately from the honour of the Crown and includes both legal and social dimensions. The [TRC] identifies that reconciliation in part requires "constructive action on addressing the ongoing legacies of colonialism that have had destructive impacts on Aboriginal peoples' ... economic opportunities and prosperity,"[396] and is a primary consideration where constitutionally protected interests are potentially at stake. Further,

> While reconciliation is a foundational objective of s 35, it is part of the broader public interest and also applies to cases impacting Indigenous peoples outside the constitutional context. In *Restoule v Canada (Attorney General)*, 2018 ONSC 114, paras 56, 58, the Court recognized that reconciliation must always be addressed in consideration by authorized government entities of the public interest: "... there is a deep and broad public interest in reconciliation with our Indigenous peoples". See also *Redmond v British Columbia (Forests, Lands Natural Resource Operations and Rural Development)*, 2020 BCSC 561, para 38. The relationship between the Crown and Indigenous Peoples is a fundamentally important part of the foundation of this country and goes to the "heart of its identity": *Southwind v Canada*, [2021 SCC 28] para 60.[397]
> …
> [119] As this Court said in [*Fort McKay v Prosper],* the direction to all authorized government entities to foster reconciliation particularly requires that they consider this constitutional principle whenever they consider the public interest*,* para 68, and requires the Crown to act honourably in promoting reconciliation, such as by "encouraging negotiation and just settlements" with Indigenous peoples: Mikisew Cree, para 26; Fort McKay, para 81.
>
> [120] Aiming to achieve reconciliation is a continuing obligation, existing separately from honour of the Crown. An important aspect of reconciliation is the attempt to achieve balance and compromise, essential to the consideration of the public good. Reconciliation must be a consideration whenever the Crown or a government entity exercising delegated authority contemplates a decision that will impact the rights of Indigenous peoples.
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> [121] An administrative tribunal with a broad public interest mandate, such as the [AUC], must address reconciliation as a social concept of rebuilding the relationship between Indigenous peoples and the Crown by considering the concerns and interests of Indigenous collectives. This includes consideration of the interests of Indigenous peoples in participating freely in the economy and having sufficient resources to self-govern effectively. [398]

As to how to implement reconciliation,

> [122] To determine how a decision could impact the imperative of reconciliation, the [AUC] should ensure that it is responsive to the submissions of Indigenous collectives which appear before it. It may also choose to consider non-binding sources of domestic and international law and policy, such as the *United Nations Declaration on the Rights of Indigenous Peoples Ac*t, GA

[395] *Ibid* at 113, citations omitted.
[396] *Ibid* at 114, citations omitted
[397] *Ibid* at 115.
[398] *Ibid* at 117, 119 and 120.

> Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A//61/295 (2007) 1, which came into force in Canada on June 21, 2021 and imposes obligations on the federal government: [UNDRIP Act]; see also Sam Adkins et al, "UNDRIP as a Framework for Reconciliation in Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects", (2020) 58:2, Alta L Rev 339, 359–365.
>
> [123] While the [AUC] is not obligated to consider UNDRIP, it may serve as a useful tool to inform a fuller understanding of reconciliation. UNDRIP acknowledges the rights and freedoms of Indigenous peoples derived from their "political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources": UNDRIP, 3. Article 20 affirms the right of Indigenous peoples to "maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." Article 21 states that Indigenous peoples have the right to the improvement of their economic and social conditions and that governments must ensure continuing improvement of those conditions.[399]

Justice Feehan was careful to say that the AUC is not obligated to consider UNDRIP, it appears to be another source for considering the public interest in reconciliation. It should be cautioned that both Justice Greckol and Justice Feehan's decisions are concurring decisions.

Subsequent Court Treatment of Fort McKay v Prosper and AltaLink v AUC

These cases have been referred to in several decisions, in reverse chronological order:

1. *Wesley v Alberta* this was a partially successful summary judgement in the Kings Bench in an expansive and long running dispute (~45+ years) between the Stoney Nakoda First Nations and the Crowns, where the applicant Crowns' succeeded in dismissing damages claims that were barred by the limitation legislation and equitable *laches*, while preserving declaratory relief.[400]
2. *Fort McMurray Métis Local Council 1935 v Alberta Energy Regulator*, this a successful application for leave to appeal a decision by AER that denied Fort McMurray Métis Local Council 1935's request for a regulatory appeal under section 38 of REDA, saying Indigenous status was not relevant, only the AER's interpretation of section 38. [401]
3. *Reference re Impact Assessment Act*, the majority of the Court of Appeal in Alberta found the IAA unconstitutional with Justice Greckol dissenting;[402]

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[399] *Ibid* at 122 and 123.
[400] *Wesley v Alberta*, 2022 ABKB 713, Note the UNDRIP Act was interpreted at 137 to 149, with *AltaLink v AUC, supra* note 374 cited at 144, in the same fashion as *Saik'uz First Nation v Rio Tinto, supra* note 52 with no mention of UNDRIP Act section 2(3).
[401] *Fort McMurray Métis Local Council 1935 v Alberta Energy Regulator*, 2022 ABCA 179, where the *Fort McKay v Prosper, supra* note 346, decision was cited at 148 to 155.
[402] *Reference re Impact Assessment Act*, 2022 ABCA 165, where *Fort McKay v Prosper, supra* note 346*,* decision was cited at 653 in Justice Greckol's dissent. Canada has announced its intention to appeal to the SCC. As a reference question the IAA will continue to apply in Alberta. See: Martin Olszynski "Carbon Tax Redux: A Majority of the Alberta Court of Appeal Opines that the Impact Assessment Act is Unconstitutional" (May 24, 2022: Ablawg.ca) at <https://canliiconnects.org/en/commentaries/88009> and Nigel Bankes & Andrew Leach, "The

4. *Benga Mining Limited v Alberta Energy Regulator,*[403] this was an unsuccessful application for leave to appeal on the JRP Decision denying approval of the Grassy Mountain Steelmaking Coal Project, a proposed open-pit coal mine in Southwest Alberta,[404] with First Nation applicants unsuccessfully argued the AER did not consider the honour of the Crown.[405]
5. *MNAA v Alberta,* this case involved Alberta's cancellation of negotiations for a new Métis Harvesting Policy, currently under appeal.[406]
6. *Yahey*.[407]

Indigenous groups in Alberta still face government resistance, as a matter of policy, to the recognition of their constitutional rights except in limited circumstances. This is driven, in no small part, by Alberta governments' misperception that Indigenous groups oppose all development rather than Indigenous concerns about the sustainable benefits of projects that respect their environmental understandings - particularly the pace and cumulative effects of development.[408]

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),[409] which asserts an EA process was the "the best process" for aboriginal consultation, based on "consultation with aboriginal leaders."[410] Some concerns, aside from its outdated nature,[411] include:

Rhetoric of Property and Immunity in the Majority Opinion in the Impact Assessment Reference" (June 8, 2022: Ablawg.ca) at <https://canliiconnects.org/en/commentaries/88130>.

[403] *Benga Mining v AER, supra* note 231 at 79 to 134. *Fort McKay v Prosper, supra* note 346 and *AltaLink v AUC, supra* note 374 were cited at 106.

[404] Benga Mining Limited Grassy Mountain Coal Project, Crowsnest Pass, 2021 ABAER 010 at <https://static.aer.ca/prd/documents/decisions/2021/2021ABAER010.pdf>. See also IAA Registry at <https://iaac-aeic.gc.ca/050/evaluations/exploration?projDocs=80101> Note this was assessed under CEEA-2012.

[405] In *Benga Mining v AER, supra* note 231, the Court said, in part that the First Nations Applicants were given full participation rights, the IBAs' were not in evidence before the Panel (presumably due to confidentiality clauses) but the Panel had, through Benga's evidence, assessed the potential benefits for the First Nations consistent with the honour of the crown at 109.

[406] *MNAA v Alberta, supra* note 258 with *Fort McKay v Prosper, supra* note 346 cited at 148.

[407] *Yahey, supra* note 125, cited *Fort McKay v Prosper, supra* note 346 at 499, 519, 1166 and 1728.

[408] See for example: Jenny Lieu et al, "Consensus Building in Engagement Processes for Reducing Risks in Developing Sustainable Pathways: Indigenous Interest as Core Elements of Engagement" Chapter 2 at 55 in H. Doukas et al. (eds.), *Understanding Risks and Uncertainties in Energy and Climate Policy: Multidisciplinary Methods and Tools for a Low Carbon Society* (Gewerbestrasse: Springer Nature Switzerland AG, 2019) Open Licence, available at: <https://www.researchgate.net/publication/329569811_A_Detailed_Overview_and_Consistent_Classification_of_Climate-Economy_Models_Multidisciplinary_Methods_and_Tools_for_a_Low_Carbon_Society>

[409] *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (2011) available at <https://www.rcaanc-cirnac.gc.ca/eng/1100100014664/1609421824729 > [Federal Consultation Policy]

[410] *Ibid* at 25. See: Laidlaw, *Alberta Accommodation, supra* note 4 at 20 to 22.

[411] Federal Consultation Policy, *supra* note 409 at 6. For example at 9 in the International section it refers the Canada's Qualified Statement of Support regarding UNDRIP. We understand an update is in progress to the Federal

1. *Distributed Policy* : The Federal Consultation Policy is a distributed model that is intended to be incorporated into separate departmental and agency policies,[412] and notes that the implementation of consultation "should integrate, to the extent possible, the fulfilment of consultation obligations with departmental policy objectives and with other overarching government policy objectives."[413] There is limited public information on how various Ministries incorporate the duty to consult with other priorities.

2. *Jurisdictionally Limited*: The Federal Consultation Policy is jurisdictionally limited to requiring consultation dealing with activities on federal lands or federally regulated activities.

3. *Canada Driven*: Canada alone will assess *how* proposed federal decisions 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.[414]

4. *Design of Consultation*: Only Federal officials are considered capable of developing consultation processes.[415] It was the Agency's policy to not invite aboriginal groups to the design committee, but merely to invite comments from them on the resultant design.[416]

5. *Project based*: Despite definitions of "Cumulative Environmental Effects"[417] and 2 mentions of "cumulative impacts", the focus is on a project based approval.[418]

Consultation Policy but that has been a few years ago and we have no information on the progress. See: *Government of Canada and the duty to consult* website at <https://www.rcaanc-cirnac.gc.ca/eng/1331832510888/1609421255810>

[412] *Ibid* at 1. These are described as *Guiding Principles and Consultation Directives* [Guiding Principles]

[413] *Ibid* at 8. A review of decision making processes affecting Aboriginal peoples is in the Third Guiding Principle at 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*." [*Emphasis* added]

[414] *Ibid* at 13.

[415] *Ibid*.

[416] Agency Approach to Aboriginal Consultation is archived online at: <https://web.archive.org/web/20111006042518/http://www.ceaa.gc.ca/default.asp?lang=En&n=ED06FC83-1>.

[417] Federal Consultation Policy, *supra* note 409, this is defined at Annex A at 61 as "Cumulative Environmental Effects: "The concept of cumulative environmental effects recognizes that the environmental effects of individual human activities can combine and interact with each other to cause aggregate effects that may be different in nature or extent from the effects of the individual activities. Cumulative environmental effects can be characterized as the effect on the environment of a proposed project when combined with those of other past, existing and imminent projects and activities, and which may occur over a certain period of time and distance" – notably this is limited to impacts on the environment and not aboriginal rights.

[418] *Ibid*, has 2 mentions, in the Pre-planning Phase 1 at 37, where the proposed Crown action suggests "Are there any other activities occurring in the same area? Is this activity likely to have any cumulative effects in combination with other activities in the same or surrounding area?" and in Step 6 of the Design of Consultation, where considerations include "Sustainable economic development balanced by an awareness of cumulative impacts and environmental stewardship;"

Accommodation Measures

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."[419] The principal accommodation measures in the Federal Consultation Policy, include:

- *project modification* as changes to design or route may eliminate some adverse impacts; [420]
- *mitigation measures* to reduce or eliminate adverse impacts either proposed by proponents, aboriginal groups or directed in approval conditions;[421] and
- in some circumstances *project cancellation*.[422]

The Federal Policy says 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. [423] 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."[424] This qualification is significant – the menu of potential accommodation measures may be limited before accommodation negotiations begin.[425]

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[419] *Ibid* at 53.

[420] *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". This can be described as *proponent practical accommodation* measures, see: Laidlaw, *Alberta Accommodation, supra* note 4 at 14, the source of this definition is from Kirk Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013) [Lambrecht, *Aboriginal Consultation, Environmental Assessment*] at 108-109.

[421] Federal Consultation Policy, *supra* note 409 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."

[422] *Ibid* at 53 "In some circumstances, appropriate accommodation may be a decision not to proceed with the proposed activity."

[423] *Ibid*.

[424] *Ibid* at 55. "Informed by its discussions with Aboriginal groups during the consultation process, the Crown must select appropriate accommodation option(s). Generally, 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*."

[425] *Consultation and Accommodation Advice for Proponents* (June 5, 2015) at <https://www.rcaanc-cirnac.gc.ca/eng/1430509727738/16094219638098>.

Federal EA Legislation

Federal EA legislation, started in 1973 with the policy-based *Environmental Assessment and Review Process,* and was legislated in 1992 as the *Canadian Environmental Assessment Act*, [CEAA-1992] that established the Canadian Environmental Assessment Agency [Agency].[426]

There are several distinct phases in Federal EA:

1. EA's conducted under CEAA-1992 and continued under CEAA-2012;
2. EA's conducted under CEAA-2012 alone; and
3. EA's conducted under the IAA after August 27, 2019. [427]

CEAA-1992 was amended in 2012 in an omnibus budget bill entitled *Jobs, Growth and Long-term Prosperity Act* [428] amending 109 pieces of legislation (including the *Fisheries Act* and *Navigable Waters Protection Act*) resulting in the *Canadian Environmental Assessment Act*, 2012 [CEAA-2012].[429] CEAA-2012 came into force on July 6, 2012 with complicated transition provisions that essentially provided grandfathering of EA's started under CEEA-1992 to continue subject to Agency administration under the CEEA-1992 regime.[430] The differences between the EA regimes in CEAA-2012 and CEAA-1992 are many and in the aboriginal context CEAA-12 represented significant changes, some of which included:

a. EA applied only to Designated Projects listed in the regulations,[431] reducing the number of projects subject to EA to an estimated 10%, rather than applying generally to projects having a federal aspect unless excluded in the regulations under CEAA–1992.[432]
b. EA consideration of environmental effects was limited to those within Parliament's jurisdiction including effects on fisheries, aquatic species at risk, migratory birds, and aboriginal

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[426] CEAA-1992 applied to all projects with a federal aspect unless excluded by regulation, it addressed aboriginal rights by defining environmental effect as any changes in the "current use of lands and resources for traditional purposes by aboriginal persons" in section 2(1).
[427] The Impact Assessment Registry [Registry] at <https://iaac-aeic.gc.ca/050/evaluations/050?culture=en-CA>, has a list of active assessments i.e. with unsatisfied conditions.
[428] *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19. This Act stripped the 4 Preambles in CEAA-1992.
[429] *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 5 [CEAA-2012]. Project subject to EA were listed in *Regulations Designating Physical Activities*, SOR/2012-147. [*Physical Activities Regulation - 2012*]
[430] See: Martin Olszynski, *Northern Gateway: Federal Court of Appeal Applies Wrong CEAA Provisions and Unwittingly Affirms Repressiveness of 2012 Budget Bills* (ABlawg.ca: July 5, 2016) at <https://ablawg.ca/2016/07/05/northern-gateway-federal-court-of-appeal-wrong-ceaa-provisions/>.
[431] In the *Physical Activities Regulation -2012*, *supra* note 429 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.
[432] 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, available at <https://www.tandfonline.com/doi/full/10.1080/14615517.2012.720417>, 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"] available at SSRN: <https://ssrn.com/abstract=2384541> or <http://dx.doi.org/10.2139/ssrn.2384541>.

peoples,[433] rather than any change the project may cause in the environment, including species at risk, health and socio-economic conditions under CEAA-1992.[434]

c. EA authority was given to the Agency, NEB and CNSC with legislated time limits for an EA: Agency standard EA within 365 days, Review Panel EA within 24 months, NEB EA within 15 months and CNSC EA within 24 months.[435] This was in contrast to the potential for multiple departments being designated as the Responsible Authority to conduct EA with essentially unlimited timelines under CEAA-1992.[436]
d. EA aboriginal and public participation was limited to interested parties defined as "any person who is directly affected by the project or has relevant information or expertise",[437] 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.[438]

CEAA-2012 considered environmental impacts as a proxy for impacts on aboriginal rights – this continues in the IAA with the addition, among others, of direct impacts to aboriginal rights.[439]

Current Federal EA Legislation

CEEA-2012 and related legislation were amended in 2019 by way of Bill-C68 and Bill C-69.[440]

Fisheries Act

The *Fisheries Act* [441] is administered by the Department of Fisheries and Oceans [DFO] which maintains a comprehensive website.[442] The *Fisheries Act* was amended in 2019 [443] in the

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[433] CEAA-2012, s 5.
[434] CEAA-1992, s 2 (1).
[435] Respectively CEAA-2012 s 27(2); and s 38(3); NEB Act ss 52(4) & (7); *Nuclear Safety and Control Act*, SC 1997, c 9 [NSC], regulation Class I Nuclear Facilities Regulations, SOR/2000-204 at s 8.3.
[436] CEAA-1992 did provide a 365 day deadline for completion of CSR under the Establishing Timelines for Comprehensive Studies Regulations in SOR/2011-139, s 5(1).
[437] CEAA-2012, s 2(2), See also: NEB Act s 55.2. See: Geoffrey Salomons & George Hoberg, "Setting boundaries of participation in environmental impact assessment" (2014) 45 EIA Review 69.
[438] CEE-1992 s 2 (1).
[439] Carol Hunsberger, Sarah Froes & George Hoberg "Toward 'good process' in regulatory reviews: Is Canada's new system any better than the old?" (2020) 82 EIA Review 1 available at <https://www.sciencedirect.com/science/article/pii/S0195925519303592>. [Hunsberger, Good Process]
[440] *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),
[441] *Fisheries Act*, RSC 1985, c F-14 [*Fisheries Act*].
[442] Department of Fisheries and Oceans [DFO] website at <https://www.dfo-mpo.gc.ca/index-eng.html>.
[443] See: Martin Olszynski, "In Search of #BetterRules: An Overview of Federal Environmental Bills C-68 and C-69" (Ablawg.ca, February 15, 2018) at [Olszynski, "Better Rules *Fisheries*"] <https://ablawg.ca/2018/02/15/in-search-of-betterrules-an-overview-of-federal-environmental-bills-c-68-and-c-69/>. There is a December 16, 2013 MOU between the NEB and Fisheries and Oceans Canada [DFO] that delegates the assessment of impact under the *Fisheries Act* to the NEB (now CER), for Projects within the NEB's authority at <https://www.cer-rec.gc.ca/en/about/acts-regulations/other-acts/cooperative-agreements/memorandum-understanding-between-

definitions in section 2(1) to remove the limiting definition of *aboriginal fisheries*; relocating the definition of *fish habitat*; change the definition of *fisheries* to not requiring fishing;[444] and add expanded definitions including *Indigenous fisher*y,

> Indigenous, in relation to a fishery, means that fish is harvested by an Indigenous organization or any of its members pursuant to the recognition and affirmation of Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982* or for any purposes set out in any rights implementation measure as agreed to by the Crown and Indigenous peoples;[445]

It included definitions of Indigenous Governing Body [IGB] with "laws" including by-laws by an IGB and the definition of Indigenous people of Canada referring to aboriginal peoples.[446] A Purposes section in 2.1 said "The purpose of this Act is to provide a framework for (a) the proper management and control of fisheries; and (b) the conservation and protection of fish and fish habitat, including by preventing pollution."

Section 2.3 said the Act was to be construed as "upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them." Section 2.4 said that "[w]hen making a decision under this Act, the Minister shall consider any adverse effects that the decision may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*."[447] Further in section 2.5 "…when making a decision under this Act, the Minister may consider, among other things… (d) Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister."[448] Provision were made for negotiating cooperation

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national-energy-board-fisheries-oceans-canada-cooperation-administration-fisheries-act-species-at-risk-act-related-regulating-energy.html>. This is undergoing a review see *Addendum to the Memorandum of Understanding between Fisheries and Oceans Canada and the National Energy Board for Cooperation and Administration of the Fisheries Act and the Species at Risk Act Related to Regulating Energy Infrastructure* (October 25, 2021) at <https://www.cer-rec.gc.ca/en/about/acts-regulations/other-acts/cooperative-agreements/addendum-memorandum-understanding-between-fisheries-oceans-canada-national-energy-board-cooperation-administration-fisheries-act-species-at-risk-act-related-regulating-energy.html>.

[444] *Fisheries Act*, *supra* note 441, section 2(1) fishery [means] with respect to any fish, includes, (a) any of its species, populations, assemblages and stocks, whether the fish is fished or not, (b) any place where fishing may be carried on, (c) any period during which fishing may be carried on, (d) any method of fishing used, and (e) any type of fishing gear or equipment or fishing vessel used.

[445] Notably *any rights implementation measures* were not restricted to Land Claim Agreement. In 2012 amendments *aboriginal fisheri*es were defined as "Aboriginal, in relation to a fishery, means that fish is harvested by an Aboriginal organization or any of its members *for the purpose of using the fish as food, for social or ceremonial purposes or for purposes set out in a land claims agreement* entered into with the Aboriginal organization."

[446] *Fisheries Act*, *supra* note 441, section 2(1). IGB were defined as "means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*."

[447] *Ibid* sections 2.3 and 2.4.

[448] *Ibid* section 2.5 "Except as otherwise provided in this Act, when making a decision under this Act, the Minister *may* consider, among other things, (a) the application of a precautionary approach and an ecosystem approach; (b) the sustainability of fisheries; (c) scientific information; (d) Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister; (e) community knowledge; (f) cooperation with any government of a province, any [IGB] and any body - including a co-management body - established under a land claims agreement; (g) social, economic and cultural factors in the management of fisheries; (h) the preservation or promotion of the

agreements between an IGB and Canada with the possibility of equivalency provisions to have an IGB law govern. [449] Measures were added to manage fish stocks and if they were unsustainable because of adverse socio-economic or cultural impacts – restoration plans would be made taking into account those factors.[450]

The combination of these amendments, and the strategic repositioning of the definition of fish habit to the general definitions, have effectively restored the pre-2012 protections.[451] In the Indigenous consultation context the relevant provisions include:

- section 34.4(1) No person shall carry on any work, undertaking or activity, other than fishing, that results in the death of fish; and
- 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*"[452] [HADD]

Unless activities under sections 34.4(2) or 35(2) were authorized by orders from DFO, or in limited circumstances by regulations, and any orders or regulations shall consider factors in section 34.1 which include,

(a) the contribution to the productivity of relevant fisheries by the fish or fish habitat that is likely to be affected;
(b) fisheries management objectives;
(c) whether there are measures and standards
(i) to avoid the death of fish or to mitigate the extent of their death or offset their death, or
(ii) to avoid, mitigate or offset the harmful alteration, disruption or destruction of fish habitat;
(d) the cumulative effects of the carrying on of the work, undertaking or activity referred to in a recommendation or an exercise of power, in combination with other works, undertakings or activities that have been or are being carried on, on fish and fish habitat;
(e) any fish habitat banks, as defined in section 42.01, that may be affected;
(f) whether any measures and standards to offset the harmful alteration, disruption or destruction of fish habitat give priority to the restoration of degraded fish habitat;
(g) [IT] of the Indigenous peoples of Canada that has been provided to the Minister; and

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independence of licence holders in commercial inshore fisheries; and (i) the intersection of sex and gender with other identity factors." There is a distinction between Indigenous knowledge [ITK] and "community knowledge" of fishers. Section 61.2 allowed for receipt of ITK in confidence and section 43(1)(j.1) allowed for regulations to maintain the confidentiality of ITK. For the permissive nature Canadas' legislation see David K Laidlaw, Chapter 45, "Challenges in using Aboriginal Traditional Knowledge in the Courts", A Ingelson, ed *Environment in the Courtroom*. (Calgary, AB: University of Calgary Press, 2019) at <https://prism.ucalgary.ca/bitstream/handle/1880/109483/9781552389867_chapter45.pdf?sequence=47&isAllowed=y> [Laidlaw, "Challenges in ATK"] at 614 to 615.

[449] *Fisheries Act*, *supra* note 441, sections 4.1 to 4.2. Agreements must comply with aboriginal rights with a public commentary process and publication requirements (this was to complement to well established provincial agreements).

[450] *Ibid* sections 6.1 to 6.3. Shark finning was also banned in section 32.

[451] *Ibid* sections 34 to 42.5.

[452] *Ibid* in section 2.1 *fish habitat* is 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.

(h) any other factor that the Minister considers relevant.[453]

Designated projects are defined in 34(1) to mean projects that are likely to affect fish or fish habitat,[454] and proposed projects must be designated in section 35.1 if the "Minister considers likely to result in the death of fish or the harmful alteration, disruption or destruction of fish habitat."[455] Essentially, permission from DFO is required for project activities that incur fish deaths or threaten HADD – independent of the IAA definition of designated project.[456] Notably, in the oil sands context "[a] Crown-Indigenous working group has been working on the creation of oilsands tailings water release standards since the beginning of the year [2021] and the federal government [with draft regulations in 2024 and final regulations in 2025."[457]

Canadian Navigable Waters Act

The *Canadian Navigable Waters Act*,[458] was renamed from the *Navigation Protection Act* and it amended and partially restored the pre-2012 protections. 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.[459] 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.[460] Transport Canada [TC] administers this through the *Navigation Protection Program* [NPP].[461]

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[453] *Ibid* section 34.2 allows for Codes of Conduct by provinces, IGB or others after public consultation, although as Olszynski, "Better Rules *Fisheries*", *supra* 443, says at page 5 of the PDF – these would reduce the burden on DFO who were, when CEEA-1992 applied, the most active regulator in Alberta.

[454] *Fisheries Act, supra* note 441, section 34(1) *designated project* means a project that is designated by regulations made under paragraph 43(1)(i.5) or that belongs to a class of projects that is designated by those regulations and that consists of works, undertakings or activities, including any works, undertakings or activities that the Minister designates to be associated with the project. *Authorizations Concerning Fish and Fish Habitat Protection Regulations*, SOR/2019-286 contain application particulars including any Indigenous consultation in section 7.

[455] *Ibid* section 34(3) Any provision of this Act that applies to works, undertakings or activities also applies to the works, undertakings or activities of *a designated project*, except paragraphs 34.4(2)(a) to (c) [permitted death of fish] and (e) and 35(2)(a) to (c) and (e) [permitted HADD].

[456] There is a searchable Registry of Projects at <https://common-project-search.canada.ca>.

[457] *Fisheries Act, supra* note 441. See: Kyle Bakx, "Banned for decades, releasing oilsands tailings water is now on the horizon", (CBC News, December 06, 2021) at <https://www.cbc.ca/news/business/bakx-oilsands-tailings-release-mining-effluent-regulations-1.6271537>; and Drew Anderson, "Ponds of toxic waste in Alberta's oilsands are bigger than Vancouver — and growing" (The Narwhal, June 4, 2022) at <https://thenarwhal.ca/oilsands-tailings-ponds-growth/>

[458] *Canadian Navigable Waters Act*, RSC 1985, c N-22 [CNWA].

[459] *Ibid*, sections 2, 2.01 and 3. Navigable waters do not include artificial irrigation canals and drainage ditches.

[460] *Ibid,* section 28(2)(a), *Major Works Order*, SOR/2019-320 and *Minor Works Order,* SOR/2021-170. see also *Navigable Waters Bridges Regulations*, CRC, c 1231, *Navigable Waters Works Regulations*, CRC, c 1232 and *Ferry Cable Regulations*, SOR/86-1026. Transport Canada, in personal communication, indicated they anticipate that proponents will opt for a formal application rather than the potential uncertainty of notice proceedings.

[461] Navigation Protection Program [NPP] at <https://tc.canada.ca/en/programs/navigation-protection-program/navigation-protection-program>. There is a searchable Registry of Projects at <https://common-project-search.canada.ca>.

Minor works do not require approval by TC if they comply with the legislation, but 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. The public who raise concerns that are unresolved have the right to petition TC to require an application for approval.[462] The list of scheduled navigable waters may be added to on application.[463]

Canadian Energy Regulator Act

The *Canadian Energy Regulator Act*,[464] replaced the NEBA and renamed the NEB as the Canadian Energy Regulator [CER] which falls under the responsibility of the Minister of Natural Resources[465] [Minister] The CER maintains an extensive website;[466] a registry entitled REGDOCS with a searchable website of active projects; and various rules and guidance.[467] In this Report we will identify relevant changes in the Indigenous context in CERA to the NEB Act and where relevant NEB practices.[468]

CERA includes Preambles;[469] and the definitions in section 2 include: *Indigenous governing body* [IGB] to mean "a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982,*" *Indigenous organization* would include an IGB or other entity

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[462] CWNA *supra* note 458*,* with Minor Works in section 4 (1), Major Works listed Navigable Waters in sections 4.1 to 9, Major Works in unlisted Navigable Waters in sections 9.1 to 10.
[463]*Ibid,* section 29.
[464] *Canadian Energy Regulator Act*, SC 2019, c 28, s 10 [CERA] The *National Energy Board Act*, RSC 1985, c N-7 [NEB Act] established the National Energy Board [NEB] in Part 1 which regulated energy projects within federal jurisdiction from 1959 to August 27, 2019. The Canadian Energy Regulator [CER] assumed regulatory authority for projects started after August 27, 2019 with the exception of projects that had not completed the screening process. Regulations made under the NEB Act remain in force following the repeal of the NEB Act due to paragraph 44(g) of the *Interpretation Act* which provides that all regulations made under a repealed enactment remain in force and are deemed to have been made under the new enactment that replaces it (i.e. the CER Act), in so far as they are not inconsistent with the new enactment, until such time as the former regulations are replaced or expressly repealed.
[465] Order Designating the Minister of Natural Resources, a member of the Queen's Privy Council for Canada, as the Minister for the purposes of the two Acts, SI/2019-65 [MNR].
[466] CER website is at <https://www.cer-rec.gc.ca/en/>. The Indigenous Engagement page is at <https://www.cer-rec.gc.ca/en/consultation-engagement/indigenous-engagement/>. The Cooperative Agreements between CER formerly the NEB, other Government Agencies and Related Organizations are listed at <https://www.cer-rec.gc.ca/en/about/acts-regulations/other-acts/cooperative-agreements/index.html>.
[467] CER REGDOCS at <https://apps.cer-rec.gc.ca/REGDOCS/Home/Index>
[468] For a general description of NEB practices see, Laidlaw, *Alberta Accommodation, supra* note 4, section 5.6 at pages 72 to 75.
[469] The NEB Act did not include any. CERA's significant Preambles include (numbering for reference): "2. Whereas the Government of Canada is of the opinion that the body should be reflective and respectful of the diversity of Canada, *including with respect to the Indigenous peoples of Canada*, and of its regional diversity and bilingual nature; 4. Whereas the Government of Canada *is committed to achieving reconciliation with First Nations, the Métis and the Inuit through renewed nation-to-nation, government-to-government and Inuit-Crown relationships based on recognition of rights, respect, co-operation and partnership*; 5. Whereas the Government of Canada is committed to implementing the [UNDRIP]; [and] 6. Whereas the Government of Canada is committed to using transparent processes that are built on early engagement and inclusive participation and under which the best available scientific information and data *as well as Indigenous knowledge* are taken into account in decision-making."

representing "the interests of an Indigenous group and its members; and equating "*Indigenous people of Canada*" to the definition in subsection 35(2) of the *Constitution Act, 1982*; [470] and Indigenous knowledge [IK] as a new defined concept.

CERA includes the standard non-derogation clause in section 3 and a new purpose section in section 6.[471] The CER is established as a corporation as an agent of Canada, and given rule making powers, with the Board of Directors requiring at least one Indigenous person. [472] It has a broad mandate which includes in section 11(h) "exercising its powers and performing its duties and functions in a manner that respects the Government of Canada's commitments with respect to the *rights of the Indigenous peoples of Canada*." The CER will have a roster of up to 7 Commissioners, one of whom must be Indigenous, a panel of three Commissioners will be appointed to a Commission, with a Lead Commissioner, and will form a court of Record, enabled to make any decisions within CERA's mandate.[473]

Commissions, and designated officers are expressly directed "[w]hen making a decision, an order or a recommendation under this Act, [they] *must consider any adverse effects* that the decision, order or recommendation may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*."[474] There are provisions to protect the confidentially of ITK if it is so provided, with exceptions if it is already public knowledge and procedural protections for disclosure to other participants.[475] CER must provide a consensual non-binding dispute resolution process, although the Commission may take into account the results of this process.[476] The CER "may enter into arrangements with any government or *Indigenous organization* to establish collaborative processes"[477] or, subject to regulations, if any, with an IGB

[470] This replaced the definition in the NEB Act in section 2 of "Aboriginal governing body means a council, government or other entity authorized to act on behalf of (a) a band as defined in subsection 2(1) of the *Indian Act*, or (b) a First Nation, an Aboriginal people or any Aboriginal organization that is a party to a land claims agreement or any other treaty, a self-government agreement or a settlement agreement;"
[471] CERA, *supra* note 464, section 6 says "The purpose of this Act is to regulate certain energy matters within Parliament's jurisdiction and, in particular, (a) to ensure that pipelines and power lines as well as facilities, equipment or systems related to offshore renewable energy projects, are constructed, operated and abandoned in a manner that is safe, secure and efficient and that protects people, property and the environment; (b) to ensure that the exploration for and exploitation of oil and gas, as defined in section 2 of the *Canada Oil and Gas Operations Act*, is carried out in a manner that is safe and secure and that protects people, property and the environment; (c) to regulate trade in energy products; and (d) to ensure that regulatory hearings and decision-making processes related to those energy matters are fair, inclusive, transparent and efficient."
[472] CER incorporation is in section 10 of CERA, with at least five but not more than nine Directors in section 14.
[473] CERA, *supra* note 464, sections 26, 27, 31, and 32. These are substantially similar to Board Members in the NEB Act.
[474] *Ibid*, section 56. Section 57 requires the appointment of an Advisory Council for the purpose of enhancing the involvement of the Indigenous peoples of Canada and Indigenous organizations with at least 3 persons recommended by an Indigenous Organization representing respective: First Nations, Inuit and Métis peoples.
[475] *Ibid*, section 58. Section 59 allows the MNR to issue regulations on this.
[476] *Ibid*, section 73.
[477] *Ibid*, section 76.

to authorize it "to exercise the powers or perform the duties and functions under this Act that are specified in the arrangement." [478]

The Commission must hold public hearings for pipeline approvals and international or designated inter-provincial power lines,[479] or other matters which it deems appropriate, in accordance with its rules.[480] The CER *must* establish appropriate processes, engage meaningfully with the public, and in particular the Indigenous peoples of Canada and Indigenous organizations in these approval and abandonment applications, and must establish a participant funding program to facilitate the participation of the public in hearings and any steps leading to them. [481]

Under section 183(4), once the Commission determines that an application for a certificate in respect of a pipeline is complete, it must prepare and submit a Report within a deadline agreed by the Lead Commissioner to a maximum of 450+ days,[482] setting out its recommendation and applicable conditions to the MNR to forward to the GIC for a decision.[483] That Report, under section 183(2) will take into account "in light of, among other things, any Indigenous knowledge that has been provided to the Commission and scientific information and data — all considerations that appear to it to be relevant and directly related to the pipeline, including,

(a) the environmental effects, including any cumulative environmental effects;
(b) the safety and security of persons and the protection of property and the environment;
(c) the health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors;
(d) the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes [CULTP];
(e) the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;
…
(j) the extent to which the effects of the pipeline hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;
(k) any relevant assessment referred to in section 92, 93 or 95 of the *Impact Assessment Act* [Section 92 describes Federal Assessment Plans on exclusively federal lands, section 93

[478] *Ibid*, section 77 to 79. Section 77(2) requires publication and section 79 provides the IGB Arrangement will overrule the collaborative process in section 76 to the extent of any inconsistences.
[479] *Ibid*, section 261 designation powers – but these have, to my understanding never been exercised. The factors in Part 4, section 262 are identical to those under section 183 (2) excepting Economic Concerns. This Report will not consider the regulation of International Power lines as Alberta's 4 international power lines cross into Montana. See: CER's International Power Lines Dashboard at <https://www.cer-rec.gc.ca/en/data-analysis/facilities-we-regulate/international-power-lines-dashboard/index.html>
[480] *Ibid*, section 52. Commissioners can by order obtained by application in section 214(1)(a) exempt "pipelines or branches of or extensions to pipelines, of not more than 40 kilometres in length;" from the public hearings.
[481] *Ibid*, section 74 to 75. See Laidlaw, *Alberta Accommodation, supra* note 4, Section 5.4 at pages 44 to 51.
[482] *Ibid*, section 183(4); in s 183(5), the Lead Commissioner may stop the clock in order to obtain information under the *Circumstances for Excluding Periods from Time Limits Regulations*, SOR/2019-348 with written reasons; and the MNR can provide by order multiple extensions to the preparing the Report. These deadlines and any extensions must be made public in the Registry, with the MNR directions published in the Gazette within 15 days.
[483] *Ibid*, section 183(1)

describes mixed jurisdiction lands and section 95 talks of Strategic Plans]; and

(l) any public interest that the Commission considers may be affected by the issuance of the certificate or the dismissal of the application." [484]

Representations on an application may be made from any member of the public in a manner specified by the Commission.[485] Upon receipt of this Report, the GIC may direct:

- a reconsideration of the Report's recommendation or conditions to the CER on any terms and specify a deadline for a Reconsideration Report;[486] or
- must direct the CER by order to issue or deny the requested certificate within 90 days+[487] with written reasons from the GIC [Decision Statement] that must demonstrate that they took into account all of the relevant considerations referred to in subsection 183(2) above.[488]

Judicial review application to the Federal Court of Appeal as to the Decision Statement may be made by applying for leave within 15 days of the Decision Statement published in the Gazette.[489]

It should be noted that in *Tsleil-Waututh Nation v Canada (Attorney General)* (2018)[490] reviewed the GIC's approval, and because the NEB Report Trans Mountain Expansion (May 20, 2010)[491] was deficient quashed the approval. The GIC then directed Reconsideration to the NEB and on receipt of the NEB Reconsideration Report (February 22, 2019)[492] Canada undertook to implement all the Recommendations in the NEB Reconsideration Report, and *amended* 6 of the recommended conditions.[493] *Tsleil-Waututh* is applicable to the CER and the GIC would have additional powers

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[484] *Ibid*, section 183(2). Subsections: "(f) the availability of oil, gas or any other commodity to the pipeline; (g) the existence of actual or potential markets; (h) the economic feasibility of the pipeline; (i) the financial resources, financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; [Economic Concerns]. Reports under NEB Act section 52(2), listed Economic Concerns and the public interest were the only factors, although in practice NEB Hearing Orders required Indigenous Input, see: Laidlaw, *Alberta Accommodation, supra* note 4 at 36 to 38. See: "public interest" in *Fort McKay v Prosper, supra* note 346 and *AltaLink v AUC, supra* note 374

[485] *Ibid*, section 183(3).

[486] *Ibid*, section 184.

[487] *Ibid*, section 186(3), the GIC as recommended by the MNR can grant additional extensions to make a decision.

[488] *Ibid*, section 186. The GIC's Order must be published within 15 days in the Gazette.

[489] *Ibid*, section 188. A Judge may, for special reasons, extend those deadlines section 188(2)(b).

[490] *Tsleil-Waututh Nation v Canada (Attorney General)* (2018), 2018 FCA 153; leave denied 2019 CanLII 37489 (SCC) [*Tsleil-Waututh*], affirmed *Gitxaala, supra* note 150, interpretation that CEEA-2012 and NEB Act comprised a complete code and the GIC was ultimate decision maker.

[491] NEB Report Trans Mountain Expansion (May 2016) [Trans Mountain Report] at <https://www.ceaa-acee.gc.ca/050/documents/p80061/114562E.pdf>

[492] NEB Trans Mountain Reconsideration Report (February 22, 2019) available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3754555>

[493] Order-In-Council (2019-0820) at <https://orders-in-council.canada.ca/attachment.php?attach=38147&lang=en>. These changes included amendments to: 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

to amend CER conditions or provide government only aboriginal accommodation measures such as replacement territories.[494] This is not the case in Alberta.

CER Standard Package of Indigenous Accommodation

The NEB had developed what we termed a "Standard Package" of Indigenous accommodations by way of project approval conditions, [495] which we anticipate will continue with the CER

1. Reception of Aboriginal Traditional Oral Evidence [ATOE]

This would be defined in the Commission's Hearing Orders or Procedural Directions, particularly where the Commission, in the course of written Public Hearings, makes an exception for the receipt of optional oral evidence from Indigenous parties with the justification being,

> …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.
>
> ATOE was to "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.[496]

The definition of ATOE was intended to be interpreted liberally – it should be noted that the use of land use maps in presenting ATOE could assist in this understanding.[497]

2. Employment of Aboriginal Environmental Monitors

Given their extensive traditional knowledge of their traditional territories, employment of aboriginal environmental monitors was imposed as a condition, in recent projects with reporting requirements. Initially this was in the construction phase where potential damage would be higher, but it is extending now to all phases of the project.

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improvements to Trans Mountain's Emergency Management Program and Condition 151: Post-construction environmental monitoring reports.

[494] See Laidlaw, *Alberta Accommodation*, *supra* note 4 at 136 to 138.

[495] *Ibid* at 75, 120-131

[496]Trans Mountain Hearings NEB Procedural Direction No. 1 (May 5, 2014) [Trans Mountain NEB Procedural Direction] available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/2452818>.

[497] Rod Northey, "Integration of Written and Visual Evidence for Expert Tribunals" CIRL Symposium Environment in the Courtroom (2015), at <https://cirl.ca/sites/default/files/2015%20Symposium/ENG_Integration%20of%20Written%20and%20Visual%20Evidence%20for%20Expert%20Tribunals_Northey.pdf>.

3. Enhanced Reporting on Project Benefits and Community Benefits

In most projects, Proponents will proffer 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.[498] The NEB imposed expanded reporting conditions and details on these proposals, in part because as an administrative regulator, it was limited to collecting information rather than directing targets in conditions, although governments may do so.[499]

4. Engagement with Aboriginal groups for the life cycle of a Project.

Proponents have incentive to consult Indigenous peoples throughout construction and operations and most proponents will have "Stakeholder Policies" in general details. The NEB would impose approval conditions on the Proponent for the Certificates approving the pipeline corridor for the inevitable late delivery of Indigenous information (due to the lack of capacity, funding or tight deadlines) and require them to take this into account on the Detailed Location hearings.

From this, the NEB gradually expanded the requirements to consult Indigenous Peoples, in the larger projects such as Enbridge Line 3, which traversed private lands, and report to the NEB the results of that consultation *in all phases of the project*, construction, operation and abandonment.[500]

This in essence was one the findings of the *Public Inquiry into Anti-Alberta Energy Campaigns* (2021) [501] in Recommendation 2 [502] where Commissioner J Stephens Allan talked of the establishment of *Elders Wisdom Panels* in Treaty regions to "explore relationships with business and government, environmental stewardship, education and training opportunities, economic development, First Nations governance, and communication."[503]

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[498] Laidlaw, *Alberta Accommodation, supra* note 4 at 125. These are intended to address the socio-economic conditions of Indigenous Peoples, such as in the Justice Feehan, concurring judgement in *AltaLink v AUC, supra* note 374.

[499] This would be politically challenging but there are precedents, for example in *R v Kapp,* 2008 SCC 41 a claim was made for breach of equality rights of non-aboriginal fishers by a pilot program that allowed aboriginal fishers priority in the salmon fishery, the Court found an ameliorative aspect to the challenged program under section 15(2) of the *Charter* that justified the discrimination at 62-65.

[500] Laidlaw, *Alberta Accommodation, supra* note 4 at 130. Enbridge Line 3 is a good example as the route traversed 97% private lands. We understand that there are practical issues in the aboriginal consultation in Enbridge's Line 3 process.

[501] *Public Inquiry into Anti-Alberta Energy Campaigns* (2021) [Allan Report] available at <https://open.alberta.ca/publications/public-inquiry-into-anti-alberta-energy-campaigns-report>.

[502] *Ibid* at 615 to 618.

[503] *Ibid* at Recommendation 2 First Nations at paragraph 1380 at page 617. These would appear to be similar to Indigenous Wisdom Advisory Panel under EPEA section 15.3(1). The Minister shall establish an advisory panel to provide advice to the Chief Scientist and the Minister about how to incorporate traditional ecological knowledge into the environmental science program. (2) The Indigenous Wisdom Advisory Panel appointed under the *Protecting Alberta's Environment Act*, SA 2013 c P-26.8, is continued and is deemed to be an advisory panel established under subsection (1), and the appointments of the members of that Panel are continued.

When an application for a Certificate relates to a "designated project", as defined in section 2 of the IAA, that is subject to an impact assessment under the IAA and timelines, Review Panel composition, and considerations are changed.[504]

Impact Assessment Act

The *Impact Assessment Act* [IAA] [505] replaced CEEA-2012 and renamed the Canadian Environmental Assessment Agency to the Impact Assessment Agency of Canada [Agency].[506] It is the primary EA legislation, now renamed Impact Assessment [IA],[507] and came into effect on projects started after August 28, 2019.[508]

It should be noted that Alberta has successfully challenged the constitutionality of the IAA in the Alberta Court of Appeal with a decision rendered on May 10, 2022 in *Reference re Impact Assessment Act*, 2022 ABCA 165.[509] This is a reference case the IAA will continue to apply in Alberta.[510] The academic consensus is that this decision will be overturned.[511]

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[504] CERA, *supra* note 464, section 185, 186(3), 215 and 44.
[505] *Impact Assessment Act*, SC 2019, c 28 [IAA]
[506] Academic literature considering the IAA are many, including: David V Wright, *Implications of the New Federal Impact Assessment Regime for Energy Projects in Alberta*, Occasional Paper #75 (Calgary: Canadian Institute of Resources Law, June 2021) at <https://canlii.ca/t/t9c3> [Wright, *Implications IAA in Alberta*]; David V Wright, "The New Federal Impact Assessment Act: Implications for Canadian Energy Projects" (2021) 59:1 Alta L Rev 67 at <https://canlii.ca/t/tcqz> [Wright, "IAA Energy Projects"]; Ryan Ng, "Revitalizing Rights: Practicable Proposals for the Law of Section 35 Consultation and Environmental Assessment" (2022) 27 *Appeal: Review of Current Law and Law Reform* 82, at <https://canlii.ca/t/7hxtk>; Andrew Leach, "The No More Pipelines Act?" (2021) 59:1 Alberta L Rev 7 at <https://canlii.ca/t/tcqw>; and Diana Audino et al, "Forging a Clearer Path Forward for Assessing Cumulative Impacts on Aboriginal and Treaty Rights" (2019) 57:2 Alta L Rev 297 at <https://canlii.ca/t/spvf> to name a few.
[507] We will use EA for those processes under CEEA-1992 and CEEA-2012, with IA reserved to the IAA although this may be used interchangeably in the general discussion.
[508] 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 IAA.
[509] *Reference re Impact Assessment Act*, 2022 ABCA 165. [*Re IAA - Alberta*]
[510] Brett Carlson, et. al, "Court of Appeal finds Federal Impact Assessment Act unconstitutional" (Borden Ladner Gervais LLP – May 13, 2022) at <https://canliiconnects.org/en/commentaries/87964>
[511] Martin Olszynski, "Carbon Tax Redux: A Majority of the Alberta Court of Appeal Opines that the Impact Assessment Act is Unconstitutional" (Ablawg.ca, May 24, 2022) at <https://ablawg.ca/2022/05/24/carbon-tax-redux-a-majority-of-the-alberta-court-of-appeal-opines-that-the-impact-assessment-act-is-unconstitutional/> and Nigel Bankes & Andrew Leach, "The Rhetoric of Property and Immunity in the Majority Opinion in the Impact Assessment Reference" (Ablawg.ca, June 8, 2022) at <https://ablawg.ca/2022/06/08/the-rhetoric-of-property-and-immunity-in-the-majority-opinion-in-the-impact-assessment-reference/>

The Agency maintains a comprehensive website,[512] with a Policy and guidance index[513] and with an IA Registry of active projects:[514] As to UNDRIP, the Agency asserts "the [IAA] already establishes a legislative and policy framework that align with the Declaration and does not need to be changed in light of the [UNDRIPA]."[515]

Funding for IA Participation for Aboriginal Groups

The Agency provides federal funding in:

- *Participant Funding Program* [PFP] for an IA with information on qualifying and forms;[516]
- *Policy Dialogue Program*, outside of an assessment to assist in the development of policies, guidance, regulations and legislation related to impact assessment;[517]
- *Indigenous Capacity Support Program*,[518] intended to develop or support consultation capacity, this has three streams: 1: Program Partners; 2: Community of Practice Events; and 3: Strategic Opportunities for communities, who in the Agency's opinion, as a priority for capacity funding; as well as Program Guidelines;[519] and
- *Agency Research Program*, with the "aim is to support the new impact assessment system by providing research and evidence related to the field of impact assessment. Research will now take place using a more multidisciplinary approach."[520] There are three areas of Research, two

[512] Agency website at <https://www.canada.ca/en/impact-assessment-agency.html>. The *Participation of Indigenous Peoples in Impact Assessmen*t webpage is at <https://www.canada.ca/en/impact-assessment-agency/programs/participation-indigenous-peoples.html>.
[513] Policy and guidance webpage at <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance.html>.
[514] Canadian Impact Assessment Registry at <https://iaac-aeic.gc.ca/050/evaluations/index?culture=en-CA> [IA Registry] IAA, *supra* note 505, section 2 defines the Internet site means the Internet site that is established under section 105. Section 105(1) requires the Agency to establish a public website on a Project Basis in section 106(1) to contain active projects until the day on which any follow-up program in respect of that designated project is completed or under section 106(3) otherwise terminated. Sections 105(2) and 105(3) specify the contents of IA Registry.
[515] The Agency web page *Implementing the United Nations Declaration on the Rights of Indigenous Peoples* at <https://www.canada.ca/en/impact-assessment-agency/programs/participation-indigenous-peoples/implementing-united-nations-declaration-rights-indigenous-peoples.html>.
[516] *Participant Funding Program* [PFP] webpage at <https://www.canada.ca/en/impact-assessment-agency/services/public-participation/funding-programs/participant-funding-program.html>. See Laidlaw, *Alberta Accommodation* Section 5.4 at 44 to 51 for Legal Remedies in underfunded assessments.
[517] *Policy Dialogue Program* webpage at <https://www.canada.ca/en/impact-assessment-agency/services/public-participation/funding-programs/policy-dialogue-program.html>. There are no open funding proposals at this time.
[518] *Indigenous Capacity Support Program* webpage at <https://www.canada.ca/en/impact-assessment-agency/services/public-participation/funding-programs/indigenous-capacity-support-program.html>. There are no open funding proposals at this time.
[519] Indigenous Capacity Support Program - National Program Guidelines (2021) webpage at <https://www.canada.ca/en/impact-assessment-agency/services/public-participation/guidelines-indigenous-capacity-support-program.html>.
[520] Agency Research Program webpage at <https://www.canada.ca/en/impact-assessment-agency/corporate/research-program.html>.

of which are already assigned.[521] *Targeted Research* involves small-scale research addressing the Agency's immediate policy or operational needs. These are allocated annually.

Given the limited funding for aboriginal communities and multiple consultation demands, funding aboriginal participation in a project IA is a constant issue.

Provincial Government as Proponent

Some consultation policies, like Alberta's policy, contemplate governments as proponents. In the 2012 EA of Littlebow, the Proponent was Alberta Transportation, and they denied funding to Aboriginal groups.[522] This appears to have changed – in the 2016 EA of the Springbank Off-Stream Reservoir Project, Alberta Transportation entered into funding agreements with First Nations for TLU and IK.[523] Other provincial governments may, but need not, enter into Funding Agreements with Aboriginal groups on 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.[524] Private proponent funding is discretionary and directed mainly towards acquisition of information on TLU and IK for use in project design and Community Socio-Economic Studies as mandated in the IA. Proponent funding takes place under a variety of private agreements which are invariably confidential and with public information generalized. 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. 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.[525]

Alberta Indigenous Capacity Funding

Since 2013, Indigenous groups in Alberta have had to rely on a mixture of proponent funding and provincial funding for consultation.[526] Provincial core funding is limited and generally provided

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[521] *Knowledge Synthesis Grants* in conjunction with Social Sciences and Humanities Research Council (SSHRC) and *Advancing Impact Assessment for Canada's Socio-Ecological System* with long term partnerships.
[522] Littlebow Comprehensive Screening Report (December 2012) at 11 <http://www.ceaa-acee.gc.ca/050/documents/p49421/85193E.pdf>.
[523] Springbank Off-Stream Reservoir Project (#80123) Registry website at <https://iaac-aeic.gc.ca/050/evaluations/proj/80123>. The funding arrangements are no longer public.
[524] For example, the Newfoundland and Labrador Policy requires the Proponent to fund all consultation activities. See Laidlaw & Passelac-Ross, *Handbook*, *supra* note 2 at 36 footnote 187.
[525] Laidlaw & Passelac-Ross, *Handbook*, *supra* note 2 at 49.
[526] *Aboriginal Consultation Levy Act*, SA 2013, c A-1.2. See: Laidlaw & Passelac-Ross, *Handbook*, *supra* note 2 at 5 to 6.

on a case-by-case basis.[527] As of 2014, Alberta had allocated only $6.6 Million of core funding for aboriginal consultation with no details provided as to whether the Proponents were government or private organizations.[528] As noted in the Alberta Indigenous Affairs Ministry's *Annual Reports*:[529]

Period	Capacity Funding	Notes
2015 – 16	$5,629,471.61[530]	48 FN at 28.
2016 – 17	$6,203,00.00	49 FN at 36 .
2017 – 18	$7,300,000.00[531]	All FN at 27-28 with review underway.
2018 – 19	$13,960,000.00	All FN at 27-28.
2019 – 20	$21,549,000.00	Renamed ICCP at 53.
2020 – 21	$6,490,000.00	At 65-66.
2021 – 22	$6,490,000.00	59 Indigenous communities $110,000 each at 34

Given the advice in the *Alberta Indigenous Affairs Report 2021-2022*, it appears that the ICCP has been equally shared.

Federal Funding

While the Federal government has, for example the *Indigenous Capacity Support Program* under the IAA most federal funding is delivered through the Agency and CER who administer separate project specific Public Participation Funds [PFP] that allow proposed IA participants to apply for funding, as noted above. The PFP, while statutorily authorized, are voluntary grants on the part of the federal government and are separately administered from the EA Tribunal with Funding Review Committees that meet to consider applications and issue public Reports granting some or all of the applicants some or all of the requested funding.[532] These decisions are not justiciable. Funding for direct Crown consultation is discretionary and is provided by the Agency.

There can be separate participant funding pools set by the Agency and CER for aboriginal groups and the public. Major projects may have multiple pools for various stages of the IA. These grants are conditioned on signing a standard form Contribution Agreement that requires participation in the IA process.

Government Funding Inadequate: Court Remedies

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

[527] Alberta's current program is the *First Nations Consultation Capacity Investment Program* (2016) FNCCIP] available at <https://open.alberta.ca/publications/first-nations-consultation-capacity-investment-program>. This has been renamed as Indigenous Consultation Capacity Program [ICCP] in 2019.
[528] *Ibid* at 50.
[529] Indigenous Relations annual report available at <https://open.alberta.ca/publications/2371-0640>.
[530] *Alberta Indigenous Affairs Report 2015-2016*, at 28. There was $600,000 allocated to 3 Tribal Councils.
[531] *Alberta Indigenous Affairs Report 2018-2019*, at 27.
[532] PFP is not available for CER Detailed Alignment Hearings.

additional revenue from, among other things, taxes and royalties. Increased funding for Indigenous participation in IA was a recommendation in *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).[533]

The Supreme Court of Canada, in the 2017 case of *Clyde River (Hamlet) v Petroleum Geo-Services Inc,* noted the lack of participant funding saying "…they may be required for meaningful consultation."[534] It contrasted the process in that case with the one used in the companion case of *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*[535] and *Taku River*[536], saying of participant funding "[w]hile these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation."[537] The 2016 case of *Gitxaala* said:

> [w]ithout doubt, the level of funding 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."[538]

Similarly, in *Tsleil-Waututh Nation v Canada (Attorney General)*, the Court said funding was available from the PFP, MPMO (Canada) and Trans Mountain, but were generally considered inadequate with delays in funding from the PFP, meaning that funding could only be addressed to "work conducted after the funding was approved and a funding agreement was executed."[539] 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."[540] 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."[541] There has been no court decision in this regard. Evidence to make an argument that under-funding affected consultation would include:

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[533] Canadian Environmental Assessment Agency, *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* (Ottawa: CEAA 2017) at <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html> at 32.
[534] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*] at 47.
[535] *Chippewas of the Thames, supra* note 333 at 57.
[536] *Taku River*, supra note 105 at 37.
[537] *Clyde River, supra* note 534 at 49.
[538] *Gitxaala*, *supra* note 150 at 210.
[539] *Tsleil-Waututh, supra* note 490 at 100.
[540] *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."
[541] *Ibid* at 538, but that was 2 of 6 Aboriginal Applicants, the balance being the Cities of Vancouver and Burnaby and two environmental NGOs, Raincoast Conservation Foundation and Living Oceans Society.

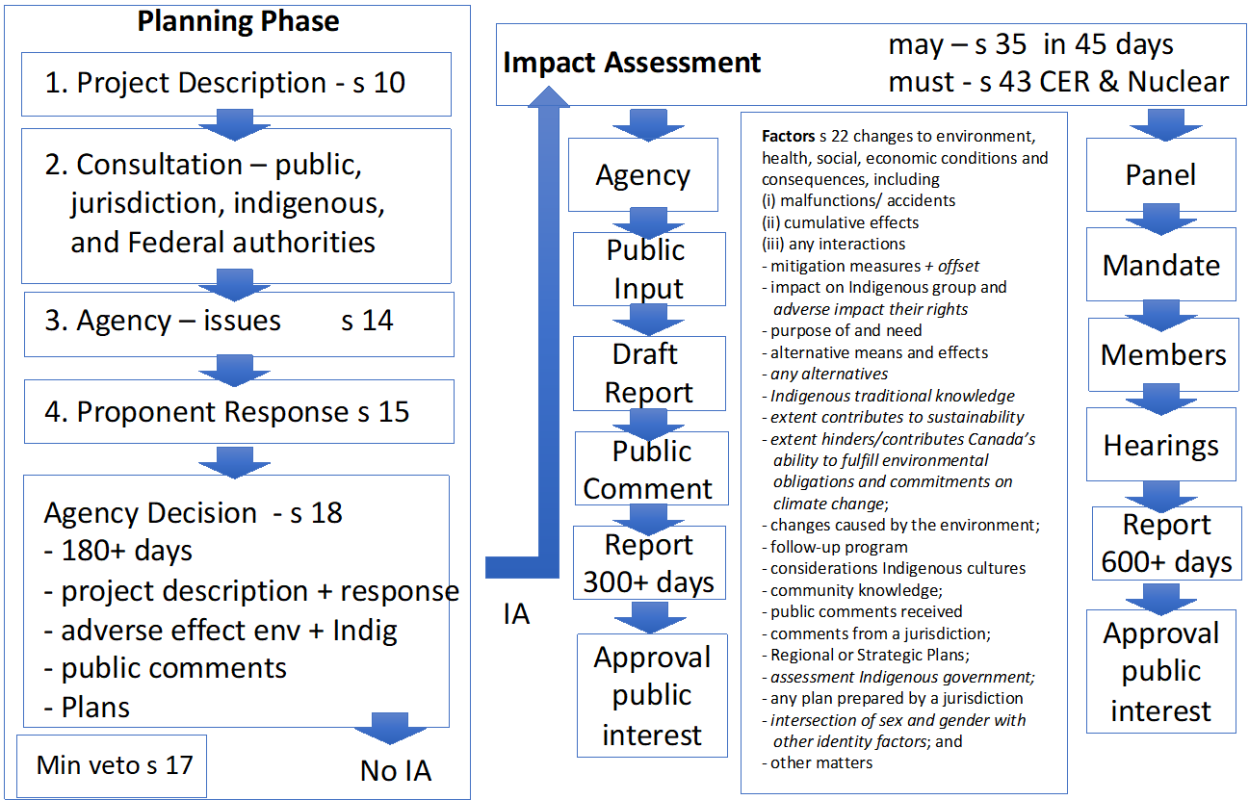
- detailed budgets for funding requests are required as blanket descriptions will not be adequate,[542] with details as to what the money would be used for;[543]
- specific requirements and proper comparators, the fact that another aboriginal group has received funding for a specific task, does not without more justify a similar request;[544]
- participation, however constrained, must take place in the IA process, and not in the post-IA consultations;[545]
- apply for and obtain all available funding, even if it is inadequate, as refusal may be seen as "frustrating consultation";[546] and
- detailed accounting as to other available resources and depositions of them, these can be sealed by the Courts.

While an interlocutory application to challenge the IA Tribunal's process most likely to obtain useful funding, they will usually fail, absent extraordinary circumstances.[547]

IAA - Process

The Agency maintains a high-level hyperlinked *Impact Assessment Process Overview*.[548] Prior to the passage of Bill-C 69, CIRL generated a graphical outline of the general process in the IAA below, with *italicized* Factors in section 22 indicating new impact factors from CEEA-2012.[549]

[542] *Ibid* at 540.
[543] *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.
[544] *Tsleil-Waututh, supra* note 490 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].
[545] *Katlodeeche First Nation v Canada (Attorney General)*, 2013 FC 458 at 166 to 184.
[546] *Ekuanitshit* Trial, *supra* note 544 .
[547] *Fort Chipewyan Métis, supra* note 544 at 128 to 129.
[548] Impact Assessment Agency of Canada, *Impact Assessment Process Overview*, at: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/impact-assessment-process-overview.html>.
[549] David Laidlaw, "Bill C-69, the *Impact Assessment Act*, and Indigenous Process Considerations" (15 March, 2018), at: ABlawg, <https://ablawg.ca/2018/03/15/bill-c-69-the-impact-assessment-act-and-indigenous-process-considerations/>.



The IAA contains the standard notwithstanding mention in section 3, but it is the first piece of federal legislation that focuses, amongst other priorities, on consideration of the impacts on aboriginal rights and effects on Indigenous groups in granting government approvals. The IAA gives Canada discretionary power for approvals in the "public interest" as defined in section 63 which now includes aboriginal rights as part of the public interest.

The historical and legal issues in establishing aboriginal rights and title, and any impacts on them could impose additional expense and time for Indigenous groups for all assessments. While there was public consultation in the development of the IAA,[550] including submissions from experts and indigenous groups intended to restore "faith in EA processes," direct input in the formulation of that legislation was denied in 2018 by the Supreme Court's decision in *Mikisew Cree First Nation v Canada (Governor General in Council.* [551] The IAAC has established two advisory groups, *Indigenous Advisory Committee* and *Technical Advisory Committee on Science and Knowledge* to advise on policy development for the Agency.[552]

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[550] Canadian Environmental Assessment Agency, *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* (Ottawa: CEAA 2017) at <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>.
[551] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.
[552] Impact Assessment Agency of Canada, *Advisory Committees,* at: <https://www.canada.ca/en/impact-assessment-agency/advisory/advisory-groups.html>. These were established prior to the passage of the IAA.

IAA - Definitions

The IAA definitions are in section 2 and include wording changes from CEAA-2012, most notably in the Indigenous context:

effects means, unless the context requires otherwise, changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes.[553]

effects within federal jurisdiction means, with respect to a physical activity *or* a designated project,

(a) a change to the following components of the environment that are within the legislative authority of Parliament:
  (i) fish and fish habitat, as defined in subsection 2(1) of the *Fisheries Act*,
  (ii) aquatic species, as defined in subsection 2(1) of the *Species at Risk Act*,
  (iii) migratory birds, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and
  (iv) any other component of the environment that is set out in Schedule 3;[554]

(b) a change to the environment that would occur
  (i) on federal lands,[555]
  (ii) in a province other than the one where the physical activity or the designated project is being carried out, or
  (iii) outside Canada;

(c) with respect to the Indigenous peoples of Canada, [556] an impact - occurring in Canada and resulting from any change to the environment - on
  (i) physical and cultural heritage,
  (ii) the current use of lands and resources for traditional purposes, or
  (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;

(d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada*;* and

(e) any change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3.

[Federal Impacts]

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[553] IAA, *supra* note 505 section 2 *direct or incidental effects* [to] means effects that are directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of a physical activity or designated project, *or* to a federal authority's provision of financial assistance to a person for the purpose of enabling that activity or project to be carried out, in whole or in part.

[554] *Ibid,* Schedule 3 is currently empty.

[555] *Ibid*, s 2 defines "*federal lands* [to] means (a) lands that belong to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above those lands, other than lands under the administration and control of the Commissioner of Yukon, the Northwest Territories or Nunavut; (b) the following lands and areas: (i) the internal waters of Canada, in any area of the sea not within a province, (ii) the territorial sea of Canada, in any area of the sea not within a province, (iii) the exclusive economic zone of Canada, and (iv) the continental shelf of Canada; and (c) *reserves*, surrendered lands and any other lands that are set apart for the use and benefit of a band and that are subject to the *Indian Act*, and all waters on and airspace above those reserves or lands."

[556] *Ibid* s 2 equates *Indigenous peoples of Canada* [to] the meaning assigned by the definition aboriginal peoples of Canada in subsection 35(2) of the *Constitution Act, 1982*

These definitions broaden the consideration of the environment from CEAA-2012. The IAA definitions in section 2, also include,

> *Indigenous governing body* means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*. [IGB]
>
> *jurisdiction* means
>
> (a) a federal authority;[557]
> (b) any agency or body that is established under an Act of Parliament and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project; [Federal Jurisdiction]
> (c) the government of a province;
> (d) any agency or body that is established under an Act of the legislature of a province and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;
> (e) any body, including a co-management body, established under a land claim agreement referred to in section 35 of the *Constitution Act, 1982* and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;
> (f) an Indigenous governing body that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project
> (i) under a land claim agreement referred to in section 35 of the *Constitution Act, 1982*, or
> (ii) under an Act of Parliament other than this Act or under an Act of the legislature of a province, including a law that implements a self-government agreement;
> (g) an Indigenous governing body that has entered into an agreement or arrangement referred to in paragraph 114(1)(e);[558] [Canadian Jurisdiction]
> (h) a government of a foreign state or of a subdivision of a foreign state, or any institution of such a government; and
> (i) an international organization of states or any institution of such an organization. [International Jurisdiction]

[557] *federal authority* means (a) a Minister of the Crown in right of Canada; (b) an agency of the Government of Canada or a parent Crown corporation, as defined in subsection 83(1) of the Financial Administration Act, [RSC 1985, c F-11] or any other body established by or under an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs; (c) any department or departmental corporation that is set out in Schedule I, I.1 or II to the Financial Administration Act; and (d) any other body that is set out in Schedule 1. It does not include the Executive Council of or a minister, department, agency or body of the government of Yukon, the Northwest Territories or Nunavut, a council of the band within the meaning of the *Indian Act*, Export Development Canada or the Canada Pension Plan Investment Board. It also does not include a Crown corporation, as defined in subsection 83(1) of the Financial Administration Act, that is a wholly-owned subsidiary, as defined in that subsection, a harbour commission established under the Harbour Commissions Act or a not-for-profit corporation that enters into an agreement under subsection 80(5) of the Canada Marine Act, that is not set out in Schedule 1 [that Schedule includes 1 Port authority as defined in subsection 2(1) of the Canada Marine Act. 2 Board as defined in section 2 of the Canada–Newfoundland and Labrador Atlantic Accord Implementation Act. 3 Board as defined in section 2 of the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act.

[558] IGB has entered into an agreement or arrangement between Canada and an IGB to be considered as a jurisdiction for the application of the IAA on lands specified in except for decisions under section 16 e.g. the necessity for an IA

It should be noted that an IGB would include persons authorized to act on behalf of an Indigenous group but not all IGB might qualify as IGB jurisdiction to be engaged under the IAA.

Changes from CEEA-2012 include:

- removing the limiting definition of "interested party" as a person "directly affected by the project or has relevant information or expertise"
- mitigation measures now include offset measures, this accords with recent EA decisions approved by the courts; and
- replacing "sustainable development" with: "sustainability [that] means the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations."[559] This is the *only* legislated mechanism whereby economic benefits of a Project may be assessed.

The IAA applies to designated projects on Reserves and any other lands set apart for the use and benefit of a First Nations subject to the *Indian Act*, and all waters on and airspace above those Reserves or lands. A streamlined approval policy for CEEA-2012 EAs in the *Environmental Review Process for Projects on Reserve Land*[560] with an updated policy under development.[561]

IAA - Purposes

The IAA purposes are set forth in section 6(1) and in the Indigenous context, significant purposes include, among others:

> (a) to foster *sustainability*;
> (b) to protect the components of the environment, and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project;
> (b.1) to establish a fair, predictable and efficient process for conducting impact assessments that enhances Canada's competitiveness, encourages innovation in the carrying out of designated projects and *creates opportunities for sustainable economic development*;
> (c) to ensure that impact assessments of designated projects take into account all effects — both positive and adverse — that may be caused by the carrying out of designated projects;…
> (e) to promote cooperation and coordinated action between federal and provincial governments — while respecting the legislative competence of each — and the federal government and *Indigenous governing bodies that are jurisdictions*, with respect to impact assessments;
> (f) to promote *communication and cooperation with Indigenous peoples of Canada with respect to impact assessments*;
> (g) to ensure *respect for the rights of the Indigenous peoples of Canada* recognized and affirmed by section 35 of *the Constitution Act, 1982,* in *the course of impact assessments and decision-making under this Act*;…

[559] IAA, *supra* note 505, definitions in section 2.
[560] Indigenous Services Canada, *Environmental Review Process for Projects on Reserve Land,* at: <https://www.sac-isc.gc.ca/eng/1345141628060/1612813855724>.
[561] Personal communication September 2021.

(j) to ensure that an impact assessment takes into account scientific information, *Indigenous knowledge* and community knowledge;…
(m) to encourage the assessment of the cumulative effects of physical activities in a region and the assessment of federal policies, plans or programs and the consideration of those assessments in impact assessments;

The IAA purposes include general directions in section 6(2) that Canada and its agents "must exercise their powers in a manner that fosters *sustainability*, respects the *Government's commitments with respect to the rights of the Indigenous peoples of Canada* and applies the *precautionary principle*"[562] and in section 6(3) they "must, in the administration of this Act, exercise their powers in a manner that adheres to the principles of scientific integrity, honesty, objectivity, thoroughness and accuracy."[563]

The *Federal Sustainable Development Act*[564] governing the implementation of a *Federal Sustainable Development Strategy* policy document and the development and monitoring of government goals and targets, was significantly amended in 2019.[565] These amendments removed the definition of the precautionary principle in section 2; added Purpose language in section 3; substituted in section 5 the Basic Principle[566] with seven, including, among others:

(a.1) the principle that sustainable development
(i) is a continually evolving concept,
(ii)may be achieved by, among other things, the protection of ecosystems, prevention of pollution, protection of human health, promotion of equity, conservation of cultural heritage, respect for domestic and international obligations relating to sustainable development and recognition of the present generation's responsibility to provide future generations with a healthy and ecologically sound environment, and

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[562] The standard definition in Canadian Courts from *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at 31 is "where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation." This formulation is controversial, see for example Charles Birchall & Julie Abouchar "Navigating Environmental Risk: When and How to Apply the Precautionary Principle" (2017) Willms & Shier Environmental Lawyers LLP. at <https://www.willmsshier.com/docs/default-source/articles/navigating-environmental-risk-when-and-how-to-apply-the-precautionary-principle---cjb-jd-ja-and-rj---december-22-2017.pdf>

[563] *Emphasis* added, the emphasis on scientific integrity will likely, but should not, deter consideration of Indigenous Knowledge as part of the sciences. See: generally Laidlaw, "Challenges in ATK", *supra* note 448. In CEEA-2012, the only purpose mandate in section 4(2) said that Canada and its agents "must exercise their powers in a manner that protects the environment and human health and applies the precautionary principle." A detailed assessment of CEEA-2012 Crowns' accommodation measures, see Laidlaw, *Alberta Accommodation, supra* note 4.

[564] *Federal Sustainable Development Act*, SC 2008, c. 33. [FSDA] Canada's website on *Sustainable Development* is at <https://www.canada.ca/en/services/environment/conservation/sustainability/federal-sustainable-development-strategy.html>.

[565] *An Act to amend the Federal Sustainable Development Act*, SC 2019, c 2. The Minister of the Environment is responsible for this Act unless otherwise stated in the definitions section 2.

[566] The original FSDA, *supra* note 564 stated the "Basic Principle" in section 5 "The Government of Canada accepts the basic principle that *sustainable development is based on an ecologically efficient use of natural, social and economic resources* and acknowledges the need to integrate environmental, economic and social factors in the making of all decisions by government." (*Federal Sustainable Development Act*, SC 2008, c33, as in force between June 2, 2008 and December 1, 2020)

(iii) may be advanced by, among other things, taking into account *the precautionary principle, the "polluter pays" principle, the principle of internalization of costs and the principle of continuous improvement*;

(b) the principle of *intergenerational equity*, which is the principle that it is important to meet the needs of the present generation without compromising the ability of future generations to meet their own needs;…

(d) the principle that it is important to involve Aboriginal peoples because of their traditional knowledge and their unique understanding of, and connection to, Canada's lands and waters;[567]

(e) the principle of *collaboration,* which is the principle that it is important for stakeholders to collaborate in the pursuit of common objectives; and…[568]

The *Federal Sustainable Development Strategy* (2022 to 2026) is available at the website.[569]

IAA - Designated Projects

The IAA continues the impact assessment regime in the older legislation that only requires assessment based on a list of *designated projects* in the regulations limiting the number of federal assessments. The current regulations for designated projects include *Physical Activities Regulations*[570] [*Physical Activities Regulations*] and the *Designated Classes of Projects Order*[571] [*Designated Classes Order Regulation*], also called environmental screening measures, are focused on what Canada's considers to be minimal impacts to the environment and by association Indigenous peoples rights – these may not follow. The IAA section 2 defines:

> *designated project* means one or more physical activities that (a) are carried out in Canada or on federal lands; and (b) are designated by regulations made under paragraph 109(b) [*Physical Activities Regulation*] or designated in an order made by the Minister under subsection 9(1) [*Ministerial Designation*]; and [i]t includes any physical activity that is incidental to those physical activities, but it does not include a physical activity designated by regulations made under paragraph 112(1)(a.2) [*Designated Classes Order Regulation*].

Physical Activities Regulations – IA

The *Physical Activities Regulations* definitions in section 1(1), relevant to the duty to consult aboriginal groups include:

> *area of mining operations* means the area at ground level occupied by any open-pit or underground workings, mill complex or storage area for overburden, waste rock, tailings or ore.
>
> *new right of way* means land that is to be developed for an international electrical transmission

[567] FSDA, *supra* note 564, section 8(1) increased aboriginal representation in the Advisory Council to 6 from 3.
[568] *Ibid*, section 5.
[569] Canada, *The Federal Sustainable Development Strategy* (2022-2026), at: <https://www.fsds-sfdd.ca/en#/en/goals/>.
[570] *Physical Activities Regulations*, SOR/2019-285.
[571] *Designated Classes of Projects Order*, SOR/2019-323.

line, a pipeline, as defined in section 2 of the *Canadian Energy Regulator Act*, a railway line or an all-season public highway, and *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*. [Prior Disturbance][572]

In section 2(1) physical activities, that are designated projects subject to an IA, are included in a Schedule. Focussing on oil sands operations, which we understand to be the current issues of concern for the many aboriginal groups, the following are designated projects:

24 to 25 The construction, operation, decommissioning and abandonment of a new oil sands mine with a bitumen production capacity of 10 000 m^3/day+; *or expansion* of an existing oil sands mine if the expansion would result an area of mining operations 50%+ *and* in excess of 10 000 m^3/day+.

30 to 31 The construction, operation, decommissioning and abandonment of a new fossil fuel-fired power generating facility with a production capacity of 200 MW+; *or expansion* of an existing fossil fuel-fired power generating facility, if the expansion would result in an increase in production capacity of 50% or more *and* in excess of 200 MW+.

32 to 33 The construction, operation, decommissioning and abandonment of a new *in situ* oil sands extraction facility that has a bitumen production capacity of 2 000 m^3/day+; *or expansion* of an existing *in situ* oil sands extraction facility to result in an increase in bitumen production capacity of 50%+ *and* a total bitumen capacity of 2 000 m^3/day+;

(a) not within a province in which provincial legislation is in force to limit the amount of greenhouse gas emissions [GHG] produced by oil sands sites in the province; or

(b) within a province in which provincial legislation is in force to limit the amount of [GHG] produced by oil sands sites in the province and that limit has been reached.

37 to 38 The construction, operation, decommissioning and abandonment of a *new* or *expansion* of an existing facility with an increase of 50%+ capacity and exceeding the limits specified for (a) oil refinery, including a heavy oil upgrader, with an input capacity of 10 000 m^3/+; (b) facility for the production of liquid petroleum products from coal with a production capacity of 2 000 m^3/day+; (c) sour gas processing facility with a sulphur inlet capacity of 2 000 t/day+; (d) facility for the liquefaction, storage or regasification of liquefied natural gas, with a liquefied natural gas processing capacity of 3 000 t/day+ or a liquefied natural gas storage capacity of 136 000 m^3+; (e) petroleum storage facility with a storage capacity of 500 000 m^3+; (f) a new natural gas liquids storage facility with a storage capacity of 100 000 m^3+.

41 The construction, operation, decommissioning and abandonment of a new [interprovincial] pipeline, as defined in section 2 of the *Canadian Energy Regulator Act*, other than an offshore pipeline, *that requires a total of 75 km or more of new right of way.*

It is noteworthy that *in situ* oil sands facilities are connected with greenhouse gas legislation, as 80% of the recoverable oil sands are limited to *in situ* methods.[573] With 53 *in situ* oil sands mining

[572] This raises concerns whether the exercise of aboriginal rights or title require undisturbed lands.

[573] AER's webpage on *In Situ Recovery* states in the opening paragraph that "Around 80 per cent of the oil from Alberta's oil sands is buried too deep to mine and can be recovered only by drilling wells. That's where "in situ" recovery comes in." at <https://www.aer.ca/providing-information/by-topic/oil-sands/in-situ-recovery>. Alberta has 173 authorized in situ oil sand project approvals of which 53 have annual production of 2,000 m^3 or more with the largest being Cenovus Christina Lake at 451,102 m^3 From current ST53 data at Alberta Energy Regulator, *ST53: Alberta In Situ Oil Sands Production Summary*, at: <https://www.aer.ca/providing-information/data-and-reports/statistical-reports/st53>.

projects qualifying as having "a bitumen production capacity of 2 000 m^3/day+" the question is: does Alberta have "provincial legislation in force to limit the amount of greenhouse gas emissions [GHG] produced by oil sands sites in the province"?

The short answer is yes, under the 2016 Alberta *Oil Sands Emissions Limit Act*[574] section 2(1) says "the *greenhouse gas emissions* limit for *all oil sands sites combined* is 100 megatonnes in any year" with those emissions "expressed in tonnes on a CO_{2e} [equivalent] basis, that are released from sources located at an oil sands site, including greenhouse gases sent off site."[575] There are exceptions in section 2(2) whereby co-generation emissions are excluded; and upgrading emissions for upgrading facilities in operation before December 31, 2015 (and any expansions) are excluded to a maximum of 10 megatonnes in any year.[576]

With respect to *Physical Activities Regulations* section 32(b), whether an emissions limit set out in provincial legislation has been reached, the short answer is that it has not. Under OSEL Alberta has a limit of 100 megatonnes (+10 megatonnes of upgrader emissions) of CO_{2e} greenhouse gas emissions per year from all oil sands sites. At present, there is a total of ~70 megatonnes of GHG emissions from all oil sands operations and Alberta asserts that,

> The 100 Mt limit provides room for growth and development of our resource as a basis for a strong economy. Overall, Alberta's new approach will incent changes that see the number of produced barrels increase relative to associated emissions. The future production achievable within the annual 30Mt "room" in the limit will be higher than at any time in our past or present. And Alberta will be able to sell its product into global markets as one of the world's most progressive and forward-looking energy producers. [577]

A constant question is whether Alberta should construct refineries to "up-grade" oil sands – but there are economic reasons that militate against this, primarily cold weather as the extensive refinery piping would require insulation increasing the capital and maintenance costs.[578]

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[574] *Oil Sands Emissions Limit Act*, SA 2016, c O-7.5 [OSEL] See: Nigel Bankes, "Oil Sands Emission Limit Legislation: A Real Commitment or Kicking It Down the Road?" (3 November, 2016), at: ABlawg, <https://ablawg.ca/wp-content/uploads/2016/11/Blog_NB_Bill25_Nov2016.pdf>.

[575] *Ibid* section 1(g). Section 1(a) defines CO_{2e} as meaning "the 100-year time horizon global warming potential of a greenhouse gas, expressed in terms of equivalency to CO_2." This is an international standard way of measuring greenhouse gases adopted by Canada and Alberta, for example CO_2 is a base unit of 1 whereas methane, a more potent greenhouse gas now counts as 25 units. see *Global warming potentials* webpage at <https://www.canada.ca/en/environment-climate-change/services/climate-change/greenhouse-gas-emissions/quantification-guidance/global-warming-potentials.html>

[576] *Ibid* section 2(2), note there are experimental projects or those excluded by the regulations.

[577] Alberta, "Capping oil sands emissions", at: <https://www.alberta.ca/climate-oilsands-emissions.aspx>

[578] There is an existing experimental refinery to upgrade oil sands bitumen to diesel fuels, the North West Redwater Partnership's Sturgeon Refinery Site that recovers 70% of the CO_2 that is subsidized by the Alberta Government see <https://nwrsturgeonrefinery.com>. See also: Auditor General of Alberta Report *APMC Management of Agreement to Process Bitumen at the Sturgeon Refinery* (2018), at: <https://www.oag.ab.ca/reports/apmc-sturgeon-refinery/>.

Canada and Alberta Regulation of Greenhouse Gasses

Canada and Alberta both have adopted "carbon pricing models" into their regulation of greenhouse gases, with the idea that increasing carbon prices will encourage consumers and industry to change their behaviour. The Supreme Court of Canada's 2021 *Reference re Greenhouse Gas Pollution Pricing Act*[579] with the majority decision upholding the constitutionality of the 2018 Federal *Greenhouse Gas Pollution Pricing Act* [580] observed that,

> [T]here is a broad consensus among expert international bodies such as the World Bank, the Organization for Economic Cooperation and Development and the International Monetary Fund that carbon pricing is a critical measure for the reduction of GHG emissions. […] In my view, the evidence reflects a consensus, both in Canada and internationally, that carbon pricing is integral to reducing GHG emissions.[581]

In Alberta, OSEL is now integrated by its section 4 into the *Emissions Management and Climate Resilience Act*,[582] and its preamble includes recognition of emissions management in serving environmental protection, and co-operative interjurisdictional efforts to reduce emissions, in addition to the establishment of clear emissions reduction targets.

Under the EMCRA the *Technology, Innovation and Emissions Reduction Regulation*, Alta Reg 133/2019[583] does not include a preamble but is described by Alberta as "an improved system to help industrial facilities find innovative ways to reduce emissions and invest in clean technology to stay competitive and save money."[584] The TIER regulatory system is described by Alberta as "a unique solution that allows the province to reduce emissions without interference from Ottawa," and the TIER regulation governs GHG emissions by *large emitters* in Alberta. It references "allowable emissions", large emitters, and applies to facilities with 100,000 CO_2e tonnes of emissions per year, and to others *who may opt in* to the program, and the regulation expressly references bitumen. Section 12 of the TIER regulation directs persons responsible for a large emitter or opted-in facility not to exceed allowable emissions. Part 3 sets out provisions for emissions offsets, emission performance credits and fund credits. These mechanisms can assist an emitter that exceeds its allowable emissions. The Alberta *Specified Gas Reporting Regulation*, Alta Reg 251/2004[585] also prescribes reporting of GHG emissions over 10,000 tonnes.[586]

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[579] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*Re Greenhouse Gas Pollution*].
[580] *Greenhouse Gas Pollution Pricing Act,* SC 2018, c12, s186 [*GGPPA*]
[581] *Re Greenhouse Gas Pollution*, *supra* note 579 at 170, per Chief Justice Wagner.
[582] *Emissions Management and Climate Resilience Act*, SA 2003, cE-7.8 [EMCRA]
[583] *Technology, Innovation and Emissions Reduction Regulation*, Alta Reg 133/2019 [TIER] see s 60 of EMCRA.
[584] Alberta, "Technology Innovation and Emissions Reduction System," at: <https://www.alberta.ca/technology-innovation-and-emissions-reduction-system.aspx>.
[585] *Specified Gas Reporting Regulation*, Alta Reg 251/2004 [*SGRR*] also under the EMCRA section 60.
[586] 10,000 is the current Specified Gas Reporting Standard published by the Minister of Energy, referenced in the *SGRR*. See Alberta Environment and Parks, Specified gas reporting standard (Version 14, May 4, 2022), at: <https://open.alberta.ca/publications/1912-5313>. See also Alberta's webpage at <https://www.alberta.ca/specified-gas-reporting-regulation.aspx>

The Alberta regime operates with an assumption that GHG pricing results in reduced GHG emissions by corporate actors as does the Federal 2018 legislation *Greenhouse Gas Pollution Pricing Act* [587] which aims to mitigate climate change through application of carbon pricing mechanisms. This act was driven in part by Canada's agreement to the *Paris Accords* (2015) governing global greenhouse gas emissions agreed to in 2015 by 193 out of 197 countries.[588] *GGPPA* Part 1 prescribes fuel charges, and Part 2 addresses industrial greenhouse gas emissions. Under Part 2, an output based pricing system (OBPS) applies an emissions limit to a facility, and subjects it to pay compensation or receive credit based on its emissions in relation to that limit. This system will be further regulated by the draft *Greenhouse Gas Offset Credit System Regulations*.[589] As a result of Alberta's TIER system, Part 2 of the *GGPPA* does not apply in Alberta Part 1, while the fuel charge in Part 1 does apply in Alberta.[590]

Designated Classes of Projects Order Regulation

The *Designated Classes of Projects Order Regulation,* passed in accordance with section 88 of the IAA, by the Preamble applies to "the carrying out of a project that is a part of [the class that] will cause only insignificant adverse environmental effects." Notable definitions in section 1 of this regulation, include "*developed land* [that] means land that is permanently altered from its natural state for human use or is landscaped and maintained for human use."[591]

This regulation applies to federal lands, lands outside of Canada in Schedule 1 and lands administered by the Parks Canada Agency in Schedule 2, excluding them from IA unless,

4. The classes of projects set out in Schedules 1 and 2 do not include projects
   (a) that cause a change to
      (i) any characteristic of a water body,
      (ii) migratory birds or nests, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*,
      (iii) wildlife species, as defined in subsection 2(1) of *Species at Risk Act* [SARA] listed in Schedule 1 of that Act, or
      (iv) residences or critical habitats, as defined in subsection 2(1) of [SARA], of wildlife species referred to in subparagraph (iii);

[587] *GGPPA, supra* note 580, section 186.
[588] United Nations, *Paris Agreement* (2015), at: <https://www.un.org/en/climatechange/paris-agreement>. English is at <http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf>. Only four nations have signed but not ratified: Iran, Eritrea, Libya and Yemen. See also *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22 [CNZEAA]. In *Misdzi Yikh v. Canada*, 2020 FC 1059, enforcement of the Paris Agreement by a private party, even an indigenous group is not justiciable at 6 to 8 and 72 to 77.
[589] Canada, *Federal Greenhouse Gas Offset System* at: <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/output-based-pricing-system/federal-greenhouse-gas-offset-system.html>.
[590] Canada, "Carbon pollution pricing systems across Canada", at: <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work.html>; see also Alastair R Lucas, "Canada's carbon energy overhang" (2022) 40:1 J Energy & Natural Resources L, 17.
[591] This would imply a difference between Prior Disturbance lands and developed lands, presumably based on the permanent alteration.

(b) that involve an activity referred to in subsection 5(1) of the *Canadian Navigable Waters Act,* [a work interfering with navigation including a major work affecting any navigable water; or a work, other than a minor work, affecting waters listed in the schedule], subsection 35(1) or 36 (3) [HADD] of the *Fisheries Act*, subsection 3(1) of the *Wildlife Area Regulations* [592] … Scott Islands Protected Marine Area Regulations [in BC];
(c) that involve the removal of any structure or resource that is of historical, archaeological, paleontological or architectural significance; or
(d) that cause damage to any structure, resource or site that is of historical, archaeological, paleontological or architectural significance.

However, any project in Canada and its waters will have the potential to impact the rights of Indigenous Peoples given their prior occupation of Canadian territory, regardless of environmental screening measures.

Ministerial Designation

The IAA in section 9(1) does include power for the Minister of the Environment,[593] to make a specific designation of physical activities (not included in *Designated Classes of Projects Order Regulation*) with *for a specific activity* being a "designated project" that requires an IA under the IAA.[594] In section 9(2) the Minister *may* consider the adverse impacts on aboriginal rights, especially Indigenous women and any relevant Federal Assessments.[595] In section 9(3) the Agency may require any person or entity to provide information with respect to any physical activity that can be designated and once completed posted on the IA Registry.[596]

The Minister of the Environment in section 9(4), must respond within 90+ days of a request with reasons to be posted on the IA Registry. The Agency may, under section 9(5), suspend that deadline in accordance with the Information and Management of Time Limits Regulations, SOR/2019-283

[592] This section prohibits, among others hunting, fishing and trapping without permits. Passed under the *Canada Wildlife Act*, RSC 1985, c W-9, it contains an aboriginal notwithstanding clause in section 2(3) allowing the exercise of aboriginal and treaty rights. In Alberta this applies to Blue Quills National Wildlife Area; Meanook National Wildlife Area; Spiers Lake National Wildlife Area and Canadian Forces Base Suffield National Wildlife Area. See: Environment and Climate Change Canada, *Current national wildlife areas*, at: <https://www.canada.ca/en/environment-climate-change/services/national-wildlife-areas/locations.html#ab> See also *Badger*, supra note 117 at 75-79 and *Sparrow*, *supra* note 74.

[593] IAA, *supra* note 505, section 2 defines the Minister [to] means the Minister of the Environment [hereafter Minister unless otherwise specified] responsible for administering the IAA, established in 1971 in the *Department of the Environment Act*, RSC 1985, c E-10, the legal name is the Department of the Environment in section 2, under the *Federal Identity Program*, the applied title is, Environment and Climate Change Canada [ECCC].

[594] *Ibid* section 9(7) limits this Ministerial Designation to circumstances where the carrying out of the physical activity has substantially begun; or a federal authority has exercised authority under another Act that could permit the physical activity to be carried out, in whole or in part.

[595] *Ibid* section 92 describes Federal Regional Plans on exclusively federal lands, section 93 Federal Plans on mixed jurisdiction lands and section 95 talks of Federal Strategic Plans. [Federal Land Use Plans]

[596] *Ibid* section 2 defines the Internet site means the Internet site that is established under section 105. Section 105(1) requires the Agency to establish a public website, [IAA Website] and sections 105(2) and 105(3) to contain *active* projects under IA consideration, ss 106 to 108 elaborates on this. [IA Registry]

[*Time Limits Regulations*][597] section 2: at the request of the proponent; or if the Agency requires further information or Agency fees are unpaid, and post a Notice with reasons for that extension on the IA Registry. Once the information is provided to the Agency's satisfaction, under section 9(6) it will post a Notice of Resumption in the IA Registry.

The use of this Ministerial power has the potential to address Indigenous concerns on a case by case basis whether prompted by letter or on the Minister's own initiative. Requests for a *Ministerial Designation* are governed by the policy in the *Operational Guide: Designating a Project under the Impact Assessment Act.*[598] Recent experience has shown that project splitting to avoid a designation is a rising trend, especially in provincial irrigation projects.[599] An argument for a *Ministerial Designation* could be made, as any project affecting aboriginal rights requires Crown consultation and accommodation that would benefit from information disclosed in an IA regardless of the limitations on IA from the *Physical Activity Regulations*.[600]

These *Ministerial Directions* can include projects under the *Designated Classes Order Regulation*, and *Physical Activities Regulations* however even without a *Ministerial Direction* the Crowns' ultimate obligation is to uphold the honour of the crown in consulting with Indigenous People prior to making a decision that affects their interests in a non-negligible fashion.

Environmental Screening in IAA

The impact of the *Physical Activities Regulations* and to a lesser extent the *Designated Classes of Projects Order Regulation* are troubling. David Wright in 2021 argues that these screening measures in the IAA will result in fewer projects being subject to IA.[601] Preliminary analysis in a press release by environmental groups on February 19, 2021 appears to bear this out "Ten projects have been triggered for assessment under the IAA since it came into force nearly 18 months ago, including two designations exercised pursuant to the Minister's section 9 discretionary power.

This compares to 75 projects per year under the Canadian Environmental Assessment Act 2012 (CEAA 2012), and as many as 3,314 EAs per year under the Canadian Environmental Assessment

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[597] *Information and Management of Time Limits Regulations*, SOR/2019-283 [*Time Limits Regulations*] Appendix 4
[598] Impact Assessment Agency of Canada, *Operational Guide: Designating a Project under the Impact Assessment Act,* at: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/designating-project-impact-assessment-act.html>
[599] These Ministerial Designations can be challenged in court by way of a judicial review, see: *Coalspur Mines (Operations) Ltd v. Canada (Environment and Climate Change)*, 2021 FC 759 and *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758. See also: *Mikisew Cree First Nation v Canadian Environmental Assessment Agency*, 2022 FC 102 for considerations under CEEA-2012.
[600] See: *Canada (Environment and Climate Change) v Ermineskin Cree Nation*, 2022 FCA 123 where the Minister had twice exercised this designation power with the first designation being successfully challenged in *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 given the lack of consultation with the Ermineskin Cree Nation, after which the Minister engaged them and exercised the discretion the second time.
[601] Wright, "IAA Energy Projects", *supra* note 506 at 69 concluding "First, changes to the federal regime, and in particular the list of projects triggering application of the IAA, mean that fewer projects will be assessed under the new regime compared to its immediate predecessor." See also: Wright, *Implications IAA in Alberta*, supra note 506.

Act (CEAA 1992). Three of the ten projects triggered under the IAA are in Alberta."[602] A recent search of the IA Registry indicates there are 782 active assessments with 104 located in Alberta in the 2 years and 5 months that the IAA has been applicable or roughly 293 projects a year, although this may be attributable to the expanded environmental reach of the IAA, or understated given reduced economic activity because of the Covid 19 pandemic.[603] Andrew Leach's 2021 paper suggests that approving large pipeline projects, necessary for oil sands development will remain a political issue that will become increasing difficult for governments' to justify in particular with the concern over climate change.[604]

IAA - Prohibitions

The IAA, in section 7(1), prohibits a Proponent[605] of a designated project from any activity in connection with the carrying out of the designated project, in whole or in part, if that activity may cause any effects on the Federal Impact Factors.[606] Exceptions are contained in section 7(3) that include: the Agency concludes under section 16 that no IA is required; the Proponent complies with the conditions in the final Decision Statement; and the Agency permits the Proponent to perform that activity, subject to any conditions, for the purpose of providing to the Agency or Review Panel review panel information or studies necessary to conduct an IA. Another exception includes activities with non-adverse impacts on health, social or economic conditions of the Indigenous peoples of Canada with the agreement of their authorized representatives in section 7(3). Under section 8, Federal authorities must not exercise their authority or provide financial assistance to the Proponent, unless the Agency decides that no IA is required, or the Proponent has a currently valid approval.

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[602] Nature Canada, West Coast Environmental Law and MiningWatch Canada Press Release (February 19, 2021), at: <https://naturecanada.ca/wp-content/uploads/2021/02/021921_BillC69_MediaAdvisory.pdf> at pages 4-5 "The IAA affects fewer Alberta projects than the Harper government's 2012 law or the Mulroney government's 1992 law. [Quoted text] Three of the ten projects triggered under the IAA are in Alberta: the Coalspur Vista Underground and Coal Mine Expansion; the Suncor Base Oil Sands Mine Extension; and the ATCO Salt Cavern. Overall, the Project List represents a shorter list of major projects over which the federal government has a strong interest and jurisdiction than under the CEAA 2012 regulations. The Project List includes fewer oil and gas pipeline projects and fewer coal mines."

[603] January 15, 2022.

[604] Andrew Leach, "The No More Pipelines Act?" (2021), 59:1 Alta L R 7, 2021 CanLIIDocs 2383, <https://canlii.ca/t/tcqw>, at 40 "Combined, the CERA and IAA regime represents a significant departure from previous legislation under the NEB Act, 2012 and CEAA, 2012, and the differences are such that the approval of new pipelines would be more difficult but not impossible. However, the combined forces of global energy markets and domestic and global action on climate change will likely imply no need for new oil sands pipelines. These trends also make it much more difficult for regulators to justify their approval under the new regime." See: Hunsberger, Good Process, *supra* note 439 at 8, to say "critics' claim that C-69 was a "no pipelines bill" seem exaggerated at best."

[605] IAA, *supra* note 505, defined in section 2 "*proponent* means the person or entity — federal authority, government or body — that proposes the carrying out of, or carries out, a designated project." [Proponent]

[606] Ibid, The Federal Impact Factors differs in the phrasing in section 7(1)(b)(iii) where the physical activity or the designated project is being carried out different, but this does not change the meaning in this context.

IAA - Planning Phase

In the new Planning Phase under section 10(1), the Proponent of a project will file with the Agency an Initial Project Description [IPD] containing the information mandated by the *Time Limits Regulations* section 3 in Schedule 1,[607] including, among others in the Indigenous context:

4. A list of the Indigenous groups that may be affected by the carrying out of the project, a summary of any engagement undertaken with the Indigenous peoples of Canada, including a summary of key issues raised and the results of the engagement, and a brief description of any plan for future engagement.
5. Any study or plan, relevant to the project, that is being or has been conducted in respect of the region where the project is to be carried out, including a regional assessment that is being or has been carried [under a Federal Regional Assessments] or *by any jurisdiction*, including by or on behalf of an [IGB], if the study or plan is available to the public.[608]
6. Any strategic assessment, relevant to the project, that is being or has been carried out under [Federal Assessment] of the Act.

…..

13 A description of the project's proposed location, including
(e) the project's proximity to land used for traditional purposes by Indigenous peoples of Canada, land in a reserve as defined in subsection 2(1) of the *Indian Act*, First Nation land as defined in subsection 2(1) of the *First Nations Land Management Act*, land that is subject to a comprehensive land claim agreement or a self-government agreement and any other land set aside for the use and benefit of Indigenous peoples of Canada; and

…

21 With respect to the Indigenous peoples of Canada, a brief description of the impact — that, as a result of the carrying out of the project, may occur in Canada and result from any change to the environment - on physical and cultural heritage, the current use of lands and resources for traditional purposes and any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, based on information that is available to the public or derived from any engagement undertaken with Indigenous peoples of Canada.

22 A brief description of any change that, as a result of the carrying out of the project, may occur in Canada to the health, social or economic conditions of Indigenous peoples of Canada, based on information that is available to the public or derived from any engagement undertaken with Indigenous peoples of Canada.[609]

In the environmental context:

19 A list of any changes that, as a result of the carrying out of the project, may be caused to the

[607] The *Time Limits Regulations* section 3 requires the IPD (a) be representative of the project at the time the information is provided; and (b) include the information related to any option that the proponent is considering in respect of any item in the description of the project.
[608] IAA, *supra* note 505, section 92 refers to Federal Regional Assessments on federal lands exclusively, 93 refers to Federal Regional assessment conducted on mixed jurisdiction lands, collectively Federal Regional Assessments.
[609] *Emphasis added.* The use of "land for traditional purposes" let alone "current use" is a problematic as it is commonly "equated with impacts on aboriginal and treaty rights and title" in EA and is a mischaracterization of the governing lifestyle cases in *Mikisew*, *supra* note 114 and *Sappier; Gray*, *supra* note 267.

following components of the environment that are within the legislative authority of Parliament:
(a) fish and fish habitat, as defined in subsection 2(1) of the *Fisheries Act*;
(b) aquatic species, as defined in subsection 2(1) of the *Species at Risk Act*;[610] and
(c) migratory birds, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*.[611]

20 A list of any changes to the environment that, as a result of the carrying out of the project, may occur on federal lands, in a province other than the province in which the project is proposed to be carried out or outside Canada.

Other notable requirements include: "23. An estimate of any greenhouse gas emissions associated with the project, 24 A list of the types of waste and emissions that are likely to be generated — in the air, in or on water and in or on land — during any phase of the project [and] 25 A plain-language summary of the [IPD] …in English and in French."

There is a *Practitioner's Guide to Federal Impact Assessments under the Impact Assessment Act* [Practitioners Guide] webpage[612] that is an "evergreen" document that is updated periodically, and contains among others a *Guide to Preparing an Initial Project Description and a Detailed Project Description* [PGIPD].[613] It urges Proponent to contact the Agency prior to filing an IPD with "the objective of this pre-submission engagement with the Agency is to facilitate development of documentation and to support a more timely and efficient planning phase. Proponents should also contact other federal regulatory agencies, the provincial government(s) and any other relevant jurisdictions, regarding project information that may be required by these authorities."[614] The PGIPD also directs that that "[f]or linear energy projects regulated by the CER, the proponent should provide the additional information set out in in Annex III. The proponent should also indicate when greater levels of details on the information (set out in Annex III) will be provided in the review process." Annex III includes a discussion of: design elements constrained or not by local or regional features; public safety; emergency response; transparency in monitoring compliance with conditions and dispute resolution process. Annex III also refers to the CER Filing Manual for guidance.[615]

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[610] *Species at Risk Act*, SC 2002, c 29 [SARA]. The exclusion of non-aquatic species at risk is a notable failure of the IAA although additions could be made in Schedule 3 of the IAA it is currently empty. The potential inclusion of them may follow in the resulting Tailored Guidelines for the Project if those issues are raised, see below.
[611] *Migratory Birds Convention Act, 1994,* SC 1994, c 22, which itself is subject to aboriginal rights in 2(3).
[612] Impact Assessment Agency of Canada, *Practitioner's Guide to Federal Impact Assessments under the Impact Assessment Act* [Practitioners Guide], at: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act.html>
[613] Impact Assessment Agency of Canada, *Guide to Preparing an Initial Project Description and a Detailed Project Description* [PGIPD], at: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guide-preparing-project-description-detailed-project-description.html>
[614] PGPIPD at Prior to Submission of an Initial Project Description section. It also advises that "[i]nformation received from a proponent is subject to public disclosure through the Registry. If the confidentiality of any information is an issue, proponents must contact the Agency prior to making any submission."
[615] PDGIPD Annex III,

In section 10(2) of the IAA, the Agency must, if the IPD complies with the regulatory requirements, post a copy of the IPD to the IA Registry. The PGPIPD says this will normally be within 10 calendar days.[616] This posting will start the 180+ days of the Planning Phase.

Agency Obligations in the Planning Process

Within the Planning Phase of 180+ days, the Agency:

1. Must, under section 11, solicit public comments on the project. The Agency is required to ensure that the public is provided with an opportunity to participate meaningfully, in a manner that the Agency considers appropriate, including comments on the IPD for a specified period.[617] The Agency has a Public participation webpage,[618] with a *Framework: Public Participation Under the Impact Assessment Act*, [619] and a *Guidance: Public Participation under the Impact Assessment Act* to assist in this.[620]

2. Must, under section 12, offer to consult with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project and any Indigenous group that may be affected by the carrying out of the designated project. The PGIPD states that "[t]his engagement period will generally take place over 20-30 calendar days, however the Agency may alter the mode and timing of this engagement after taking into consideration the needs of the public, Indigenous groups, and other jurisdictions."[621]

3. May ask every federal authority, that is in possession of specialist or expert information or knowledge who must, on the Agency's request and within the period that it specifies, make that information or knowledge available to the Agency under section 13(1). Further under section 13(2) any federal authority that has powers in respect of the designated project,

[616] PGPIPD at Submission of an Initial Project Description (Annex I) section. CER Filing Manual which is continually being revised with the latest version available at <https://www.cer-rec.gc.ca/en/applications-hearings/submit-applications-documents/filing-manuals/filing-manual/>.
[617] IAA, *supra* note 505, section 11.
[618] Impact Assessment Agency of Canada, *Public participation*, at: <https://www.canada.ca/en/impact-assessment-agency/services/public-participation.html>
[619] Impact Assessment Agency of Canada, *Framework: Public Participation Under the Impact Assessment Act*, at: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/framework-public-participation.html> with a PDF Link to the same document.
[620] Impact Assessment Agency of Canada, *Guidance: Public Participation under the Impact Assessment Act*, at: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-public-particaption-impact.html> with a PDF Link to the same document.
[621] PGPID at Engagement on an Initial Project Description section, This section goes on to say "[w]here the designated project is regulated by a lifecycle regulator - such as the CER, the Canadian Nuclear Safety Commission (CNSC) or an Offshore Petroleum Board - the Agency will collaborate with these lifecycle regulators to prepare for the possible impact assessment."

must on the Agency's request, engage the Proponent to determine what, if any, information it requires to exercise their authority.[622]

4. Must under section 14 provide the Proponent with "a summary of issues with respect to that project that it considers relevant" including issues raised by the public, Canadian Jurisdictions, affected Indigenous groups and federal authorities to be posted on the IA Registry [Agency Issues]. The PGIPD says "[t]he Agency will aim to provide the [Agency] Issues document to a proponent within 10 calendar days of the close of an engagement period on an [IPD]."

5. The Proponent must provide a Notice to the Agency under section 15(1), how it intends to address the Agency Issues and provide a Detailed Project Description [DPD] of the project that includes the information prescribed by *Time Limits Regulations*.[623] Under section 15(2), the Agency may, where the Proponents filed a Response and DPD that does not include prescribed information or does not contain sufficient details, require the proponent to provide a Revised DPD or further Response and suspend the timeline.

   The PGPID describes the DPD "which provides more detailed information about the designated project and updates the information provided in the [IPD] in response to issues raised by provincial, territorial and Indigenous jurisdictions, Indigenous groups, the public, federal authorities and other participants during consultations and engagement and includes the proponent's response to the [Agency Issues].[624] Further, in providing the Proponent the Agency Issues documents, "the Agency will request that a proponent submit a [DPD] within 30 calendar days, or inform the Agency that more time is required…. If more than 30 days is required, the proponent should notify the Agency in writing and request that the Agency suspend the time limit until the required information is provided…. The Agency will review the [DPD] and determine if it meets the requirements of the [*Time Limits Regulation*s]. The Agency will aim to complete its review of the [DPD] to determine if it meets the requirements within 10 calendar days of receipt."[625]

6. When the Agency is satisfied that the Proponent's DPD and Response includes all of the information or details that the Agency and regulations specify, it must post it on the IA Registry under section 15(3).

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[622] This includes the: CER, CNC, Canada-Nova Scotia Offshore Petroleum Board and Canada–Newfoundland and Labrador Offshore Petroleum Board.
[623] *Time Limits Regulations* s 4, sets out the information required for a DPD in Schedule 2, and section 4(c) mandates the inclusion of the response to Agency Issues.
[624] PGPID in the Introduction
[625] PGPID in the Detailed Project Description (Annex II) section. It also states that directs that that "[f]or linear energy projects regulated by the CER, the proponent should provide the additional information set out in in Annex III. The proponent should also indicate when greater levels of details on the information set out in Annex III will be provided in the review process."

Agency Decision on IA

The Agency must decide under section 16(1), once the DPD is posted whether an IA is required for the project, and must take into account the factors in 16(2) which include:

(a) the [IPD] referred to in section 10 and any [Response to Agency Issues] referred to in section 15;
(b) the possibility that the carrying out of the designated project may cause adverse effects within federal jurisdiction or adverse direct or incidental effects;
(c) any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;
(d) any comments received within the time period specified by the Agency from the public and from any jurisdiction or Indigenous group that is consulted under section 12;
(e) any relevant assessment referred to in section 92, 93 or 95 [Federal Assessments];
(f) any study that is conducted or plan that is prepared by a jurisdiction in respect of a region that is related to the designated project and that has been provided to the Agency;[626] and
(g) any other factor that the Agency considers relevant

The PGPID said the Agency will aim to make this decision within 10 calendar days of accepting the DPD. This Agency Decision must be posted with reasons in the IA Registry in section 16(3).

IA Required

If the Agency decides an IA is required, provided that the Minister does not approve the substitution of a process under section 31 (see below) for that project, the Agency must, within the same180 days± Planning Phase after the day on which it posts an IPD of the project, provide the Proponent with in section 18(1):

(a) Notice of the Commencement of the IA of the project that sets out the information or studies that the Agency requires from the proponent and considers necessary for the conduct of the IA; and
(b) any documents that are prescribed by the *Time Limits Regulation*s, including *tailored guidelines* regarding the information or studies referred to in paragraph (a) and *plans* for cooperation with other jurisdictions, for engagement and partnership with the Indigenous peoples of Canada, for public participation and for the issuance of permits. [Notice of Commencement]

In section 18(1.1), in providing the Notice of Commencement, the Agency must take into account the factors set out in subsection 22(1),

22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:
(a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the

[626] This would be the entry point in Alberta for Lower Athabasca Regional Plan, 2012 [LARP] that has been described as a "blueprint for the oil sands industry" with many of the purported governing frameworks still incomplete, see below.

carrying out of the designated project, including
(i) the effects of malfunctions or accidents that may occur in connection with the designated project,
(ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and
(iii) the result of any interaction between those effects;
(b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;
(c) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;
(d) the purpose of and need for the designated project;
(e) alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;
(f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;
(g) Indigenous knowledge provided with respect to the designated project;
(h) the extent to which the designated project contributes to sustainability;
(i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;
(j) any change to the designated project that may be caused by the environment;
(k) the requirements of the follow-up program in respect of the designated project;
(l) considerations related to Indigenous cultures raised with respect to the designated project;
(m) community knowledge provided with respect to the designated project;
(n) comments received from the public;
(o) comments from a jurisdiction that are received in the course of consultations conducted under section 21;
(p) any relevant assessment referred to in section 92, 93 or 95 [Federal Assessments];
(q) any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project [This would include any MFCN Assessment of the Project]*;*
(r) any study or plan that is conducted or prepared by a jurisdiction - or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition jurisdiction in section 2 - that is in respect of a region related to the designated project and that has been provided with respect to the project [This would include any MFCN Regional Assessment]*;*
(s) the intersection of sex and gender with other identity factors; and
(t) any other matter relevant to the impact assessment that the Agency requires to be taken into account.

[Federal IA Factors]

In section 18(1.2), the scoping of the non-*italicized* Federal Impact Factors including the extent of their relevance to the impact assessment is determined by the Agency and set out in the Tailored Guidelines referred to in subsection 18(1)(b). This distinction appears that any input whether from the Indigenous knowledge, community knowledge, public comments, relevant jurisdictions,

Federal Land Assessments, and an IGB's study or plan (not otherwise considered a jurisdiction) will be received and weighed directly as a procedural matter.

Under section 18(2) the Agency must post the Notice of Commencement on the IA Registry. However in section 18(3), any Canadian Jurisdiction (excluding Federal Jurisdictions) can request an extension of the 180 day deadline for 90 days to allow the Agency to cooperate with that jurisdiction with respect to the Notice of Commencement document, and this extension with reasons will be posted to the IA Registry under section 18(4). Further, under section 18(5) the Agency may suspend the time limit within which it must provide the Notice of Commencement until any activity that is prescribed by *Time Management Regulation* is completed and post a Notice of Suspension with reasons in the IA Registry. Once the Agency is satisfied that the activity is completed it will post a Notice to that effect in IA Registry in section 18(6).

Proponent Prepares Impact Statement

The Proponent is given 3 years in section 19 to provide the required information or studies included in the Notice of Commencement in an *Impact Statement* to start the IA. That deadline may be extended at the Proponent's request although the Agency may require additional information or studies. If the Proponent does not provide that information within this timeframe the IA will be terminated under section 20 and this will be posted with reasons in the IA Registry.

Practitioner's Guidance

In the Practitioner's Guide there is a 3.0 Indigenous Participation and Engagement section with hyperlinked documents, as follows:

3.1 Policy Context: Indigenous Participation in Impact Assessment
3.2 Guidance: Indigenous Participation in Impact Assessment
3.3 Policy Context: Assessment of Potential Impacts on the Rights of Indigenous Peoples
3.4 Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples
3.5 Guidance: Collaboration with Indigenous Peoples in Impact Assessment
3.6 Guidance: Indigenous Knowledge under the Impact Assessment Act: Procedures for Working with Indigenous Communities
3.7 Guidance: Protecting Confidential Indigenous Knowledge under the Impact Assessment Act

Some highlights in this include:

- Planning Phase input on how Indigenous Groups wish to be consulted – this could include collaborative arrangements or other mechanisms;

- The Agency, not the Major Projects Office [MPMO],[627] will be responsible for coordinating Crown consultations from the Planning phase to the issuance of the Decision Statement, and responsible for preparing a Crown Consultation and Accommodation Report following Panel Reviews. This may be significant given the IAA Purpose sections 6(1) and 6(2) that direct consideration of the impacts on aboriginal rights. What has not changed is, the Agency's role as a substituted MPMO, for example the Agency will lead the consultation process and coordinates participation of other federal authorities or lifecycle regulators as appropriate, enabling a "one window" point of contact for Indigenous groups throughout the process. In Agency IA,

  > The Agency will engage with interested Indigenous communities on the draft Report and proposed conditions to discuss any residual project impacts, taking into account mitigation measures proposed by the proponent and potential accommodation measures. In addition to the Impact Assessment Report, the Agency will develop a Consultation Summary, which will include context for the Minister regarding the adequacy of consultations. The Agency will work with Indigenous communities on the Consultation Summary document, and Indigenous communities may wish to draft sections of the Summary.[628]

  Further, in Panel IA,

  > The Agency will share a draft version of the Crown Consultation and Accommodation Report with Indigenous communities for their review and feedback. Collaboration in this phase could include co-drafting relevant sections of the Crown Consultation and Accommodation Report and collaborating on methodology for the assessment of rights
  >
  > The Agency will also develop proposed conditions for possible inclusion in a Decision Statement. These proposed conditions may serve to further mitigate or accommodate potential adverse impacts on Aboriginal and treaty rights. The Agency will invite Indigenous communities to provide comments on the proposed conditions. Upon receiving and incorporating relevant comments on the Crown Consultation and Accommodation Report and proposed conditions, the Agency will submit both to the Minister of Environment and Climate Change for consideration in decision-making.
  >
  > In the case of an integrated review with a lifecycle regulator, the Review Panel will include proposed conditions in the panel's report. The proposed conditions will be informed by the Agency, the lifecycle regulator and other federal authorities during the impact assessment

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[627] Implemented by *The Cabinet Directive on Improving the Performance of the Regulatory System for Major Resource Projects* in 2007. The MPMO is undergoing review, see: Natural Resources Canada, *Horizontal Evaluation of the Major Projects Management Office Initiative (MPMOI)* (2020), at: <https://www.nrcan.gc.ca/transparency/reporting-and-accountability/plans-and-performance-reports/strategic-evaluation-division/reports-and-plans-year/horizontal-evaluation-the-major-projects-management-office-initiative-mpmoi>. See also *Major Projects Management Office* [MPMO] 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>.

[628] Guidance: Indigenous Participation in Impact Assessment in section 4.3 Indigenous Participation in the Impact Assessment Phase for Agency-led Assessments

process. Indigenous groups will be invited to comment on the proposed conditions.[629]

- The exercise of aboriginal rights may be affected by contextual factors including current and historical environmental, health, social and economic conditions. [A]n evaluation of the baseline conditions and context needs to be carried out early on in the assessment process. This preliminary work needs to include whether the present ability of the community to exercise rights has been diminished due to factors such as cumulative adverse effects and historical or current interferences with traditional practices.
- The assessment of potential impacts on rights should also include consideration of how the effects of a project could affect title and governance rights, including self-governance and self-determination.
- Community-defined thresholds and measures for key indicators, where they exist, should be part of the assessment.
- Given the interconnectedness of the practice of rights with social, cultural, spiritual, health, economic, and environmental factors, a variety of qualitative and quantitative methods may be required to develop a comprehensive assessment of how the project may impact the exercise of rights. This should include applying an impact pathways approach that allows for evaluation of linkages between: the project component or activity; the effects of the project on the environment and social, economic, cultural, and health conditions; and the direct or indirect impacts on the exercise of Aboriginal and treaty rights. The example of the pathway methodology is cited in the 3.4 Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples.[630]

The balance is, from a cursory review, standard government fare, for example, the duty to consult is phrased only as a legal duty not as a constitutional principle.

Agency Requirements: Agency Tailored Guidelines

The Practitioner's Guide webpage in the 1. Planning Phase contains hyperlinks for detailed:

- 1.2 Tailored Impact Statement Guidelines Template for Projects Subject to the IAA;
- 1.3 Tailored Impact Statement Guidelines Template for Projects subject to the IAA and the CER;
- 1.4 Tailored Impact Statement Guidelines Template for Projects Subject to the IAA and the NSCA; and

[629] Guidance: Indigenous Participation in Impact Assessment section 4.4 Indigenous Participation in the Impact Assessment Phase for Review Panels

[630] Impact Assessment Agency of Canada, *3.4 Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples*, at: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-assessment-potential-impacts-rights-indigenous-peoples.html>

- 1.5 Tailored Impact Statement Guidelines (Offshore Projects) this is currently a placeholder for guidelines to be developed.[631]

These are described as:

> A key element for the federal [IA] process is the introduction of Tailored Impact Statement Guidelines (TIS Guidelines), which will provide direction and requirements for the proponent in preparing an Impact Statement. The TIS Guidelines are tailored for a specific designated project, during the planning phase of the impact assessment process, by the [Agency]. The tailoring [or scoping] is based on the nature, complexity and context of the project, and is informed and guided by consultation and engagement that occurs with the public, Indigenous groups, lifecycle regulators, jurisdictions, federal authorities (FAs) and other interested parties during early planning.
>
> The Agency or a Review Panel uses the proponent's Impact Statement and other information received during the impact assessment process to prepare an Impact Assessment Report that informs the decision statement to be issued by the Minister. The TIS Guidelines are posted on the Agency's website (Internet Site) to ensure the process is clear and transparent for all participants.[632]

It goes on to say that the Impact Statement Guidelines Template are the,

> …starting point for the tailoring process, which will ultimately lead to the TIS Guidelines. The TISG Template sets out a comprehensive list of potential information requirements that may be included in the TIS Guidelines. The TISG Template is intentionally written to be broad and inclusive of the information requirements for a wide range of project types. The requirements are intended to support a holistic impact assessment that recognizes that projects will have both adverse and positive effects.
>
> Through the tailoring process during the planning phase, the Agency identifies the project-specific information requirements necessary for a proponent to submit a complete and detailed Impact Statement. The TIS Guidelines will contain a subset of what is in the TISG Template that is relevant to the impact assessment of that specific designated project. Additional information requirements beyond what are identified in the TISG Template may be included in the TIS Guidelines for individual projects.[633]

Agency Requirements: Agency Plans

The Practitioner's Guide webpage in the 1. Planning Phase has hyperlinks for detailed:

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[631] Impact Assessment Agency of Canada, *Practitioner's Guide*, at: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act.html>.
[632] Tailored Impact Statement Guidelines Template for Projects Subject to the IAA, Introduction
[633] Tailored Impact Statement Guidelines Template for Projects Subject to the IAA, Introduction, it also notes that Proponents are free to provide an Impact Statement format for their project but it must include a table of concordance that identifies where each requirement of the TIS Guidelines is located within the Impact Statement.

- 1.6 Overview: Cooperation Plan (and 1.6.1 Template) saying in the Overview that Agency will provide an "Impact Assessment Cooperation Plan that describes how the Agency will cooperate with other jurisdictions. These plans aim to satisfy the requirements and objectives of the [IAA] and the participating provincial, territorial and/or Indigenous jurisdictions to reduce duplication, increase efficiency and certainty, and draw on the best available expertise. Cooperation plans will be developed with other jurisdictions during the planning phase setting out how the jurisdictions plan to cooperate during the impact assessment process of a specific project."[634]

1.7 Overview: Permitting Plan (and 1.7.1 Template) saying in the Overview Context section that the Agency will develop a permitting plan for Proponent: although that would not change any regulatory requirements it would provide Indigenous groups, the public and other participants in the process with an outline of the permits, licences and authorizations that may be required for a Project, although that may change with new information. It notes that,

> Although the regulatory processes for designated projects are distinct from and normally follow the impact assessment process, some of the information gathered and the consultations and analysis carried out during the impact assessment could be applicable to both. A proponent is not obligated, however, to provide regulatory information that is not required for the impact assessment during the impact assessment process. A proponent may, with the agreement of regulators or other jurisdictions, decide to carry out certain actions to advance its regulatory processes during the impact assessment. At the proponent's request and where possible, the Agency will *facilitate coordination with regulators* regarding the procedures for proponents to apply for applicable permits, licences and authorizations.[635]

It is notable that this facilitation does not include the public or interested parties – although presumably the regulators' notification requirements would apply, although Alberta's regulator restrictions only notification to those directly affected will continue, unless amplified by the honour of the crown developments as noted above.

1.8 Overview: Public Participation Plan (and 1.8.1 Template) saying that,

> Public participation is an essential part of open, informed and meaningful impact assessment. The Government of Canada is committed to providing the public with the opportunity to participate meaningfully in the process and to provide them with the information needed to participate in an informed way. The [IAA] requires the development of a Public Participation Plan during the Planning phase for all projects subject to an impact assessment. The Public Participation Plan is designed to provide proponents, the public and other participants with certainty about how and when public participation will occur.
> …
> A Public Participation Plan will be tailored to a project and will include:
>
> 1. Objectives of the plan that reflect the views heard during the Planning phase.
> 2. A list of groups and individuals who have indicated that they have an interest in participating

[634] Practitioner's Guide, 1.6 Overview: Cooperation Plan in Context
[635] Practitioner's Guide, 1.7 Overview: Permitting Plan in Application and Limitation section.

in the impact assessment.
3. How groups and individuals indicated they wish to participate in the assessment.
4. A table that describes the phases of the impact assessment and the engagement opportunities during each phase.

The Agency will post the draft Public Participation Plan to the Registry for public comment. In the case of a designated project regulated by a lifecycle regulator (the CER, the CNSC, the Canada–Nova Scotia Offshore Petroleum Board, or the Canada–Newfoundland and Labrador Offshore Petroleum Board), the lifecycle regulator will collaborate with the Agency to organize and participate in public participation activities.[636]

1.9 Overview: Indigenous Engagement and Partnership Plan (and 1.9.1 Template), as follows:

Context

The integration of Crown consultation and Indigenous participation in impact assessments supports the Government's commitment to reconciliation by providing tools for effective and meaningful participation, collaboration, and partnership with Indigenous peoples during the assessment process.

An Indigenous Engagement and Partnership Plan (the Plan) will be developed during the Planning phase for designated projects requiring assessment under the [IAA]. One plan will be developed for each impact assessment, outlining at a high level the groups that will participate in the impact assessment, and how they will participate, including, where available, information on proponent-led engagement activities. The Indigenous Engagement and Partnership Plan will inform community-specific consultation plans, where appropriate. The Plan will be developed collaboratively during the Planning phase with Indigenous communities that may be affected by a proposed project.

Indigenous communities will have the opportunity to inform the Agency as to how they would like to participate, and how they will work with the Government of Canada during the impact assessment process. The Plan will also indicate where, in certain circumstances, the Agency will work in collaboration or partnership with Indigenous communities, for example to co-draft parts of assessment reports.

Time line for Completion

In accordance with the Act, the Agency must post a copy on the Registry of the Indigenous Engagement and Partnership Plan within 180 days after the day on which the Initial Project Description of the project is posted on the Registry. As a result, the development of the Indigenous Engagement and Partnership Plan is initiated early in the Planning phase.

Contents of an Indigenous Engagement and Partnership Plan

An Indigenous Engagement and Partnership Plan will be tailored to each specific project and will include:
1. Objectives of Engagement and Partnership.

[636] Practitioner's Guide, 1.8 Overview: Public Participation Plan

2. The Indigenous communities identified by the Agency for Crown consultation and those communities that have expressed an interest in engaging.
3. Information related to the methods and tools that may be used as well as preferences for specific engagement methods. It would also include information related to more collaborative approaches such as Indigenous-led studies to inform the impact assessment or co-drafting parts of assessment reports.
4. A table that describes the phases of the impact assessment and the engagement opportunities during each phase.
5. Roles and responsibilities of federal authorities that may be required to issue permits or authorizations in relation to the designated project.

The Plan will be posted on the Registry. Community-specific consultation plans or protocols may also be developed to provide further details on engagement in the impact assessment process.

Ministerial Veto of an IA

Up until the Agency issues a Notice of the Commencement to the Proponent, the Minister may, under section 17, *veto* an IA of the Project if: a federal authority advises the Minister that it will not be exercising a power conferred on it under an Act of Parliament other than the IAA that must be exercised for the project to be carried out…; or the Minister is of the opinion that it is clear that the designated project would cause unacceptable environmental effects within federal jurisdiction. The Minister must provide the Proponent with a written notice with reasons they have been so advised or is of that opinion, and then post it to the IA Registry.

This *veto*, in combination with IAA prohibitions in section 7, will terminate any development of that project. To our understanding this Planning Phase was included as an effort to avoid public controversy over resource projects such as the Northern Gateway Project, coal mining in the Alberta Foothills or open pit oil sands mine in Northern Alberta before they gain the inevitable "momentum" for project approval.

Consultation and Coordination for Jurisdictions

The Agency, or Minister if the IA is directed to a Panel, is required under section 21 to consult and cooperate with federal authorities having duties or functions related to environmental assessment that are regulated by *Canada Oil and Gas Operations Act*, the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* or the *Canada Transportation Act* [637] [Specified Legislation] or Canadian and International Jurisdictions that may result in coordinated but separate processes under various arrangements or agreements.[638]

[637] *Canada Oil and Gas Operations Act*, RSC 1985, c O-7; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988, c 28; *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3 or the *Canada Transportation Act*, SC 1996, c 10. [Specified Legislation]
[638] As set forth in the Practitioners Guide 1.6 Overview: Cooperation Plan

Substituted Processes

Under section 31(1) the Minister of the Environment may consider any Canadian jurisdictions' (excluding Federal Jurisdiction) request for a substitution of their review process for a federal IA review, prior to the expiry of the 180+ Planning Phase, with existing Panel Reviews and IAs under the Specified Legislation not eligible for substitution under section 32.

The substitution request will be posted to the IA Registry with an invitation for public comments for 30 days, in section 31(2) and the Minister must consider public comments in deciding this substitution request under section 31(3) and post that decision in the IA Registry with reasons in section 31(4). The IAA now has comprehensive provisions regarding a substituted process in section 33(1) that require the Minister to be satisfied that the proposed process includes:

- consideration of impacts listed in section 22 [Federal Impact Factors];
- participation for federal authorities with relevant expertise;
- entering into arrangements described in section 21 [Consultation and Coordination] with other jurisdictions, including IDG jurisdiction;
- consultation with affected Indigenous groups;
- public participation in the assessment with public access to records to provide meaningful participation, public comment on the Draft Report and Final Report made public; and
- any other condition the Minister deems appropriate. [Substitute Report Requirements]

The Minister must also be satisfied in section 33(2) that the potential Substitute Report will set out effects that, in the opinion of the substituted decision maker, are likely to be caused by the project; including those that are adverse effects within federal jurisdiction; and adverse direct or incidental effects; and specifying the extent to which those effects are adverse (this replaces the significance directions in the existing legislation) and took into account and used any Indigenous knowledge provided with respect to the designated project in section 33(2.1). The Minister's conditions will be posted to the IA Registry in section 33(4).

Under section 33(3), an existing Report of a Canadian jurisdiction *may* be substituted as long as it complies with Substitute Report Requirements – it is noteworthy that section 33(2.1) regarding the use of Indigenous knowledge in the Report is not included in this requirement.

If the Minister approves of a substitute process, that substituted Report will be considered a Report under the IAA under section 34. The substituted Report will be provided to the Minister for decision and the Agency may, under section 35, request additional information from the jurisdiction involved or the Proponent, prior to making a decision on the project as discussed below in Project Approval Decisions.

Impact Review Mechanisms

There are several impact review mechanisms in the IAA: Agency Review, Review Panel and Joint Review Panel, CER Review Panel and CNSC Review Panel we collectively refer to them as an IA Tribunal.

Agency Review – 300 ± Days

Under section 24, an Agency Review is the default process unless the Minister orders a Review Panel. The Agency must conduct an IA considering the Federal Impact Factors in accordance with the Tailored Guidelines and Agency Plans and prepare a Final Report to the Minister in section 25. The Agency must establish a deadline for the Final Report that cannot exceed 300 days, in section 28(2) from the time the Notice of Commencement is posted on the IA Registry, however in section 28(5),

(a) the 300 day deadline may be extended to allow cooperation and consultation with other jurisdictions under section 21 (discussed above in the Consultation and Coordination for Jurisdictions) *or* to take into account circumstances that are specific to that project;
(b) the Agency may shorten this deadline for any reason that the Agency considers appropriate.

This deadline may be extended by the Minister, under section 28(6) for up to 90 days to permit the Agency to cooperate with a jurisdiction referred to in section 21 (discussed above in the Consultation and Coordination for Jurisdictions) *or* to take into account circumstances that are specific to the designated project. The GIC, on the recommendation of the Minister, may extend that deadline any number of times under 28(7). Those extensions must be posted on the IA Registry with reasons in section 28(8).

While conducting the IA, the Agency may use any information available to it in accordance with section 26(1), but if in the Agency's opinion there is not sufficient information available for the purpose of conducting the IA or preparing the Report, under section 26(2) the Agency may require the collection of any necessary information or the undertaking of any study that it deems necessary, including requiring the proponent to collect that information or undertake that study. The Agency has no powers to hold hearings.

The Agency must, in section 27, ensure that the public is provided with an opportunity to participate meaningfully, in a manner that the Agency considers appropriate, within the time period specified by the Agency. In section 28(1) the Agency must prepare a Draft Report and post on the IA Registry: either a copy or notice specifying how the public may obtain one and a deadline for public comments. The Draft Report must, from among the effects set out in the report, specify those that are adverse effects within federal jurisdiction and those that are adverse direct or incidental effects, and specify the extent to which those effects are significant in section 28(3). That Report must, in determining the effects that are likely to be caused by the carrying out of the designated project, include any Indigenous knowledge provided with respect to the designated

project in section 28(3.1). This is subject to confidentiality provisions in section 119, discussed below. In section 73, the IA can be cancelled by the Proponent in writing indicating to the Agency that the Project will not be carried out.

After taking into account public comments, the Agency may suspend that deadline, until any report or study has been completed in the accordance with the *Time Management Regulations* and post a Notice with reasons in section 28(9), and once that activity is completed to the Agency's satisfaction it will post a Notice to that effect on the IA Registry in section 28(10).

The Agency's Final Report must include a summary of public comments, an approval recommendation and recommended conditions, and will be posted to the IA Registry or a notice as to how that can be obtained. Interestingly the Final Report is the only one required to include recommendations and potential recommended conditions. This Final Report will submitted to the Minister for an approval decision, as described below under Project Approval Decisions.

The Agency may, under section 29, delegate to a Federal Jurisdiction or Canadian Jurisdiction the complete or partial IA of the Project and the preparation of a Report. Unlike the substitution requests, this delegation appears to be without qualification as to the IA requirements, Federal Impact factors and Reporting requirements. This is troubling, in part as there is no mechanism to require posting of this delegation to the IA Registry - to prompt a judicial review of that delegation. In effect it appears that the use of this delegation power may sidestep the Substitution protections.

Review Panel – 600 ± Days

A Review Panel to conduct an IA may be directed by the Minister under section 36(1), within 45± days of the Agency posting a Notice of Commencement on the IA Registry, if the Minister is of the opinion that it is in the "public interest" and that determination must include consideration of the factors in section 36(2),

(a) the extent to which the effects within federal jurisdiction or the direct or incidental effects that the carrying out of the designated project may cause are adverse;
(b) public concerns related to those effects;
(c) opportunities for cooperation with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project or any part of it; and
(d) any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.

The 45 day deadline may be suspended by the Agency under section 36(3), until any activity that is prescribed by *Time Limits Regulations* is completed and the Agency will post a Notice with reasons to the IA Registry. Once the Agency is satisfied that activity is completed it will post a Notice to that effect on the IA Registry in section 36(4).

If the Minister refers the IA to a Review Panel the Agency will post a Notice with reasons to the IA under section 36(5). The Agency must, in section 37(1),

(a) establish a time limit from the time the Notice of Commencement are posted on the IA Registry for a Panel Report to the Minister; and
(b) establish a time limit for the Agency to post its recommendations on conditions in the Panel Report for the Project Approval Decisions, discussed below.

The total time for the Panel Report is not to exceed 600± days in section 37(2) unless the Agency is of the opinion that more time is required for the Consultation and Coordination of other jurisdictions or to take into account circumstances that are specific to that project. The Minister may extend that deadline up to 90 days for the Consultation and Coordination of other jurisdictions or to take into account circumstances that are specific to that project in section 37(3). The GIC on the recommendation of the Minister may extend that deadline any number of times in section 37(4). The Agency's initial deadline with reasons, the Minister extension with reasons and a Notice of the GIC extension(s) only will be posted on the IA Registry in section 37(5).

The Agency may suspend the time limit for the Panel Report until the required activities in the *Time Management Regulations* are completed and post a Notice with reasons on the IA Registry in section 37(6), and when that activity is completed to the Agency's satisfaction a Notice of Resumption will be posted on the IA Registry.

In section 38, the Agency may, from the day on which the referral is made and until the day on which the Panel is established, as discussed below, require the Proponent of the project to collect any information or undertake any studies that, in the opinion of the Agency, are necessary for the IA by the Review Panel.

Required Panel Review CER and CNSC – 300 ± Days

A Panel Review to conduct an IA is required in section 37.1(1) if any project activities are regulated by the CERA or the CNSCA. The Agency will establish time limits in 37(1),

(a) from the time the Notice of Commencement (and associated Agency Requirements) are posted on the IA Registry for a Panel Report to the Minister; and
(b) for the Agency to post its recommendations on conditions in the Panel Report for Project Approval Decisions.

In section 37.1(2) the total time limits, cannot exceed 300± days, however the total number of days may be up to 600± days if the Agency is of the opinion that the Panel Review requires more time and it establishes those time limits before it posts a copy of the Notice of Commencement (and associated Agency Requirements) in the IA Registry. In section 37.1(3) the Agency's decision for an extension beyond the 300 days must consider factors in section 36(2), namely:

(a) the extent to which the effects within federal jurisdiction or the direct or incidental effects that the carrying out of the designated project may cause are adverse;
(b) public concerns related to those effects;
(c) opportunities for cooperation with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project or any part of it; and
(d) any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Section 37.1(4) incorporates by reference the extension and Agency suspension of that deadline provisions above in section 37(3) to 37(7), namely where the Minister may extend that deadline up to 90 days for the Consultation and Coordination of other jurisdictions *or* to take into account circumstances that are specific to that project; the GIC on the recommendation of the Minister may extend that deadline any number of times; the Agency's initial deadline with reasons, the Minister extension with reasons and a Notice of the GIC extension(s) only will be posted on the IA Registry; the Agency may suspend the time limit for the Panel Report, until the required activities in the *Time Management Regulations* are completed and post a Notice with reasons on the IA Registry, and when that activity is completed to the Agency's satisfaction a Notice of Resumption will be posted on the IA Registry.

In section 38, the Agency may, from the day on which the referral is made and until the day on which the Panel is established, as discussed below, require the Proponent of the project to collect any information or undertake any studies that, in the opinion of the Agency, are necessary for the IA by the Review Panel.

Joint Review Panel – 600 ± Days

Under section 39(1) when the Minister refers the impact assessment of a project to a Review Panel, the usual Review Panel deadlines apply (see above) but the Minister may enter into an agreement or arrangement with any Federal or Canadian Jurisdiction for the Joint establishment of a Review Panel and the manner in which the impact assessment of the project is to be conducted by that Joint Review Panel [JRP]. A JRP cannot be established for the CER or CNSC regulated activities under section 39(2). The Minister and Minister of Foreign Affairs may establish agreements for a JRP with International Jurisdictions in section 39(3). Any JRP agreement must be posted on the IA Registry before the commencement of the hearings conducted by the JRP. There are similar provisions for Joint IA under the *Mackenzie Valley Resource Management Act*, SC 1998, c 25 in section 40.

Panel Review Terms of Reference and Appointments

The Minister must, under section 41(1), within 45+ days from the time the Notice of Commencement are posted on the IA Registry, establish the Panel's Terms of Reference [Terms of Reference] and the Agency must appoint one or more qualified members of the Panel.

Under section 42, the Terms of Reference of Review Panel or contained in a JRP Agreement *must* include consideration of the Federal IA Factors and other factors included by the Agency, in the Notice of Commencement, and must:

(a) be approved by the Minister within the same 45+days from the time the Notice of Commencement are posted on the IA Registry and include the Agency set deadlines for a Panel Review;
(b) the Minister may, at any time, modify the Terms of Reference in order to reflect an extension of the time limit granted by the Minister or the GIC;
(c) the Agency must within 45+ days of the Notice of Commencement being posted on the IA Registry, appoint the Chairperson, or a Co-Chairperson, and at least one other member of the Review Panel; and
(d) the members of the Review Panel must be unbiased and free from any conflict of interest relative to the designated project and must have knowledge or experience relevant to the project's anticipated effects or have knowledge of the interests and concerns of the Indigenous peoples of Canada that are relevant to the assessment.

CNSC Review Panel

In section 44, for a CNSC Review Panel the Terms of Reference would be established by the Minister in conjunction with the President of the CNSC and include consideration of Federal IA Factors and regulatory requirements with at least one person from the Roster[639] of Members of the CNSC recommended by the President but those would not constitute a majority of the Panel. The Review Panel Report due in 300+ days (absent extensions) would, in section 45, be the only assessment that the CNSC may use for the purpose of issuing the licence referred to in the Panel's Terms of Reference and in section 46 of the IAA, the CNSC Review Panel may exercise the powers of the CNSC.

CER Review Panel

In section 47, for a CER Review Panel the Terms of Reference would be established by the Minister in conjunction with the Lead Commissioner of the CER, and include consideration of the Federal IA Factors and regulatory requirements and at least one person from the Roster recommended by the Lead Commissioner, but those would not constitute a majority of the Panel. In section 46 the IAA, the CER Review Panel may exercise the powers of the CER.

[639] In section 50, the Minister must maintain Roster of members eligible for appointment to Review Panels, in the case of a CNSC Review Panel and a CER Review Panel these members are appointed in consultation with the Minister of Natural Resources.

All Panel Reviews IA

Within the 600± days, a Review Panel must, under section 51(1), in accordance with its Terms of Reference:

(a) conduct an IA of the Project;
(b) ensure that the information uses when conducting the IA is made available to the public;
(c) hold hearings in a manner that offers the public an opportunity to participate meaningfully in the IA, in the manner that the Review Panel considers appropriate and within the time period that it specifies;
(d) prepare a Report with respect to the IA that
  (i) sets out the effects that, in the opinion of the Review Panel, are likely to be caused by the carrying out of the Project,
  (ii) indicates which of the aforementioned effects are adverse effects within federal jurisdiction and which are adverse direct or incidental effects, and specifies the extent to which those effects are significant,
  (ii.1) subject to Indigenous Confidentiality requirements, discussed below, sets out how the Review Panel, in determining the effects that are likely to be caused by the carrying out of the project, took into account and used any Indigenous knowledge provided with respect to the Project,
  (iii) sets out a summary of any comments received from the public, and
  (iv) sets out the Review Panel's rationale, conclusions and recommendations, including conclusions and recommendations with respect to any mitigation measures and follow-up program;
(e) submit the Report to the Minister; and
(f) on the Minister's request, clarify any of the conclusions and recommendations set out in the Panel Report.

A CER Review Panel will, under section 51(3), include in the Panel Report the conclusions or recommendations necessary for a certificate, order, permit, licence or authorization to be issued, a leave or an exemption to be granted or a direction or approval to be given under the *Canadian Energy Regulator Act* in relation to the project that is the subject of the Report.[640]

Under section 52, a Review Panel may use any information that is available to it, or if it is of the opinion that there is not sufficient information available for the purpose of conducting the IA or preparing the Panel Report project, it may require the collection of any information, undertaking of any study that is necessary for that purpose, including requiring the Proponent to collect that information or undertake that study. Under section 53 the Review Panel has the power to summon any person to appear as a witness before it and to order the witness to give evidence, orally or in writing; and produce any records and other things that the Review Panel considers necessary for

[640] A CNSC Review Panel will, under section 51(2), include in the Panel Report the information necessary for the licence referred to in the Panel's Terms of Reference to be issued under section 24 of the *Nuclear Safety and Control Act* in relation to the project that is the subject of the Report.

conducting its IA of project with the same power that is vested in a court of record Any hearing by a Review Panel must be public, unless the Panel is satisfied after representations by a witness that direct and substantial harm to the witness, an Indigenous group, specific harm to the environment would be caused by the disclosure of their evidence, in which case that evidence will be sealed with penalties for disclosure. These directions can be filed in the Federal Court for enforcement. No action will lie against a member of the Review Panel for anything they have done or omitted to do in the course of an IA. In section 54, a Review Panel, to the extent that is consistent with the general application of the rules of procedural fairness and natural justice, emphasize flexibility and informality in the conduct of hearings and in particular must allow, if appropriate, the admission of evidence that would not normally be admissible under the rules of evidence. Under section 73 the Proponent may request cancellation of the IA in writing to the Minister that the project will not be carried out.

The Minister must on receipt, post the Panel Report to the IA Registry under section 55. The Agency must under section 55.1 make recommendations as to the proposed Proponent conditions in the Panel Report and post them to the IA Registry. Under section 56 the Minister may, prior to referring it to the GIC for decision, require the Proponent to collect any information or undertake any studies necessary for the GIC to make the project approval decision.

Termination provisions for a Panel IA are included in sections 58 to 59, essentially if the Minister is of the opinion that the deadline for the Report, including any extensions, will not be met or if the Panel Report is not submitted in time, the Minister must consult with the relevant jurisdictions or the leaders of the CER or CNSC prior to cancelling the Panel IA and the Agency will complete the Report for submission to the Minister.

Federal Impact Factors – Indigenous Concerns

Agency and Panel IA are governed by an extensive list of factors in section 22(1) that must be considered, but only considered. IA Tribunals come to an IA as a "blank slate" and it is incumbent on Indigenous Groups to provide this information to them and Proponents within the relevant deadlines. While all of these factors will be canvassed by the Proponent in an Impact Statement and will require a response from Indigenous groups if possible, there are Indigenous factors of concern that will be a priority, as follows:

> 22(1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:
> (a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including
> (i) the effects of malfunctions or accidents that may occur in connection with the designated project,
> (ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and
> (iii) the result of any interaction between those effects; [Environmental Impacts]

These environmental impacts are a proxy for impacts on Indigenous rights, insofar as they relate to aboriginal right's exercise in the environment, although the "health, social or economic conditions" would apply to Indigenous communities as would "cumulative effects." There are new direct factors regarding Indigenous groups in the IAA, including in 22(1):

(c) the impact that the designated project may have on any Indigenous group [Indigenous Group] and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*. [Aboriginal Rights]
(l) considerations related to Indigenous cultures raised with respect to the designated project; [Indigenous Culture]
(q) any assessment of the effects of the designated project that is conducted by or on behalf of an [IGB] and that is provided with respect to the designated project.[641] [IBG Project Assessment]
(r) any study or plan that is conducted or prepared by a jurisdiction or [a non-jurisdiction IGB] that is in respect of a region related to the designated project and that has been provided with respect to the project; [IBG Regional Assessment]
(g) Indigenous knowledge provided with respect to the designated project;

Aboriginal groups could present studies or Indigenous knowledge (in ATOE proceedings or otherwise) relating to the impacts the Project would have on their: Indigenous Group, Aboriginal Rights, Indigenous Culture, IGB Project Assessment and IBG Regional Assessments.

A factor of concern to Indigenous groups in Alberta is the inclusion under 22(1)(r) of Alberta's contentious Lower Athabasca Regional Plan, 2012 [LARP] under the *Alberta Land Stewardship Ac*t,[642] which saw flawed and limited Aboriginal consultation (see the non-binding *Review Panel Report* (2015)[643]) in its formulation as a cabinet level planning document that requires provincial decision makers to comply with it. It has been described as a "blueprint for the oil sands industry"

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[641] It is interesting to note, that the Tsleil-Waututh First Nation, a principal opponent to Kinder Morgan's Trans Mountain Pipeline Expansion has conducted their own environmental assessment of the project. If the IAA was in effect – consideration of that assessment would be required and unscoped, see George Hoberg (Liu Institute for Global Issues UBC), "Pipelines and the Politics of Structure: A Case Study of the Trans Mountain Pipeline," Prepared for delivery at the Annual Meeting of the Canadian Political Science Association, May 31-June 2, 2016 Calgary, AB at <https://cpsa-acsp.ca/documents/conference/2016/Hoberg.pdf>

[642] *Alberta Land Stewardship Ac*t, SA 2009, c A-26.8 [ALSA]. LARP is at <https://landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%202012-2022%20Approved%202012-08.pdf>.

[643] Review Panel Report (2015) at <https://landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%20Review%20Panel%20Recommendations%20-%202016-06.pdf>. This Review Panel was applied for by six Indigenous groups, including the Athabasca Chipewyan First Nation (ACFN); Cold Lake First Nations (CLFN); Mikisew Cree First Nation (MCFN); Onion Lake Cree Nation (OLCN); Fort McKay First Nation and Fort McKay Métis Community Association (FMFN); Chipewyan Prairie Dene First Nation (CPDFN). The ALSA regulation governing this Review Alberta Land Stewardship Regulation, Alta Reg 179/2011.

with many of the purported governing frameworks still incomplete.[644] In the Joint Review Panel Report (2013) on the Jackpine Mine Expansion Project, LARP was described as "an appropriate mechanism for identifying and managing regional cumulative effects."[645]

The receipt of LARP under section 22(1)(r) would see the potential governance of LARP on cumulative effects. However, if aboriginal groups were to present competing Regional Studies, e.g. cumulative water quality studies, with connections to the drainage basins in and to the Athabasca River in the oilsands region with federal effects (i.e. HADD in the *Fisheries Act*, pollution in trans-boundary waters et.) using science and their IK, from an IA perspective, the LARP may not be as persuasive.[646]

Other Factors of Potential Concern

Additional factors that may be relevant would include:

> 22(1)(h) the extent to which the designated project contributes to sustainability;

In the IAA, sustainability is defined in section 2 as "the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations". This is one of the few references to economic matters and a way to incorporate potential economic benefits as positive impacts of the project. The Practitioner's Guide has webpages: 2.0 Impact Statement and Impact Assessment Phase has Guidance webpages for *2.2 Guidance: Considering the Extent to which a Project Contributes to Sustainability* and *2.3 Framework: Implementation of the Sustainability Guidance* for added information.

> 22(1)(i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;

Current EA processes including this factor have phrased this requirement as the incremental contribution of the Project to greenhouse gases in relation to Canada's commitments. With few projects generating significant incremental contributions, this phrasing and any potential scoping are unlikely, rightly or wrongly, to allow this impact factor to be dispositive, see for example the recent *Towerbirch Expansion Project Review of Related Upstream Greenhouse Gas Emissions*

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[644] See: 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."
[645] Jackpine Mine JRP, *supra* note 221 at paragraph 14.
[646] Particularly the lack of any Biodiversity Plans in LARP and the inadequate Tailings Management Plans in LARP, let alone the mess the oilsands monitoring programmes given the lack of continuity in Baseline Monitoring Standards, see: Laidlaw, *Alberta Accommodation, supra* note 4 at 70 to 71.

Estimates (2017) or the Policy of excluding downstream emissions.[647] A Ministerial Veto of an IA, in section 17 over public concerns remains available. Practitioner's Guide has a webpage *2.6 Policy Context: Considering Environmental Obligations and Commitments in Respect of Climate Change* for further information.

22(1)(s) The intersection of sex and gender with other identity factors.

The Practitioner's Guide has a webpage *2.1 Guidance: Gender-based Analysis Plus in Impact Assessment* that provides further information.

Project Approval Decisions

The Minister can make a Project approval decision based on an Agency Report or Substituted Process Report, or that decision may be referred by the Minister under section 60(1) to the GIC, and that decision must:

(a) determine whether the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the report are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest; or
(b) refer to the GIC the matter of whether the effects referred to in paragraph (a) are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest.

Any referral to the GIC by the Minister will be documented by a Notice with Reasons in the IA Registry in section 60(2).

Panel Reports must, under section 61, be referred to the GIC, after consultation with the Minister of Natural Resources, and the GIC will determine whether the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the Panel Report are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest in granting or denying Project approval.

Panel Reports will be sent to the Agency in section 55.1 to review the Panel Report's proposed conditions – that review may reduce or clarify the conditions but the addition of conditions is uncertain, unless they flow from direct Federal government consultations with Indigenous Groups.

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[647] Environment and Climate Change Canada, *NOVA Gas Transmission Ltd - Towerbirch Expansion Project Review of Related Upstream Greenhouse Gas Emissions Estimates* (2017) at 14 at: <https://www.ceaa-acee.gc.ca/050/documents/p80106/118038E.pdf>. See also *A015 – National Energy Board - Letter and Hearing Order OH-001-2014 – Application for Trans Mountain Expansion Project (A59503)* (April 3, 2014) , at:<https://apps.neb-one.gc.ca/REGDOCS/Item/View/2445930> and *A013 – National Energy Board – Letter – Application for Trans Mountain Expansion Project – Factors and Scope of the Factors for the Environmental Assessment pursuant to the Canadian Environmental Assessment Act 2012 (A59505)* (April 2, 2014) [Scoping Decision], at:<https://apps.neb-one.gc.ca/REGDOCS/Item/View/2445374>.

The Agency will also generate a Crown Consultation Report, documenting federal and provincial governments direct consultation efforts, and post this Report to the IA Registry.

Public Interest

The Minister's referral to the GIC for decision, any Ministerial Project approval decision, and the GIC's Project approval decision, are governed by consideration of the "public interest" which *must* include consideration of the factors listed in section 63, as follows:

(a) the extent to which the designated project contributes to sustainability;
(b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the [IA Report] in respect of the designated project are significant;
(c) the implementation of the mitigation measures that the Minister or the [GIC], as the case may be, considers appropriate;
(d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*; and
(e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change. [Public Interest Factors]

This is a prescriptive list but there may be other factors that warrant consideration.[648]

Decision Statement

The Minister, under section 65, is required to make a Project Approval decision in a *Decision Statement* and that Project approval or disallowance must be made within 30 days, and if referred to the GIC within 90 days, of the relevant Report being filed on IA Registry. The Minister may extend these deadlines for a maximum of 90 days and the GIC may extend this deadline for any number of extensions. It is current practice, to defer direct Indigenous consultation with governments until the receipt of an IA Report – these extensions would accommodate this but they remain under government control.

Any Decision Statement must, under section 65:

- inform the Proponent of the Project approval or not and the reasons, that *must* demonstrate that the Minister or the GIC, as the case may be, has considered all of the Public Interest Factors in that determination;
- includes any Proponent conditions that must be complied with;

[648] Agency Policy and guidance webpage has a website: Impact Assessment Agency of Canada, *Policy Context: Public Interest Determination under the Impact Assessment Act*, at: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/public-interest-determination-under-impact-assessment-act.html>

- set out the period under which a Proponent must substantially begin to carry out the Project;[649]
- includes a description of the Project; and
- be posted in the IA Registry.[650]

That Decision Statement will be considered as authorizing the activities that are regulated under the *Canadian Energy Regulator Act,* and is considered to be a part of the certificate, order, permit, licence or authorization issued, the leave or exemption granted or the direction or approval given under that Act in relation to the designated project in section 67(2).[651]

The Minister or the GIC must establish conditions which the Proponent must comply in section 64(1) - notably this would not be limited by the Agency IA, Panel Report or the Agency's recommendations. This legislatively implements the *Tsleil-Waututh* decision.

Under section 64(2) those conditions may require a federal authority to not permit a project to be carried out, in whole or in part, or to the provision of financial assistance in breach of the Proponent conditions, if any. In section 64(4) (4) those conditions must include the implementation of the mitigation measures that Minister or GIC deem reasonable, including follow up plan, and if appropriate an adaptive management plan, unless the Minister is satisfied that another person or jurisdiction will ensure enforcement.

Amending Decision Statements

The Minister has limited powers to amend a Decision Statement in section 68, that amendment can add or remove a condition, amend any condition or to modify the Project's description, *but*

- this amendment is not permitted to amend the Decision Statement to change the decision included in it;
- the amendment may not increase the extent to which the effects in in relevant IA Report are adverse; and
- must be in the public interest.

Prior to amending the Decision Statement, the Minister may in section 72 require the Proponent to provide the Minister with any information necessary for the purpose of amending the Decision Statement and consult with the CER or CNSC as the case may be. The Minister must, in section 69, post the proposed amendment to the IA Registry and invite public comments for the period specified. If after taking into account the public comments, the Minster proceeds with the amendment that amended condition with the Minister's reason will be posted on the IA Registry.

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[649] IAA, *supra* note 505, section 70(1) the Minister must consider the views of the Proponent in setting this timeline.
[650] *Ibid*, section 74 maintains Cabinet confidentiality for the GIC.
[651] *Ibid*, section 67(1) identical provisions are included for CNSC regulated activities and the Canada Oil and Gas Operations Act in section 67(4),

Deadline to Substantially begin Project

In section 70(1) regarding setting the deadline in the Decision Statement, where the Proponent is required to *substantially begin* to carry out the project, the Minister must consider the views of the Proponent. That period may extended in section 70(2) at Proponent's request and Minister on considering that the matter, extend the period by any period that the Minister considers reasonable and, in that case, must ensure that a notice of the extension and the reasons for the extension are posted on the IA Registry. The definition of *substantially begin* is not defined in the IAA, and we have found no directly relevant case law.

Under section 70(3), if the Proponent does not *substantially begin* to carry out the Project within that period, or any extensions, the Decision Statement will expire and a Notice to that effect will posted to the IA Registry. In section 71, a Proponent may advise the Minister that the project will not, or will no longer be carried out, and the Minister may revoke the Decision Statement.

Federal Assessments

Federal Impact Factors include "(p) any relevant assessment referred to in section 92, 93 or 95." These are not project IA but are intended to guide future designated project's IA.[652]

Section 92 - Regional Assessments on Federal Lands

Under section 92, the Minister may establish a Committee, or authorize the Agency, to conduct a regional assessment of the effects of existing or future physical activities carried out in a region that is entirely on federal lands, these would include, among others, marine regions, Federal Parks, Indian Reserves and federal works. In section 94, the Agency in conducting an assessment must offer to consult with relevant Canadian Jurisdictions. This is the basis for the ongoing Regional Assessment of the St. Lawrence River Area initiated by the Mohawk of Kahnawà:ke.[653]

[652] *Ecology Action Centre v Canada (Environment and Climate Change)*, 2021 FC 1367 [*Ecology Action Centre v. Canada*] at 8. The Agency's Policy and guidance web page has several Fact Sheets, one of which is *Regional Assessment under the Impact Assessment Act* which notes that "The Agency is developing a policy to clarify the conduct of regional assessments under the IAA. A key driver for regional assessments under the IAA *is to inform future project impact assessments*. Using regional assessment to address issues that are best considered at a regional level will improve both the effectiveness and efficiency of the impact assessment process." Whether a Project's Impact Statement, will change as a result of completing a Regional Assessment Report prior to or after the IA process is underway is an open question.

[653] Impact Assessment Agency of Canada, *Regional Assessment of the St. Lawrence River Area* (IA Registry Project Page), at: <https://iaac-aeic.gc.ca/050/evaluations/proj/80913>. Québec has been consulted.

Section 93 – Joint Regional Assessment

Under section 93(1), if the Minister is of the opinion that it is appropriate to conduct a regional assessment of the effects of existing or future physical activities carried out in a region that is composed in part of federal lands or in a region that is entirely outside federal lands, the Minister may enter into an Agreement with any one or more Federal or Canadian Jurisdictions regarding the joint establishment of a Committee to conduct the assessment and the manner in which the assessment is to be conducted or authorize the Agency to conduct the assessment. In that Agreement, under section 93(2), the Minister must establish or approve the Committee's Terms of Reference; appoint or approve the appointment of members to the Committee which must include at least one member recommended by the other jurisdictions; and establish a time limit for the Committee's Report. In section 94, the Agency in conducting an assessment must offer to consult with relevant Canadian Jurisdictions. Section 93(2) allows for a similar agreement with an International Jurisdiction, in conjunction with the Minister of Foreign Affairs. This is the basis for the ongoing Regional Assessment in the Ring of Fire Area between Canada and Ontario.[654] The Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador under this section has been completed: this was initiated under CEEA-2012 and grandfathered in by section 187.1 of the IAA.[655]

Section 95 - Strategic Assessments

Under section 95, the Minister may establish a Committee, or authorize the Agency to conduct an assessment of: any Government of Canada policy, plan or program, proposed or existing, that is relevant to conducting impact assessments; or any issue that is relevant to conducting impact assessments of designated projects or of a class of designated projects. The Minister may also deem any assessment that provides guidance on how Canada's commitments in respect of climate change should be considered in IA and that is prepared by a federal authority and commenced before August 28, 2019 to be an Strategic Assessment

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[654] Impact Assessment Agency of Canada, *Regional Assessment in the Ring of Fire Area*, (IA Registry Project Page), at: <https://iaac-aeic.gc.ca/050/evaluations/proj/80468>. *Draft Agreement to Conduct the Regional Assessment between Canada and Ontario* (December 2, 2021), at: <https://iaac-aeic.gc.ca/050/documents/p80468/142280E.pdf> is open for comments.

[655] Canada, Regional Assessment Committee, *Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador* (February 2020), at: <https://iaac-aeic.gc.ca/050/documents/p80156/134068E.pdf>. This Regional Assessment was unsuccessfully challenged in judicial review proceedings in the December 13, 2021 in *Ecology Action Centre v. Canada,* 2021 FC 1367 see Martin Olszynski, "Are Regional (and other) Assessments pursuant to the Impact Assessment Act Justiciable? Ecology Action Centre v Canada (Part 1)" (December 22, 2021), at: ABlawg, <http://ablawg.ca/wp-content/uploads/2021/12/Blog_MO_Ecology_Action_Centre_1.pdf>> continuing his argument that *Gitxaala* was wrongly decided, and Mark Mancini and Martin Olszynski, "Reviewing Regulations Post-*Vavilov*: *Ecology Action Centre v Canada* (Part II)" (December 24, 2021), at: ABlawg, <http://ablawg.ca/wp-content/uploads/2021/12/Blog_MM_MO_Ecology_Action_Centre_2.pdf>

General Rules on Federal Assessment

If a Minister, under section 99, establishes a Committee for a Regional Assessment on Federal Lands or Strategic Assessment, the Minister must establish its Terms of Reference and appoint Members of the Committee, if the Agency is delegated those Assessments, or a Joint Regional Assessment the Minister must establish the Agency's Terms of Reference. Under section 97(1), the Minister must respond, with reasons and within the *Time Limit Regulations*, to any request for a Federal Assessment and post that response to the IA Registry.

The Agency or Committee may take any information, including IK, into account, ensure public participation, provide public notice by postings on the IA Registry, require federal authorities to provide relevant evidence, may hold public hearings with attendant powers to compel witnesses and provide a Report, including the use of IK, to the Minister within the time limits, with the Report posted to the IA Registry.[656]

Requesting a Federal Assessment

Requesting a Federal Assessment is governed by an *Operational Guide: Requesting a Regional or Strategic Assessment under the Impact Assessment Act*,[657] stating "Minister must respond to any request for a regional or strategic assessment to be conducted. In accordance with the [*Time Limits Regulations*] the Minister's response, with reasons, must be provided within 90 days of receiving the request for a regional or strategic assessment, and must be posted on the [IA Registry]."

We would suggest that an Alberta Indigenous Group be very careful in requesting a Federal Assessment, firstly because they could involve a lengthy time frame and are unlikely to change a specific project IA, secondly they are broadly phrased and unlike Project IA other considerations, including business and provincial government interests would be involved. It is noteworthy that the Federal Assessments currently underway are restricted to federal lands, with the notable exception of the *Regional Assessment in the Ring of Fire Area* in Ontario[658] which was requested by Ontario. We are given to understand that, absent compelling reasons, Federal Assessments will not be undertaken in the face of provincial objections.[659]

Indigenous Knowledge Confidentiality

One of the Purposes of the IAA is to ensure that Indigenous Knowledge [IK] that is provided is taken into account in an IA, it is one of the Federal Impact Factors that an IA Tribunal must take into account, and IA Tribunal Reports must describe how they used Indigenous Knowledge in their

[656] IAA, *supra* note 505, sections 96 to 103.
[657] Contained in the Agency webpage in the Policy and Guidance section: Impact Assessment Agency of Canada, *Operational Guide: Requesting a Regional Strategic Assessment under the Impact Assessment Act*, at: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/requesting-regional-strategic-assessment-iaa.html>.
[658] Regional Assessment in the Ring of Fire Area - #80468 at <https://iaac-aeic.gc.ca/050/evaluations/proj/80468>.
[659] Personal communication November 2022.

decisions.[660] Under section 119 any Indigenous Knowledge provided to the Agency, Minister, Review Panel or Committee for Regional Planning [Recipient] is confidential and must not knowingly be, or be permitted to be, disclosed without written consent.

There are exceptions: if the Indigenous Knowledge is publicly available or the disclosure is necessary for the purposes of procedural fairness and natural justice in which case the Recipient must consult the person or entity providing the Indigenous Knowledge and the proposed Recipient about the scope of the proposed disclosure and potential conditions may be ordered on the proposed Recipient on the use of Indigenous Knowledge. Indigenous Knowledge can be disclosed for use in legal proceedings or the disclosure is authorized in the prescribed circumstances (by regulation of which there are none), their records, unless they are public, are protected from disclosure under the *Access to Information Act*.[661]

There are additional rules binding the Agency from non-disclosure of ITK even with written consent, for example under section 30 where the Agency is satisfied that the disclosure would cause harm to a person, Indigenous Group or to the environment.

The Practitioner's Guide has webpages *3.6 Guidance: Indigenous Knowledge under the Impact Assessment Act: Procedures for Working with Indigenous Communities* and *3.7 Guidance: Protecting Confidential Indigenous Knowledge under the Impact Assessment Act*. These include relevant definitions, as follows,

> Indigenous knowledge is a holistic system embedded in the various cultures of different Indigenous peoples. For the purposes of assessment processes under the IAA, generally, Indigenous knowledge is understood as a body of knowledge built up by a group of Indigenous people through generations of living in close contact with the land. Indigenous knowledge is cumulative and dynamic. It builds upon the historic experiences of a people and adapts to social, economic, environmental, spiritual and political change. While the term '"traditional knowledge" is often used interchangeably with Indigenous knowledge, the IAA uses the term Indigenous knowledge in order to recognize that the knowledge system evolves and is not set in the past, as the word "traditional" may imply.[662]

The Agency will work with Indigenous groups and arrange for Confidentiality Agreements, ideally before any ITK is provided, and they should contain:

- the roles and responsibilities of each party;

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[660] IAA, *supra* note 505, Purposes section 6(1)(j)), IA Tribunal Federal Impact Factors section 22(1)(g); how ITK was used: in Agency Reports 28(3.1); Panel Reports 51(d)(ii.1;)proposed substituted processes must contain a Report 33(1); Terminated Panel Reviews continued by the Agency in 59(3); IA Reports by a Federal Authority under the specified legislation 84(1)(b); Federal Regional Plan Committees or the Agency must take into account ITK in section 97(2); those Reports must describe how they used ITK in section 102(2);

[661] *Access to Information Act*, RSC 1985, c A-1. There are protections of Agency, Minister from legal claims in inadvertent disclosure of ITK in IAA, *supra* note 505, section 108.

[662] 3.6 Guidance: Indigenous Knowledge under the Impact Assessment Act: Procedures for Working with Indigenous Communities at 2. Introduction (Practitioner's Guide)

- conditions on sharing confidential Indigenous knowledge with other parties;
- limitations on who can access the Indigenous knowledge provided;
- how, where, and by whom the Indigenous knowledge would be stored, and for how long;
- any disposal procedures, including timing considerations for disposal;
- whether a non-confidential summary or redacted version of the Indigenous knowledge could be created and shared with the public;
- how the Indigenous knowledge should be reflected in reporting and the decision statement; and
- whether and how the Indigenous knowledge could be used in monitoring and follow-up programs.[663]

It is suggested that these Confidentiality Agreements be made Project specific – in order to avoid misinterpretation in another project given the Agency and Review Panel's ability to use information already in their possession.[664]

IK Policy Framework for Project Reviews and Regulatory Decisions

Canada released in 2022 the "Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions,"[665] which is meant to guide considerations of Indigenous Knowledge for project reviews and regulatory decisions under the *IAA*, *CERA*, *Navigable Waters Act*, and *Fisheries Act*. The document was developed in collaboration with numerous Indigenous groups and organizations, and is made available in 9 different Indigenous languages. As a new document introduced September 26, 2022, [666] it has yet to be tested in practice, however, on initial reading, it serves more to formalize existing law and policy than create them anew. The document sets out background and context, and explains concepts in law and policy, including UNDRIP and the current federal approach to Indigenous consultation. It includes five guiding principles to be used by regulators and decision-makers[667], including their illustration and guidelines, which may guide development of department- and agency-specific policies as well:

- Respect Indigenous Peoples and their knowledge
- Establish and maintain collaborative relationships with Indigenous Peoples
- Meaningfully consider Indigenous Knowledge
- Respect the confidentiality of Indigenous Knowledge
- Support capacity building related to Indigenous Knowledge

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[663] 3.7 Guidance: Protecting Confidential Indigenous Knowledge under the Impact Assessment Act at 4. 4. Confidentiality Agreements and Undertakings

[664] IAA, *supra* note 505 section 26(1) with respect to the Agency, and IAA s52 with respect to the Review Panel..

[665] Canada, Impact Assessment Agency of Canada, "Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions", at: Canada <https://www.canada.ca/en/impact-assessment-agency/programs/aboriginal-consultation-federal-environmental-assessment/indigenous-knowledge-policy-framework-initiative/indigenous-knowledge-policy-framework-project-reviews-regulatory-decisions.html> [Canada, "Indigenous Knowledge Policy"].

[666] Impact Assessment Agency of Canada, News Release, "New Framework to Guide Inclusion of Indigenous Knowledge in Impact Assessment" (26 September 2022), at: Canada <https://www.canada.ca/en/impact-assessment-agency/news/media-room/new-framework-guide-inclusion-indigenous-knowledge-impact-assessments.html>

[667] Canada, "Indigenous Knowledge Policy", *supra* note 665

Yahey v British Columbia

Settlement from Yahey

Yahey v British Columbia[668] is a recent British Columbia Trial decision, released on June 29, 2021 that resulted in a tentative settlement to be approved by December 29, 2021 as discussed in the January 7, 2022 decision *Apsassin v Blueberry River First Nations*.[669] Some details are set forth in a News Release by B.C.'s Indigenous Relations and Reconciliation Ministry dated Thursday, October 7, 2021.[670] The BC News Release, describes this as follows,

> The initial agreement [Initial Agreement] is a first step in responding to the B.C. Supreme Court's decision, which requires the Province and Blueberry to work together to develop land management processes in Blueberry territory that restore and protect the ability of the land to support Indigenous ways of life, and ensure future development authorizations manage cumulative effects on land and wildlife and their impact on the Nation's treaty rights.
>
> Under the agreement, the Province will establish a $35-million fund for Blueberry to undertake activities to heal the land, creating jobs for Nation members and business for service providers in the northeast region. Activities will include:
>
> - land, road and seismic restoration;
> - river, stream, and wetland restoration;
> - habitat connectivity;
> - native seed and nursery projects; and
> - training for restoration activities.
>
> In addition, $30 million will be allocated to support the Blueberry River First Nations in protecting their Indigenous way of life. Activities will include:
>
> - work on cultural areas, traplines, cabins and trails;
> - educational activities and materials, including teaching traditional skills and language;
> - expanding Blueberry River resources and capacity for land management; and
> - restoring the health of wildlife through wildlife management, habitat enhancement including • prescribed burning, and research.
>
> As part of the agreement, 195 forestry and oil and gas projects, which were permitted or authorized prior to the court decision and where activities have not yet started, will proceed. Twenty currently approved authorizations, which relate to development activities in areas of high cultural importance, will not proceed without further negotiation and agreement from Blueberry.

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[668] *Yahey*, *supra* note 125.
[669] *Apsassin v Blueberry River First Nations*, 2022 FC 17 at 10. This was an unsuccessful application to change the Custom Band Election Code, governing the Blueberry First Nation [BFN] to a date prior to the Settlement Approval deadline. Chief Yahey was not re-elected.
[670] British Columbia, News Release, "BC, Blueberry River First Nations reach agreement on existing permits, restoration funding" (7 October 2021) [BC News Release], at: <https://news.gov.bc.ca/releases/2021IRR0063-001940>. See also British Columbia, Joint Press Release, "Joint statement on negotiations related to BC Supreme Court decision" (1 October 2021), at: <https://news.gov.bc.ca/releases/2021IRR0061-001879>

The Province has provided notification to the respective permit holders.

This BC New Release goes on to say, that,

> The Province and Blueberry are now working to finalize an interim approach for reviewing new natural resource activities that balance Treaty 8 rights, the economy and the environment.
>
> Once an interim approach is in place, the negotiation teams will work to reach long-term solutions that protect Treaty 8 rights and an Indigenous way of life. They will explore establishing areas for protection and developing ecosystem-based management systems to incorporate cumulative impacts into decision-making. The solutions will work to reset the balance promised in Treaty 8, ensuring environmental sustainability, protection of Treaty 8 rights and Indigenous culture, and stable economic activity and employment.
>
> The Province is starting dialogue with the other Treaty 8 Nations on matters of treaty rights, including advancing new environmental restoration work across Treaty 8 territory and ensuring all Treaty 8 Nations are part of the development of a new approach to how natural resource activity is planned and authorized in the territory.

The Interim Agreement is not yet publicly available and the details may be confidential.[671]

Trial Decision

As noted in Chief Yahey's Outgoing Statement, the decision in *Yahey* was a result of a 5 year Court battle, indeed the Trial decision notes that there were 160 days of Trial beginning May 27, 2019 to November 30, 2020 with the Trial decision comprising 1,900 paragraphs. The Trial Judge was the Honourable Emily Burke, appointed in 2014.[672]

The Judge opens in an Overview in paragraph 3, which she describes as a "a very condensed overview of the facts of the claim, the parties' positions and my essential conclusions on the issues raised." The Overview is reproduced in its entirety, below

- In 1899, Commissioners acting on behalf of Her Majesty the Queen ("Crown") and the Chiefs and headmen of the Cree, Beaver and Chipewyan as well as other Indigenous people gathered at Lesser Slave Lake and entered into Treaty 8. In 1900, Blueberry's ancestors adhered to the Treaty.
- Treaty 8 protects the Indigenous signatories' and adherents' rights to hunt, trap and fish in the Treaty area, subject to regulations made by the government, and except over areas the government may have "taken up" for settlement, mining, lumbering, trading or other purposes.
- At the time the Treaty was entered into, the Indigenous people were also promised that there

[671] For additional media coverage see: Matt Simmons, "Document reveals influence of oil and gas lobbyists on B.C. officials after Indigenous Rights ruling", The Narwhal (2 March 2022), at: <https://thenarwhal.ca/bc-oil-gas-blueberry-docs/>. Some details were announced at "Province, Blueberry River First Nations reach agreement", BC Press Release: 18-Jan-2023 at <https://news.gov.bc.ca/releases/2023WLRS0004-000043>.
[672] Canada, "British Columbia Judicial Appointment Announced" (Ottawa, May 13, 2014), at: <https://www.justice.gc.ca/eng/news-nouv/ja-nj/2014/doc_33073.html>

would be no forced interference with their mode of life. They would be as free to hunt and fish after the Treaty, as they would be if they never entered into it.

- Much has changed over the last 120 years. This case raises questions about what was intended in 1899 and 1900, how much change was anticipated, and how promises made over one hundred years ago are to be honoured and upheld today.
- Over the last several decades, Blueberry has witnessed extensive industrial development in its territory. It alleges that it has become harder to exercise its rights to hunt, trap and fish and to maintain its way of life. It says provincially authorized industrial development has pushed its members to the margins of its territory to seek to exercise their constitutionally protected treaty rights. It says the effects of the industrial development are well beyond what was contemplated at the time of the Treaty.
- Blueberry brings this claim alleging that the cumulative impacts from a range of provincially authorized industrial developments in its territory have breached the Treaty and infringed its rights.
- The Province denies that Blueberry's rights have been infringed or that the Treaty has been breached. It relies on the taking up clause contained in the Treaty, which gives the government the power to take up lands within the Treaty territory for specific purposes. The Province frames the issue as to whether it has taken up so much land, in the territories over which Blueberry members traditionally hunted, fished and trapped and continue to do so today, that no meaningful rights remain.
- The Province also points to the provincial regulatory regimes for managing forestry, wildlife, oil and gas and to policies and processes for the consideration of cumulative effects, which it says, take into account Blueberry's treaty rights. It says that it consults with Blueberry to avoid infringement of its rights and to mitigate potential effects of development.
- Aboriginal and treaty rights, and the infringement of these rights, have often been considered in the context of regulatory prosecutions, and the applicable tests have been developed in that setting. To date, the cases in which First Nations have alleged infringements of their Aboriginal and treaty rights have focussed on single authorizations or specific provisions in statutes and regulations.
- In this case, however, Blueberry alleges that it is not one single impact from one single regulation or project that has infringed its rights. Rather, it is the cumulative effects from a range of provincially authorized activities, projects and developments (associated with oil and gas, forestry, mining, hydroelectric infrastructure, agricultural clearing and other activities) within and adjacent to their traditional territory that has resulted in significant adverse impacts on the meaningful exercise of their treaty rights, and that amount to a breach of the Treaty.
- This therefore is a case of first instance with constitutional implications.

Conclusions

- Courts have noted that Treaty 8 is not a final blueprint. It established the beginning of an ongoing relationship. It was recognized that the relationship would be difficult to manage. The promises contained in Treaty 8 have become harder to keep as time has gone on, and the Court has been called upon to assist the parties in understanding their obligations under the Treaty.
- I find that Treaty 8 protects Blueberry's way of life from forced interference, and protects their rights to hunt, trap and fish in their territory.
- I recognize that the Province has the power to take up lands. This power, however, is not infinite. The Province cannot take up so much land such that Blueberry can no longer meaningfully exercise its rights to hunt, trap and fish in a manner consistent with its way of life. The Province's power to take up lands must be exercised in a way that upholds the promises

and protections in the Treaty.

- I find that the Province's conduct over a period of many years – by allowing industrial development in Blueberry's territory at an extensive scale without assessing the cumulative impacts of this development and ensuring that Blueberry would be able to continue meaningfully exercising its treaty rights in its territory – has breached the Treaty.
- I conclude that the extent of the lands taken up by the Province for industrial development (including the associated disturbances, impacts on wildlife, and impacts on Blueberry's way of life), means there are no longer sufficient and appropriate lands in Blueberry's territory to allow for the meaningful exercise by Blueberry of its treaty rights. The cumulative effects of industrial development authorized by the Province have significantly diminished the ability of Blueberry members to exercise their rights to hunt, fish and trap in their territory as part of their way of life and therefore constitute an infringement of their treaty rights. The Province has not justified this infringement.
- I find that, for at least a decade, the Province has had notice of Blueberry's concerns about the cumulative effects of industrial development on the exercise of its treaty rights. Despite having notice of these legitimate concerns, the Province failed to respond in a manner that upholds the honour of the Crown and implements the promises contained in Treaty 8. The Province has also breached its fiduciary duty to Blueberry by causing and permitting the cumulative impacts of industrial development without protecting Blueberry's treaty rights.
- The Province has not, to date, shown that it has an appropriate, enforceable way of taking into account Blueberry's treaty rights or assessing the cumulative impacts of development on the meaningful exercise of these rights, or that it has developed ways to ensure that Blueberry can continue to exercise these rights in a manner consistent with its way of life. The Province's discretionary decision-making processes do not adequately consider cumulative effects and the impact on treaty rights.
- The rights, obligations and promises made in Treaty 8 must be respected, upheld, and implemented today. Time is of the essence. Relief will follow.

Prior to delving into the details, she makes two observations: firstly, the amount of detail in this case in which the Court said all of the differences would not be resolved – only the ones necessary to her findings; and secondly, her reasons, while lengthy must be accessible,

> I will attempt not to use the acronyms that are typically used by the participants in the forestry, oil and gas and other natural resource industries, as well as in government. To shorten long names, I will paraphrase these names in an identifiable, understandable way.
> [8] The *persistent use of acronyms creates a closed community in which others cannot easily participate. It impedes understanding, and impacts on communication with others outside these communities.* It is therefore important for the understanding and accessibility of all that acronyms not be persistently used in these reasons.

We plead guilty to extensive use of acronyms in this Report and have included a Glossary.

Parties and Treaty 8

Justice Burke described the parties to the lawsuit, in paragraphs 10 to 26, as follows:

> *Blueberry First Nation*

The Plaintiff, Blueberry First Nation is a community that is predominantly of Dane-zaa ancestry, with their Traditional territory located in the upper Peace River region of northeastern British Columbia and their main reserve community today is Indian Reserve 205 ("IR 205") located approximately 65 kilometres north of Fort St. John. Blueberry's claimed territory, is some 38,000 square kilometres in the upper Peace River[673] and extends, roughly, from the Alberta border in the east to the foothills of the Rocky Mountains in the west, south to and including the Peace River, and north and east to Pink Mountain, Sikanni Chief, Lily Lake and Tommy Lakes. The Alaska Highway, which was built in the 1940s, runs roughly from the south to the northwest through the territory. Their territory covers the Montney gas basin which has been the site of extensive oil and gas exploration and extraction, with Blueberry's history of that development summarized in her earlier decision *Yahey v British Columbia*, 2017 BCSC 899 [*Yahey* 2017] at para. 24:

> Since the construction of the Alaska Highway opened up the Upper Peace to industrial development, the Province of British Columbia has authorized a wide variety of Industrial developments in the traditional territory…
>
> … [resulting] in a wide range of physical works and activities… Collectively, the Industrial Developments have transformed the physical landscape in the traditional territory.
>
> In recent years, the cumulative impact of the Industrial Developments in BRFN's traditional territory has had a profound and negative effect on BRFN members' ability to exercise their treaty rights.

British Columbia

The Defendant Province "is the emanation of the Crown that holds the beneficial interest in the land that is material to the issues in this proceeding (subject to any third-party rights)," in accordance with the *Constitution Act,* 1867 sections 92(5), 92A and 109.

Treaty 8

Treaty 8 was made between the Crown and various Indigenous peoples in June 1899 at Lesser Slave Lake, Treaty Commissioners representing the Crown met with other Indigenous people living in the territory sought their adhesion to the Treaty. Blueberry's ancestors, the Dane-zaa at Fort St. John, adhered to Treaty 8 in 1900. Justice Burke notes that:

> The promises made in Treaty 8 were promises of the Crown. The Province was not a signatory to Treaty 8 but, along with Canada, holds the duties and benefits of this treaty. Both levels of government are responsible for fulfilling these promises when acting within the division of powers under the *Constitution Act,* 1867. The issues in this case concern the responsibilities of the Province.

[673] *Yahey, supra* note 125 at 12-14 with a Map included in the decision which the Court described as the Blueberry Claim Area.

Citing recent Supreme Court decision, including *Mikisew*, in interpreting Treaty 8, noting the centrality of the livelihood promises in Treaty 8 with the "continuity in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue 'after the treaty as existed before it.'"[674] Treaty 8 foreshadowed change and provided a framework for managing relations.

Procedural History and Issues

Blueberry launched its claim in 2015 seeking various declarative remedies, injunctions and "other remedies" the Court saw fit – notably this did not include damage claims.[675] After two failed injunction attempts to prohibit the Province from allowing approvals pending trial,[676] and a failed Judicial Review application on the Province's decision to enter into a long-term royalty agreements,[677] trial was set for March 2018 but postponed to allow settlement discussions with the Province that failed to resolve the issues.

Justice Burke determined the issues to be resolved in this case, as follows:

> [62] First: What are the rights and obligations in Treaty 8?
>
> [63] Blueberry and the Crown are parties to Treaty 8. Blueberry relies upon the rights in Treaty 8, which it maintains includes a right to continue its mode of life free from interference. In ascertaining these rights and obligations, the Court must consider the historical context and the promises of the Treaty, including oral promises that accompany the written text. It must also consider Blueberry's mode or way of life, and whether this was protected. The Court must consider the Crown's rights to pass regulation and to take up lands for specific purposes, and how these rights interact with those of the Indigenous signatories and adherents. In addition, the Court must consider the change foreshadowed by the Treaty.
>
> [64] Second: What is the test for finding an infringement of treaty rights?
>
> [65] The parties fundamentally disagree on what is the applicable test for infringement of a treaty right. While they agree the Supreme Court of Canada's decision in *Mikisew* is applicable, they dispute how that case, and in particular the reasoning at para. 48, should be interpreted and applied in these proceedings. Accordingly, the Court's analysis of the infringement issue also considers what it means for a First Nation to have "no meaningful right…remain[ing] over its traditional territories."
>
> [66] Third: Have Blueberry's treaty rights have been infringed? As part of this, I must consider whether sufficient and appropriate land in Blueberry's traditional territory exists to allow for the meaningful exercise by Blueberry of its treaty rights?

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[674] *Mikisew*, supra note at 114 at 47.
[675] *Yahey, supra* note 125 at 27 to 30.
[676] *Yahey v British Columbia*, 2015 BCSC 1302, formally dismissed on the balance of convenience test but also on the basis that there was a corresponding comprehensive claim. Justice Burke another injunction in *Yahey* 2017.
[677] *Blueberry River First Nations v British Columbia (Natural Gas Development)*, 2017 BCSC 540 at 83

> [67] Fourth: If the Plaintiffs can no longer meaningfully exercise their Treaty 8 rights, has the Province breached the Treaty in failing to diligently implement the promises contained therein in accordance with the honour of the Crown? The Court will also consider whether the Province has breached its fiduciary obligations associated with the Treaty.
>
> [68] To answer the third and fourth questions, findings of fact are required regarding: the state of the lands over which Blueberry seeks to exercise its rights; the Province's "taking up" of lands; and, the Province's management of wildlife and natural resources, as well as its efforts to develop processes and frameworks for taking into account cumulative effects and to consult with Blueberry.

Justice Burke discussed her understanding of aboriginal rights in section 35(1) of the *Constitution Act, 1982*, Treaty interpretation, honour of the Crown, *fiduciary* duties on the Crown, the *Sparrow* two part test for justification of the infringement of aboriginal rights, and evidentiary issues in aboriginal cases. Noting the parties agreed to most of these principles, "[t]hey differ, however, on the interpretation and application of these principles in this case." [678]

Treaty 8 Promises

The goal of interpreting Treaties was to discern the common intent of the parties in the text, Justice Burke noted that Treaty 8 had been acceded to by Blueberry one hundred and twenty years ago – necessitating an exploration as to what Blueberry's ancestors understood "derived from the language used in the Treaty, informed by the report of the Commissioners, and the available oral history."[679] The parties proffered historians who were qualified as expert witnesses, and for the most part they agreed on facts – differing only on the emphasis which the parties had agreed had no significance, but the Court said that evidence differed "as to the extent of the promises in Treaty 8 and the extent to which change was foreshadowed as part of these promises."[680] The expert witnesses relying on official Reports, missionary documents and contemporary accounts of Indigenous concerns in the Treaty 8 area, that they would be confined to Reserves by settlement and unable to continue their accustomed way of life was a governing concern. [681] In terms of Canada's intent, again relying on the contemporary official documents, noting that the area was unsuitable to agriculture and while there "may be mineral development and some consequent settlement in spots; but this will not bring sudden or great changes likely to interfere to any marked degree with the Indian mode of life and means of livlihood [sic]."[682]

It was on this basis that Treaty 8 was signed on June 21, 1899, with the written text,

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[678] *Yahey, supra* note 125 at 69, The were set out in a section entitled Legal Framework Principles, from 70 to 103.
[679] *Ibid* at 110. Justice Burke did not explore the transmitted oral history of Indigenous people regarding the signing of Treaty 8 in 1899 at Lesser Slave Lake, or the acceptance by Blueberry of Treaty in 1900 at Fort St. John..
[680] *Ibid* at 117.
[681] *Ibid* at 121, 128, 131 noting Treaty 8 area Indigenous people were familiar with the Prairie Treaties, Dominion land policy and aspects of the *Indian Act* and 134.
[682] *Ibid* at 138, quoting Treaty Commissioner McKenna, who with Treaty Commissioners David Laird and James Ross entered into Treaty 8 on behalf of Canada at Lesser Slave Lake. The Province's expert witness confirmed "that mode of life could mean more than just their means of livelihood" at 139. See *Yahey* at 127, 136, 137, 140 and 142.

> And Her Majesty the Queen HEREBY AGREES with the said Indians they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes…

This written text was supplemented and incorporated, by the promises,

> … made by the Treaty Commissioners to those assembled at Lesser Slave Lake, and the way they allayed concerns expressed by the Indigenous people gathered are relevant and constitute the oral promises included within Treaty 8. They are solemn statements and promises made on behalf of the Crown. The same or similar assurances were made to other Indigenous signatories and adherents to Treaty 8.[683]

Justice Burke agreed with Blueberry that Treaty 8 "guarantees the Indigenous signatories and adherents the right to continue a way of life based on hunting, fishing and trapping, and promises that *this way of life will not be forcibly interfered with*. Inherent in the promise that there will be no forced interference with this way of life is that the Crown will not significantly affect or destroy the basic elements or features needed for that way of life to continue."[684] This was supported by the Canadian jurisprudence interpreting Treaty 8.[685]

Turning to the Treaty 8 promises that Blueberry's *way of life* will not be forcibly interfered with Justice Burke, noting that the concept was a difficult one, and provisionally adopted the definition of the Plaintiffs expert that "mode of life involves looking at how a people make a living, group organization and the relationship between culture and ecology," and this was not fixed into traditional expressions as a matter of law.[686] The Province had argued that Blueberry had not defined their way of life, Justice Burke disagreed noting the Province's demand for Particulars in the Pleadings and Blueberry's detailed Response, included among other things,

> The primary cultural and economic activity that the Plaintiffs can no longer meaningfully pursue is the carrying on of a mode of life based on a fundamental reliance on lands and waters within the Territory and traditional patterns of land use while engaging in the meaningful pursuit of traditional activities including hunting, trapping, fishing, gathering plants and berries, camping, processing that which was harvested, spiritual practices, and family/educational practices, including the teaching and passing on of knowledge to younger generations of plaintiff members as to how this mode of life is or may be properly conducted and continued. The plaintiffs say that

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[683] *Ibid* at 165. The detailed history of Treaty 8 negotiations are at 144 to 168, Blueberry's adhesion is discussed at 169 to 173.
[684] *Ibid* at 175. She went on at 176 to state "my conclusions on the evidence and then review the jurisprudence on Treaty 8, which I have concluded, supports this determination."
[685] *Ibid* at 177 to 276.
[686] *Ibid* at 279. She noted this was consistent with the *Sappier; Gray, supra* note 267*,* enquiry into culture as simply an enquiry into "the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits" at 278.

> the holistic pursuit of this mode of life is a single cultural and economic activity, protected by Treaty 8 (the "Treaty"), that can no longer be meaningfully pursued.[687]

This was supported by Blueberry's witnesses and experts.

Drawing post-Treaty history, Justice Burke described the 1914 Reserve selection of Indian Reserve 172 known as "the Montney Reserve, and Suu Na chii K'chi ge in Dane-zaa…was a very important place both ecologically and culturally to Blueberry's ancestors and to its members today."[688] They were displaced from their lands twice, once in 1940's where the IR 172 was surrendered to the Crown and provided to veterans for settlement, and secondly in the 1970's as a consequence of a sour gas leak where they moved away from the river to another location in their current reserve.[689] The Alaska Highway through the region opened their lands to settlement, oil and gas companies began exploration in 1940's and once discovered in the 1970's they were extensively developed.[690]

The Province had emphasized that Treaty 8 had always contemplated land use changes, but Justice Burke resisted that interpretation, particularly given that the,

> …change foreshadowed by the Treaty cannot be understood as eviscerating the fundamental promise that Indigenous peoples' way of life would not be interfered with. …The Indigenous people specifically confirmed that the Treaty would be forever. The Treaty was made to preserve and protect certain rights in the face of change; not to see those rights erased by a tide of change. While change was foreshadowed, these cannot be empty promises.[691]

Test for Infringement of Blueberry's Treaty Rights

Justice Burke addressed this in several parts: firstly, an enquiry as to scope of Blueberry's traditional territories, secondly, a determination of the extent of industrial disturbance, thirdly, the impacts of that disturbance on Treaty rights, as the Province argued those rights could be exercised in in a disturbed area, fourthly whether the Province's actions have contributed to this situation, including an assessment of Provincial regulatory regimes and finally potential Provincial justifications for those actions.[692]

Before this, one of the central points of dispute was the applicable test for infringements of treaty rights. Blueberry said the framework for determining infringement of aboriginal rights, including

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[687] *Ibid* at 293. See also 294 to 297.
[688] *Ibid* at 284.
[689] *Ibid* at 285 and 287, the Blueberry Elders interviewed by the Plaintiff's experts in the 1960's and 70's "spoke about not understanding the transaction involving IR 172 and why this was no longer their land." Other Blueberry witnesses spoke about the "old reserve" in the relocation in the 1970's.
[690] *Ibid* at 284 to 289 briefly summarized this history, which was expanded by Blueberry witness and their experts from 307 to 493 to support the Blueberry way of life. Another change was the imposition of registered traplines in the 1920's in response the white fur trappers encroaching Blueberry lands.
[691] *Ibid* at 198 to 199, see also 117, 216, 305, 438 "While change was foreshadowed, this was only to the extent it did not interfere with Blueberry's ability to maintain this mode of life and meaningfully exercise rights protected by the Treaty."
[692] *Ibid* at 440 to 444.

Treaty rights, remains the Supreme Court ruling in *Sparrow* while the Province argued *Mikisew* had moved away from and modified the *Sparrow* test when it comes to the infringement of treaty rights, and the test is now whether "no meaningful right" to hunt, fish or trap remains.[693]

Justice Burke noted the parties had agreed that *Mikisew* applies and Blueberry bears the burden of proof of infringement in this case, she said,

> [a]s I understand their arguments, Blueberry's application of the test focuses on the meaningfulness of the exercise of rights, and the Province's application focuses on whether rights remain. While the Province says its position is not that "no meaningful right" to hunt, fish or trap must be established to find an infringement, the effect of its argument will be examined as part of the Court's analysis.[694]

To address this difference, Justice Burke reviewed the jurisprudence saying the *Sparrow* (1990) justificatory test was the first Supreme Court case to consider infringement of aboriginal rights: because no rights were absolute *Sparrow* expressed when aboriginal rights could be infringed. The *Sparrow* test involved two parts; firstly, whether an aboriginal right was infringed invited three questions: "First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?", and in her elaboration of the case these questions had to be proven by the claimant; and the second part involved the government's justification of the infringement.[695] The Supreme Court extended the application of the *Sparrow* test, in the 1996 *Badger* case to the infringement of Treaty Rights, with Justice Cory noting that,

> … that both Aboriginal rights and treaty rights are *sui generis* [unique] and both engage the honour of the Crown. The wording of s. 35(1) supports taking a common approach to infringements of Aboriginal and treaty rights (at para. 79). Justice Cory at para. 82 noted it was "equally if not more important to justify prima facie infringements of treaty rights."[696]

Justice Burke noted that the *Sparrow/ Badger* test of infringement was applied in the 1999 *Marshall* case regarding the interpretation of the *Mi'kmaq Treaties of 1760-61*,[697] as to *Mikisew*, Justice Burke said as the case progressed, it was transformed into a case requiring consultation in Treaty circumstances where the Province proposed to exercise its right under the Treaty "taking up clause."[698] She noted,

> [t]he *Sparrow* framework for infringement can and has been modified to fit the circumstances of given cases. It has been broadened to consider the effects caused by a regulatory regime (*Gladstone*, see also *Ahousaht*), as opposed to a specific provision. The regulatory and legislative context is relevant to understanding how the infringement arises. Context can also be relevant to

[693] *Ibid* at 445 to 446.
[694] *Ibid* at 447.
[695] *Ibid* at 448 to 445, noting that the *Sparrow*, *supra* note 74, questions were examples of factors to consider in the infringement of aboriginal rights, *Yahey* at 459 to 463.
[696] *Ibid* at 455, see 456 to 458.
[697] *Ibid* at 464 to 468.
[698] *Ibid* at 469 to 484, This included an elaboration of the *Halfway River First Nation*, *supra* note 143 at 469 to 475.

> understanding the effect and significance on the exercise of Aboriginal or treaty rights of a specific regulatory regime or proposed development. While the Province argues that challenges to specific aspects of a regulatory regime can and should have been addressed by way of judicial review and not in a trial, the Supreme Court of Canada has indicated that a treaty infringement claim should be dealt with in an action.[699]

With this in mind, Justice Burke turned to a determination of the test for the breach of Treaty Rights. Blueberry maintained that,

> …the Sparrow/Badger test for infringement applies, and that *Mikisew* must be considered in its jurisprudential context, with an eye to the purpose of the protection of Aboriginal and treaty rights in s. 35 and to the nature of the promise contained in the Treaty.
>
> [491] It says the way to interpret and apply the Court's statement at para. 48 of *Mikisew* that a potential action for treaty infringement arises if "no meaningful right" remains, is to focus on whether there is no meaningful right left, not on whether the rights can be exercised at all.
>
> [492] To be meaningful, Blueberry says, its members must be able to exercise their rights as part of a mode of life that has not been significantly diminished. Focussing on whether its mode of life has been significantly diminished, says Blueberry, is important in a case such as this, where the allegation of infringement isn't made with respect to one specific interference with the right to hunt, fish or trap, but rather with the cumulative effects of hundreds or thousands of interferences with Blueberry's exercise of rights.[700]

The Province,

> …maintains the legal test for a claim of infringement of Treaty 8 rights is now expressly set out by the Supreme Court of Canada in *Mikisew*, and takes into account the Province's right to take up lands from time to time.[701]

Justice Burke disagreed with the Province's position, citing Justice Greckol's concurring judgement in *Fort McKay v Prosper* where he said at 81,

> …the Crown's obligation to ensure the meaningful right to hunt under Treaty 8 is an *ongoing* one.

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[699] *Ibid* at 488. This was after noting the decision in *Morris, supra* note 75, post *Mikisew*, *supra* note 114 that involved a breach of the Douglas Treaties and section 88 of the *Indian Act*, and the *Grassy Narrows*, *supra* note 70 that involved a taking up by Ontario that referenced the *Mikisew*, *supra* note 114, test.

[700] *Ibid* at 490 to 492.

[701] *Ibid* at 493 to 495. Blueberry was critical of the Provinces approach saying "the Province is essentially starting at nothing (i.e., no rights) and is "counting up from nothing" to find specific instances of Blueberry members exercising their treaty rights, thereby confirming the Province's position that rights remain. Blueberry argues the Court should start from the premise that their way of life was not to be interfered with and that their rights were to be protected by the Treaty and, weighing the evidence of loss and conducting a qualitative assessment, determine whether there has been a significant diminution or significant diminishment in Blueberry's way of life" at 496. The Province responded citing *Prophet River First Nation v. Canada (Attorney General),* 2017 FCA 15, at 34 to say the Court "has moved away from the *Sparrow*-based infringement approach and imposed on the Crown a duty to consult and accommodate prior to taking up lands … The obligation to consult is imposed as a serious and substantive restraint on Crown action, and was developed and applied to avoid infringements."

> Proper land use management remains a perennial concern for the Crown, as "none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint": *Mikisew 2005* as [sic] para. 27. Reconciling this "inevitable tension" (para 33) between Aboriginal rights and development in Treaty 8 territory has, first and foremost, been a matter of the Crown adhering to its duty to consult on individual projects, as mandated in *Mikisew 2005*. Acting honourably in this fashion has promoted reconciliation, in part, by "encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims" (*Mikisew 2018* at para 26), much as *Haida Nation* had counselled with respect of unproven Aboriginal rights claims. And yet, as this record itself attests, the long-term protection of Aboriginal treaty rights, including the right to hunt under Treaty 8, is increasingly thought to require negotiation and just settlement of disputes outside the context of individual projects in order to address the *cumulative effects* of land development on First Nation treaty rights.[702]

She said that the Province's reliance on the duty to consult to prevent infringements,

> …however, presupposes both the ability of those consultation processes to consider and address concerns about cumulative effects as opposed to simply single projects or authorizations, as well as the success of those consultations.
>
> [501] As a myriad of cases have shown, consultation is often marred by both procedural and substantive defects. While the obligation to consult is important, it does not erase the right of a First Nation to bring an infringement claim when it believes the promises made in Treaty 8 are now in question and that it is reaching the point where it can no longer meaningfully exercise rights in its territory. It cannot be that the consultation duty outlined in *Mikisew* precludes a First Nation from bringing an infringement claim in appropriate circumstances, or that it has to wait until it has no ability to exercise rights to do so.[703]

Justice Burke said that "[w]hile *Mikisew* is of undoubted importance to this case, it is difficult to rely on it as a guide to the infringement analysis, since it was not decided on that point,"[704] and "[a] more nuanced and contextual understanding of what the Supreme Court of Canada meant when it said the search was to see if "no meaningful right …remains" is appropriate."[705] She interpreted *Mikisew* as saying,

> … two things which, together, suggest that courts should consider the context within which an infringement claim is made and should take into account the cumulative effects of previous developments. First, Justice Binnie noted that not every taking up will constitute an infringement (at para. 31); and second, he recognized that "if the time comes" when a First Nation can no longer meaningfully exercise its rights, a potential action for infringement would be a legitimate response (at para. 48).[706]

The statement that "if the time comes" implies a tipping point after which development would render the exercise of treaty rights either becomes less meaningful or impossible, which was

[702] *Ibid* at 499 [Emphasis in the original]
[703] *Ibid* at 500 to 501
[704] *Ibid* at 504.
[705] *Ibid* at 515.
[706] *Ibid* at 516.

recognized in the leave to appeal decision in *Fort McKay v Prosper* and in the concurring judgement of Justice Greckol in the subsequent hearing of that appeal, when he stated,

> [t]his raises the prospect that the effects of any one "taking up" of land will rarely, if ever, itself violate an Aboriginal group's Treaty 8 right to hunt; instead, the extinguishment of the right will be brought about through the cumulative effects of numerous developments over time. In other words, no one project on FMFN's territory may prevent it from the meaningful right to hunt – however, if too much development is allowed to proceed, then, taken together, the effect will be to preclude FMFN from being able to exercise their treaty rights. … the "promise" of hunting – given the reality of large-scale oil and gas developments in Treaty 8 territory, which is incompatible with Aboriginal hunting – is not fulfilled definitively. Rather, the promise is easy to fulfill initially but difficult to keep as time goes on and development increases."[707]

Justice Burke, noting that *Mikisew* "did not precisely define the degree of interference that would amount to an infringement of a treaty right within the *Sparrow* framework … [w]hile having "no meaningful right" left would no doubt constitute a *prima facie* infringement of treaty rights, the question is what level of interference less than extinguishment would constitute an infringement …. The concept of infringement exists in the middle ground between no interference with an Aboriginal or treaty right and extinguishment of the right." [708] After canvassing case law on infringement, and arguments she said,

> I conclude that the appropriate standard through which to consider the question of infringement in this case is: whether Blueberry's treaty rights (in particular their ability to hunt, fish and trap within their territories) have been significantly or meaningfully diminished when viewed within the way of life from which they arise and are grounded. In other words, can Blueberry members hunt, fish and trap as part of a way of life that has not been meaningfully diminished?[709]
>
> [542] As noted earlier, Blueberry alleges that it is the Province's express actions as well as its nonfeasance that has caused this infringement. Specifically, Blueberry says it is the cumulative impact of forestry, oil and gas, hydro-electric infrastructure and agricultural development authorized (and at times promoted) by the Province, while failing to prioritize or respect treaty rights, that Blueberry says has caused the infringement.
>
> [543] In the context of this claim, the infringement analysis also requires inquiries into:
>
> a) whether the provincial regimes for managing natural resources and taking up lands in northeastern BC, and in particular in the Blueberry Claim Area, give decision-makers unstructured discretion that risks significantly or meaningfully diminishing and therefore infringing treaty rights;
> b) whether the regulatory regimes operate in such a way that they significantly diminishes the Plaintiffs' treaty rights. As noted in *Ahousaht* at para. 757, this question incorporates the three *Sparrow* questions: is the limitation unreasonable; does it impose undue hardship; and does it

[707] *Ibid* at 519, this compresses extracts from Justice Greckol concurring judgement in *Fort McKay v Prosper, supra* note 346, at 79 to 80.
[708] *Ibid* at 522 to 540. See also 529 "I find it appropriate to consider whether there has been an infringement of Blueberry's treaty rights by considering if there has been a significant or meaningful diminishment of the rights."
[709] *Ibid* at 541 to 543.

deny the holders their preferred means of exercising their rights;

c) whether existing policies and decision-making frameworks for managing natural resources and taking up lands in the Blueberry Claim Area recognize and seek to implement the rights contained in Treaty 8 and guide the exercise of discretion; and,

d) whether the regulatory regimes for managing natural resources and taking up lands in the Blueberry Claim Area, have mechanisms to assess cumulative impacts, take into account cumulative impacts on the exercise of Treaty 8 rights, and manage in a way to avoid infringements resulting from cumulative impacts that could significantly diminish rights to hunt, trap and fish within a way of life protected by Treaty 8.

Blueberry Traditional Territory

Justice Burke, noting that *Mikisew* was not concerned with Treaty 8 rights but only territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today, she set out to define Blueberry's traditional territory. Blueberry had appended a Map of its Traditional Territory in its claim which Justice Burke described as the Blueberry Claim Area.[710]

Blueberry commented on the Blueberry Claim Area: firstly, it only represented a portion of the area that their ancestors had exercised their Treaty rights; secondly, the Blueberry Claim Area reflected their post treaty land use areas from a semi-nomadic to semi-settled way of life; and thirdly, their current way of life focusses on what they described as their core territories which have been under pressure by development such that they cannot meaningfully exercise their Treaty Rights in these core areas – they "ought to be able to rely on areas outside the Blueberry Claim Area, but should not be relegated to those areas."[711] The Province's main positions is that the Court does not need to determine Blueberry's Traditional Territories as members still have a meaningful ability to exercise their rights in the Blueberry Claim Area, alternately they would still have Treaty rights in the broader asserted Traditional Territories (194,000 square kilometres) when Treaty 8 was entered into, and Blueberry's concept of core areas was not contemplated in *Mikisew*.[712]

Justice Burke referred to the duty to consult jurisprudence saying the determination of traditional territories was an important component of fulfilling the duty to consult, and likewise was central in this infringement case.[713] In doing so, she said at 574,

> In determining traditional territories, the court must consider the nature of a First Nation's society.

[710] *Ibid* at 544 to 547.

[711] *Ibid* at 548 to 553. They also noted that the Blueberry Claim Area overlapped the Province's Consultation Area A reflecting the Provinces assessment that this area evidenced the strongest area of historical uses..

[712] *Ibid* at 554 to 557.

[713] *Ibid* at 561 "Knowing the areas used for the exercise of rights is also important in a consultation setting, since the Crown's right to take up lands under Treaty 8 is subject to its duty to consult and, if appropriate, accommodate. The Crown must consult before reducing the area over which a First Nation's members may continue to pursue their hunting, trapping and fishing rights [*Mikisew*, supra note 114] at 56. This consultation is premised on knowing the area used. See also 573 "The location and extent of Blueberry's traditional territories is important both for purposes of consultation and for purposes of adjudication. While the Province says Blueberry can still exercise its rights and continues to do so today, the Court must know the areas used by Blueberry for the exercise of its rights for the purposes "of the infringement analysis in this case.."

> Delineating the traditional territories of a semi-nomadic society and assessing whether treaty rights have been infringed may well require different considerations than for non-nomadic groups. Looking at patterns of use may be more important than focussing on boundaries. That rights can no longer be meaningfully exercised within specified areas of a First Nation's traditional territories (for example, in areas of particular ecological, cultural or spiritual significance to the First Nation historically and today) might also be sufficient for finding an infringement. The areas may be insufficient in area and character to provide for the meaningful exercise of Treaty rights.

Prior to doing this, she explored the correlation between traditional territories and provincial Consultation Maps maintained in a provincial database intended to guide the provincial Crown as to areas where the duty to consult was triggered.[714] On October 17, 2012, Blueberry wrote to the Province and attached a map of its traditional territories, with an enclosed TLU study by Dr. Dorothy Kennedy and Randy Bouchard ("Kennedy and Bouchard Report") and the Province responded with a three part consultation map with area A demarking deeper consultation, dependent on the project and Area B and C requiring notification only consultation – notably Area A covers most but not all of the Blueberry Claim Area.[715]

Justice Burke observed that,

> [591] *Mikisew* does not set the scale at which an infringement claim can be pursued. I do not interpret *Mikisew* and the cases that have followed as requiring a First Nation, when bringing an infringement claim, to do so in relation to the whole of the territories it traditionally used and continues to use today. A First Nation may be entitled to bring a claim in relation to one or more significant portions (whether culturally, spiritually or ecologically) of its traditional territories, including its "core" areas.
>
> [592] It may be that an area within its traditional territory (for example a particular watershed) is an important location for the exercise of certain rights, and that development activities planned for that location risk infringing those rights. The First Nation would be entitled to bring an infringement claim, in relation to that portion of its traditional territories. Nothing in para. 48 of *Mikisew* precludes a First Nation from bringing a claim in relation to a specific area within the territories over which it traditionally hunted, fished and trapped, and continues to do so today. Moreover, in my view, this approach gives meaning to the Supreme Court of Canada's insistence that patterns of activity and occupation matter, as it recognizes the importance to First Nations of specific locations.

Consequently she did not accept the Province's position that a First Nation "cannot bring a claim to a core or preferred area of its territory. Specific areas have significant value."[716] Arbitrary boundaries are inconsistent with Indigenous land use, but in this case it is legally required.[717]

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[714] *Ibid* at 575 to 577.
[715] *Ibid* at 578 to 583. At 580 "The Province had reviewed and considered the Kennedy and Bouchard Report, and … agreed it provided "a credible analysis of known historical sources…The Province agrees with the Report findings that the sources of historical documented use by BRFN are strong in some areas and weaker in others, and is of the view that Area A represents the area historically used by BRFN ancestors, as described in the Report."
[716] *Ibid* at 594. This was supported by a Blueberry witness at 593.
[717] *Ibid* at 599. Indigenous perspective covered is at 600 to 613. Justice Burke, noting the overlap with other First Nation's Consultation Areas in the Provincial database, said this was not a case about aboriginal title, governed by

Justice Burke divided Blueberry's use into four general categories: prior to treaty as a semi-nomadic peoples as detailed in the Kennedy and Bouchard Report (contact in the 1700's to 1900); post treaty as they transitioned to a semi-settled people with use radiating out from their Reserves within easy travel, as detailed in Blueberry's expert witness Dr. Ridington (1900 to 1970); this continued in the 1970s to the 1980's as detailed in Blueberry's expert witness Mr. Brody; and the current use by Blueberry elders and members who testified to ranging farther afield as development enclosed many of the core areas they had relied upon in the past.[718] She decided as a fact that the Blueberry Claim Area represented their "traditional territories."

Yahey's approach to defining traditional territories in considering use over time is, we would suggest both legally correct and sensitive to Indigenous perspectives

Blueberry Infringement Evidence

Justice Burke, having determined Blueberry's traditional territories, turned to key wildlife indicators and then assessed the data regarding the disturbance in the Blueberry Claim Area. While Blueberry members harvested a wide variety of species, key species included: caribou, moose, and furbearers, including marten and fisher, and they were all in decline with evidence of that decline being established by experts, lay witnesses and official provincial information.[719]

The Province had denied that "some of the subject species are actually in decline in the Blueberry Claim Area. The Province contends that, where species are in decline, causation cannot be made out. The Province points to non-industrial factors, which vary between species, but that broadly include increased predation, natural forest fires, climate change, and more."[720]

Justice Burke turned to the standard of proof, including what the Plaintiff must meet and what exactly they were trying to prove, noting that:

> Blueberry seeks to establish that the decline of various species within the Blueberry Claim Area, chiefly moose and caribou, are the result of industrial development. The Province argues that while wildlife decline in the Plaintiffs' territory may be correlated with industrial development, the evidence does not show a causal relationship, i.e., that wildlife decline is actually the result of extensive industrial development.[721]

Delgamuukw, supra note 74, with its requirement for exclusive occupancy occupation prior to the assertion of European sovereignty, nor need it show sufficiency, continuity and exclusivity of occupation over the whole of its territory. Its task here is to bring forward evidence of the areas its ancestors traditionally used, including information about the specific activities undertaken and relevant patterns of use, for the purpose of their infringement claim, at 610.

[718] *Ibid* at 614 to 649. Many of Blueberry's witnessed overlapped this time frame, for example the Kennedy and Bouchard Report detailed land use up to the 1930's and Blueberry elders recall land use from the 1960.

[719] *Yahey, supra* note 125 at 660 to 671.

[720] *Ibid* at 672 to 674.

[721] *Ibid* at 676

Justice Burke said, Blueberry tendered a substantial volume of scientific evidence on the causal connection between industrial development and wildlife decline, however scientists work to a different standard of proof than the courts because it does not require proof to a standard of scientific precision or certainty, and as this was a civil case causation need only be demonstrated by the balance of probabilities.[722] She noted that,

> Causation in the context of a cumulative effects claim is something of a novel or currently developing issue at law, and one which was not fully litigated at trial. It is not necessary for me to fully explore it here. For now, it is enough to note that I am not tasked with determining whether industrial development is the *only* cause of wildlife decline, nor with resolving debates amongst the scientific community. I am tasked only with determining whether, based on the evidence before me and on a balance of probabilities, the Province's actions have caused, contributed to or resulted in an infringement of the Plaintiffs' rights which include the Province's actions in permitting the industrial development.[723]

Ultimately, Justice Burke determined that key species had declined over the Blueberry Claim Area "[o]verall, it is clear that wildlife populations that are important to Blueberry are in a reduced state that is likely to interfere with Blueberry's hunting and trapping rights. The evidence establishes that the declines are the result of anthropogenic disturbance, including industrial development impacts upon habitat." [724]

In terms of impacts of industrial development, the Province disputed this and Justice Burke clarified the meaning of "disturbance" as including anthropogenic disturbance together with natural impacts like forest fires, landslides and pests, saying by overlapping these measures it would be possible to see the comprehensive disturbance footprint.[725] Blueberry had submitted testimony from their witnesses and experts, expert reports, maps, their own studies including those prepared by Ecotrust Canada entitled *Atlas of Cumulative Landscape Disturbance in the Traditional Territory of Blueberry River Fist Nations, 201*6 ("2016 Atlas") which had been submitted as part of the Province's 2016 *Regional Strategic Environmental Assessment* process (RSEA) intended to guide provincial decision makers as well as provincial documents which were

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[722] *Ibid* at 678 citing *Snell v Farrell*, 1990 CanLII 70 (SCC) [*Snell*], *Clements v. Clements*, 2012 SCC 32; *Ediger v. Johnston*, 2013 SCC 18. [*Ediger*]

[723] *Ibid* at 679. With several other evidentiary rulings, in aboriginal cases flexibility was required in Snell, given the specialized nature of the evidence she can rely on expert testimony for inferences and opinions on causation that said the presence or absence of evidence from an expert is not dispositive as causation can be inferred, even in the face of expert testimony from other evidence – even circumstantial evidence. Finally from *Ediger* she could make an adverse inference against a defendant if they did not provide enough evidence to disprove the plaintiff causation arguments, noting that the Province held a significant informational advantage.

[724] *Ibid* at 683 to 811.

[725] *Ibid* at 812 to 815. "One of the reports in evidence in this case – Blueberry Cumulative Effects Case Study, prepared for the Oil and Gas Commission by Salmo Consulting in January 2003 – defines disturbance as "a natural or human action that affects physical, chemical or biological conditions." A disturbance feature is defined as "a corridor or patch created by natural random events (e.g., burn or flood) or human action (e.g., cutblock, facility, community, road)." These definitions are possible descriptions of what might be considered a disturbance."

all accepted under the public document exception to the hearsay for the truth of their contents including documents submitted in the RSEA process.[726]

The ongoing RSEA was the result of a "broad collaborative planning process involving seven Treaty 8 First Nations and the Province, and also includes representatives from industry (primarily from the forestry and oil and gas sectors) as observers. Blueberry joined … in 2016" and is currently working on a cumulative effects framework.[727] Early in the RSEA process the parties recognized the need for a common dataset of disturbances and the province engaged consultants in 2017 that worked with the parties to develop a disturbance layer and dataset that was distributed to the parties in 2018 and was an exhibit in evidence.[728] As part of that process Dr. Holt, called as a fact witness, instructed a Geographical Information System [GIS] technician to calculate the disturbance area within the Blueberry Claim Area with a 250 m and 500 m buffer – and the "results of these calculations indicated that 85% of the Blueberry Claim Area is within 250 metres of a disturbance, and 91% of the Blueberry Claim Area is within 500 metres of a disturbance."[729]

This was supported by others studies in evidence and Justice Burke concluded that was a valid measure of industrial disturbance in the Blueberry Claim Area,[730] she had considered the Province's objections, and canvassed provincial arguments in detail and found them wanting.[731]

Justice Burke turned to the province's position that not all disturbances constitute lands "taken up" under the Treaty, citing *Badger* for the proposition that Indigenous peoples would consider land had been "required or taken up" when it was visibly being put to a use that was incompatible with the exercise of their rights. She found that the Treaty 8 promises were not being met in the Blueberry Claim Area when over 90% of that was within 500 metres of a disturbance.[732] Justice Burke rejected the Province's argument that Blueberry Members were still able to exercise their rights, submitting extracts from the discovery evidence that summarized their current harvesting activities and implying that Blueberry had not canvassed all of its members,

> I must consider the evidence as a whole, and consider the Indigenous perspective. I do not accept that the only conclusion to be drawn from the specific instances of the exercise of rights referred

[726] *Ibid* at 816 to 855. Although Blueberry did not rely on any *one* of the provincial documents they formed a pattern to support the infringement analysis. Justice Burke noted that the Province had the opportunity to call the authors of those provincial documents to provide contrary evidence but failed to do so.
[727] *Ibid* at 867 to 878.
[728] *Ibid* at 868 to 899.
[729] *Ibid* at 888 to 889, Dr Holt status ruled on at *Yahey* at 664 to 667. She noted that "zones of disturbance" was widely accepted in federal and provincial regulation.
[730] *Ibid* at 900 to 913. She noted at 905 that "the 2016 Atlas demonstrates, that based upon the data available as of January 2016: a) 73% of the Blueberry Claim Area is within 250 metres of an industrial disturbance; and, b) 84% of the Blueberry Claim Area is within 500 metres of an industrial disturbance."
[731] *Ibid* at 914 to 1058. The disturbance datasets and disturbance layer have been created as part of a collaboration between the Province and Treaty 8 Nations, along with stakeholders. The data was intended to be accessed and used for the management of the land. It has been subject to quality assurance and cannot be so easily dismissed. The Province, which is the custodian of this data, has not shown any great magnitude to their criticisms. The evidence therefore must be given significant weight with awareness of the limitations expressed. (at 1058)
[732] *Ibid* at 1059 to 1077.

> to by the Province is that the rights have not been infringed. The members' evidence of loss, together with the disturbance data and evidence about the status of wildlife populations in the Blueberry Claim Area, supports a finding that there has been a significant and meaningful diminishment in the Plaintiffs' way of life, and that their treaty rights to hunt, trap and fish have been infringed.[733]

Her conclusions on infringement are summarized in the Overview above, and in

> [1129] The evidence from Blueberry members about the loss of their ability to exercise their rights as part of their way of life, together with the evidence about the disturbance of the land and the status of wildlife populations in the Blueberry Claim Area, leads me to conclude that the time has come that Blueberry can no longer meaningfully exercise its treaty rights in the Blueberry Claim Area. Their rights to hunt, fish and trap within the Blueberry Claim Area have been significantly and meaningfully diminished when viewed within the context of the way of life in which these rights are grounded.
>
> [1130] Their way of life which is dependant on healthy mature forests, a variety of wildlife habitats, fresh clean water and access to these places are threatened by the level of disturbance from industrial development in the Blueberry Claim Area. Their ability to hunt, fish and trap in this context is also threatened.
>
> [1131] I conclude due to the level of "taking up" caused by Provincially authorized activities, including resulting disturbance, the impact on the wildlife, and the evidence of Blueberry members that there are not sufficient and appropriate lands in Blueberry's traditional territories to permit the meaningful exercise of their Treaty rights.
>
> [1132] I conclude therefore that Blueberry members' rights to hunt, fish and trap as part of their way of life have been significantly and meaningfully diminished. Blueberry's rights under Treaty 8 have therefore been infringed.[734]

Province's Failure to Diligently Implement Treaty 8

Blueberry sought not only a declaration that the Province had infringed some or all of its treaty rights, which was granted above, but also sought declarations that the Province: a) breached its obligations to Blueberry under the Treaty; and b) breached its fiduciary obligations to Blueberry.

Justice Burke described Blueberry's argument that "the Province breached its obligations under the Treaty by failing to diligently implement the Treaty's promise to protect Blueberry's rights and way of life from the encroaching cumulative impacts of industrial development. These arguments are based on the honour of the Crown and (to a lesser extent) the Crown's fiduciary duty."[735] She particularized Blueberry's argument, after an intervening recap of the relevant jurisprudence, saying in general that Blueberry argued,

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[733] *Ibid* at 1078 to 1114.
[734] *Ibid* at 1115 to 1132.
[735] *Ibid* at 1134 to 1135.

> …the honour of the Crown gives rise to a positive obligation on the Province to implement Treaty 8. It must act to accomplish the purpose of the Treaty and of the solemn promise given, and it must do so with diligence. Blueberry argues that implementing the Treaty promise means that before the Province authorizes land uses in the areas Blueberry relies on, it must put in place measures to ensure the essential elements of the Treaty will not be violated. In other words, the Province has a positive duty to protect treaty rights, and its management of the lands and resources should reflect this.
> …
> Blueberry says the search to see if the Crown has honourably upheld its treaty obligations involves looking for persistent patterns of errors and indifference that frustrate the purpose of the solemn promise. Here, says Blueberry, the Province has failed to act with diligence, or at all, to address Blueberry's concerns, protect Blueberry's treaty rights or uphold the treaty promise, with the result that the Province has breached its duty to implement the Treaty.
>
> [1168] In particular, Blueberry says the Province has failed to:
>
> a) develop processes to assess whether the ecological conditions in Blueberry's traditional territories are sufficient to support Blueberry's way of life;
> b) develop processes to assess or manage cumulative impacts to the ecosystems in Blueberry's traditional territories and/or on their treaty rights;
> c) implement a regulatory regime or structure that will take into account and protect treaty rights, and that will guide decision-making for taking up lands or granting interests to lands and resources within Treaty 8; and,
> d) put in place interim measures to protect Blueberry's treaty rights while these other processes are developed.
>
> [1169] Blueberry goes on to allege that, since none of the above measures have been developed or implemented, and since development has continued to proceed in the absence of protections for its treaty rights, the Province's approach to forestry, hydro-electric development, land use planning, agriculture, and oil and gas development breaches the Treaty and the Crown's solemn promise that Blueberry would not be interfered with in their way of life. Blueberry's argument and evidence focussed on forestry, land use policy and oil and gas development.[736]

The Province argued it recognized the honour of the Crown is engaged in treaty implementation and speaks to how the Crown's obligations are to be fulfilled, while the proper approach in this case was to consider the Crown's conduct as a whole, and ask whether it acted with diligence to pursue the fulfillment of the purposes of the Treaty obligation and the Province had met them in this case.[737] Further,

> [1173] The Province ties the honour of the Crown to the duty to consult, not a fiduciary duty. It argues that Blueberry is conflating the honour of the Crown that is applicable before an infringement, and the fiduciary duty that is applicable after an infringement. …

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[736] *Ibid* at 1165, 1167 to 1169. The recap of the relevant jurisprudence is at 1136 to 1164. Noting the honour of the Crown was foundation and was referenced as far back as 1895 in decision of the Supreme Court in *Province of Ontario v. The Dominion of Canada and Province of Quebec*, 1895 CanLII 112 (SCC), [1895] 25 S.C.R. 434, by Justice Gwynne of the Supreme Court of Canada (writing in dissent) who evoked the concept of the honour of the Crown to explain the Crown's approach to treaty making and interpretation at 1137.
[737] *Ibid* at 1171 to 1172.

> [1174] Moreover, it says there is no duty for the Province to implement regulatory policies that place Blueberry's views as the paramount views. It has no duty to implement the kind of "fettered regulatory structure" Blueberry seems to be seeking. The Province says that Blueberry's complaint is with the Province's policy decisions regarding the management of wildlife and natural resources.
>
> [1175] As to the fiduciary duty, the Province emphasizes that the Crown's fiduciary duty does not exist at large, but in relation to specific interests, such as reserve lands. The Province notes that in order to attract a fiduciary duty, the First Nation must identify a "specific or cognizable Aboriginal interest" in relation to which the duty is owed. It says the interest must be a communal Aboriginal interest in land that is integral to the nature of the Aboriginal community and their relationship to the land. This interest must be predicated on historical use and occupation, and cannot be established by treaty or legislation.
>
> [1176] The Province seems to be suggesting that in this case, Blueberry has not identified a specific or cognizable interest over which the Province has assumed discretionary control. The Province also points out that the Crown has responsibilities to the public as a whole. It is no ordinary fiduciary; it wears many hats, some of which may be conflicting.[738]

Justice Burke in addressing these arguments turned to considering the various regulatory regimes the Province has put in place to manage oil and gas development, forestry, wildlife, the impacts of industrial development in the Blueberry Claim Area, and whether these regimes consider Blueberry's Treaty rights, and whether the Province has acted diligently in doing so.[739]

Oil and Gas Development

The Province led evidence as to how oil and gas development in the Blueberry Claim Area worked: this was a two stage process, granting tenure in the subsurface recourses, and managing development by the Oil and Gas Commission – both of which had no effective means of considering Blueberry Treaty rights or regulating development in this regard.[740] Justice Burke, have extensively considered the Province's evidence and Blueberry's experience concluded, "[i]n sum, the Province has no substantive measures in place to protect the Blueberry Claim Area against cumulative impacts from oil and gas development. The Province also scarcely considers treaty rights in its oil and gas regime."[741]

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[738] *Ibid* at 1173 to 1176. Interestingly aside from the one reference to *Morris, supra* note 75, at 485, there was no discussion of the current section 88 of the *Indian Act* which says in part, "88 *Subject to the terms of any treaty … all laws of general application from time to time in force in any province* are applicable to and in respect of Indians in the province,…"

[739] *Ibid* at 1177 to 1178. She noted this was not an enquiry as to the provinces policy choices in managing development as this was a case about Blueberry members ability to practice their Treaty rights at 1183 – which she had already determined were breached, noting Province's "regulatory regime controls development and impacts in the Blueberry Claim Area. Whether and how the regulatory regime considers treaty rights is an essential underpinning question as to whether the Crown has diligently implemented the Treaty" at 1185.

[740] *Ibid* at 1190 to 1403 contains detailed evidence about this process.

[741] *Ibid* at 1404. She did, at 1417, laud recent efforts "particularly in the [RSEA] process, these initiatives have no definitive timelines and are ultimately discretionary. The Province continues to have all the power, and ultimately

Forestry Management

In terms of forestry management she found decision makers at all levels but noted the 1997 Cabinet level directive as to an "enhanced resource development" zone that covers approximately a quarter of the Blueberry Claim Area, the Chief Forester that sets an "allowable cut" and the special regime in the *Fort St. John Timber Supply Area* which directed forestry companies to develop a "sustainable forestry" plan.[742] After reviewing the details, Justice Burke agreed with Blueberry that the "Province's forestry regime is built upon the fundamental goal of maximizing harvest and replacing all the natural forests with crop plantations that will create efficiencies for the next harvest cycle."[743] She concluded that "[w]hile it would be helpful for the parties to continue in a collaborative process to change forestry practices for the better, the implementation of legal tools that take into account Blueberry's treaty rights in the Blueberry Claim Area, and that have legal effect, is critical."[744]

Cumulative Effects Framework

Justice Burke then considered the nascent efforts to manage cumulative effects, noting that the Province had made only paltry efforts in the past 10 years, for example in 2011 the Forest Practices Board released its special report entitled *Cumulative Effects: From Assessment Towards Management* that noted "there were methods for assessing these effects but, to the extent that there is an issue, there was "no one to tell – there is no decision maker in the context of cumulative effects."[745] The Province began to initiates studies to assess cumulative effects management in 2010, she cited the Auditor General's 2015 Report that said, among other things, there was a lack of clear direction from the responsible Ministry and this prompted the release in November 2016 of the *Cumulative Effects Framework Interim Policy for the Natural Resource Sector,* which meant the work of conducting assessments of the status of the identified provincial values and developing a management framework began.[746] The problem, identified by Blueberry was that framework lacked thresholds as well as enforcement mechanisms and Justice Burke agreed with that assessment – noting this demonstrates "the problem of persistent delay that threads many of the Province's actions and initiatives."[747]

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little incentive to change the status quo. There is a clear need for timely, definitive, enforceable legal commitments that recognize and accommodate Blueberry's treaty rights. The delay in implementing such legally enforceable commitments must therefore come to an end."

[742] *Ibid* at 1418 to 1427.

[743] *Ibid* at 1562, details are discussed at 1428 to 1561 and she notes the consistent pattern, much like the regulation of oil and gas development, of forestry decision makers passing on Blueberry concerns to another decision maker with no effective means of regulating the cumulative impacts at 1572.

[744] *Ibid* at 1586.

[745] *Ibid* at 1592 to 1593.

[746] *Ibid* at 1594 to 1608.

[747] *Ibid* at 1609 to 1630.

Wildlife Management

The primary tool used was land use designations by Ministerial decree with increasing restrictions on activities – but even the second most restricted designation that of Class A Provincial Parks still allows motorized recreational use and in any event permissive development can be made in these "protected areas."[748] Almost all of the Blueberry Claim Area did not fall within these protected areas, and those that did proffered little protection, leading Justice Burke to conclude that "the Province was unable to demonstrate effective tools existed to protect wildlife in the Blueberry Claim Area. Critically, a few of these legally designated protections exist in the Blueberry Claim Area, and many of the tools only limit and do not prevent industrial activity."[749] Other tools, included species specific recovery plans including the 2017 Boreal Caribou recovery plan that allowed forestry activities – even though the evidence was this was one of the most devastating impacts to caribou habitat and a draft unimplemented Moose Recovery Plan dropped in 2018, leading Justice Burke to conclude they were ineffective.[750]

Justice Burke concluded that "[o]verall, the Province has not demonstrated any substantive, concrete protections for wildlife or wildlife habitat within the Blueberry Claim Area." [751]

Province's Implementation of the Treaty

The law requires the Crown to act with diligence and integrity to implement, uphold and protect the purpose and promise of Treaty 8, at the time Treaty 8 was entered into in 1900, and for approximately 50 years thereafter Blueberry First Nation were able to exercise their way of life with little Provincial interference, but increasing development in the Blueberry Claim Area changed this in the next half century – a sacred promise was made that became increasingly difficult to fulfill as the years passed.[752] It was this difficulty, which Blueberry First Nation had notified the Province of for over 25 years, that should have required the Province to act with diligence and integrity to implement measures to protect Blueberry Treaty rights – they did nothing, or worse actively promoted development all the while dragging their feet.[753] Further,

> The problem with the Province's emphasis in this case that consultation is the route to protect treaty rights, is that despite years of engagement, their processes have not resulted in a consequential way to assess the cumulative effects of development in the Blueberry Claim Area.

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[748] *Ibid* at 1631 to 1652. For example designated Old Growth Forest Management Areas, which were critical habitat for Blueberry harvesting activities only lasted for 80 years as a "reserve" and then rotated to another designation that allowed forestry, see 1639 to 1641.
[749] *Ibid* at 1653 to 1662
[750] *Ibid* at 1663 to 1701. She did discuss the Provincial hunting regulations, including restriction on time and "bag limits at 1702 to 1709, with preferential treatment for Indigenous Hunters and gave example of the recent collaborative effort by Blueberry and the Wildlife Branch to change this – but as of the Trial few changes were approved.
[751] *Ibid* at 1713. She recounted her specific conclusions at 1710 to 1712.
[752] *Yahey* at 1724 to 1728 citing Justice Greckol concurring judgement in *Fort McKay v Prosper*, *supra* note 346, at 1714 to 1723.
[753] *Ibid* at 1729 to 1734.

> The processes do not consider the impacts on the exercise of treaty rights or implement protections other than occasional site-specific mitigation measures. The Province has long been on notice that a piece-meal project-by-project approach to consultation will not address Blueberry's concerns. To date, there is a lack of mechanisms to meet and implement the substantive rights and obligations contained in the Treaty.
>
> [1736] The Province rightly points out that the honour of the Crown speaks to how Crown obligations are to be fulfilled, and that the Court should consider its conduct as a whole, in the context of the case and ask whether it acted with diligence to pursue the fulfillment of the purposes of the obligation. I conclude on the evidence before me that it did not. As Blueberry points out, the Crown is to be held to its promise. As per *Restoule* at para. 567: "The duty of honour must find its application in concrete practices and in legally enforceable duties."
>
> [1737] The evidence in this case shows the Province has, for nearly twenty years, had information showing the significant level of disturbance within the Blueberry Claim Area, and that critical changes affecting Blueberry's ability to meaningfully exercise its treaty rights were occurring. The Province therefore had reasonable and credible notice that its own actions and inactions were putting it in potential breach of Treaty 8 by its failure to monitor cumulative impacts while continuing to permit and foster development in Blueberry's traditional territory. It therefore failed to act with diligence to ensure that despite the taking up of land, it protects the meaningful exercise of treaty rights, and this has resulted in an infringement of Blueberry's rights to hunt, fish and trap as part of their way of life.
> …
>
> [1749] I agree with the framing as set out in Blueberry's submissions that the Province had a practice of deferring real engagement and referring Blueberry to processes that were fledgling and inoperative rather than dealing substantively with their concerns about further development being continuously authorized.
>
> [1750] I find that the Province has, for approximately two decades, been aware that the cumulative effects of development in the northeast portion of BC were leading to changes in wildlife habitat and water quality that posed serious concerns, and that by the late 1990s much of the Blueberry Claim Area was being significantly impacted by industrial development. The Province has also, for at least a decade and likely more, had notice from Blueberry that it was concerned about the impacts of cumulative development in the Blueberry Claim Area, and on the exercise of their treaty rights. Despite having notice of Blueberry's concerns, I find that the Province has failed to respond in a manner that upholds the honour of the Crown and the obligation to implement treaty promises.
>
> [1751] I conclude that the existing processes for authorizing industrial development in the regulatory regime which the Province relies upon, do not ensure that the taking up of land protects the meaningful exercise of treaty rights. The provincial processes do not adequately consider treaty rights or cumulative effects and have contributed to the meaningful diminishment of Blueberry's treaty rights to hunt, fish and trap when viewed within the way of life from which these rights arise and are grounded.[754]

[754] *Ibid* at 1735 to 1751.

She recaps her specific findings on the Oil and Gas, Forestry Management, Cumulative Effects Framework, and Wildlife Management, and concludes as to diligent implementation,

> Based on the whole of the evidence, I find a persistent pattern of redirection on the part of government officials in resource sectors, … as well as those involved in Indigenous relations, telling Blueberry that its concerns regarding the cumulative effects of development on the exercise of its treaty rights would be addressed elsewhere, at other tables, through other policies or frameworks. These repeated responses, many of which were clearly a template response, …, reflected conduct that can be considered perfunctory. I conclude this is conduct that "substantially frustrates the purposes of a solemn promise" ... in particular, it frustrates the essential promise of the Treaty.
> …
> [1780] In addition, while certain officials appeared sincere in recently trying to address these concerns, they candidly admitted they had no tools to do so. The best they could do was "mitigate" an adverse effect. They could not say no to a permit or activity based on an identified concern about impacts on the exercise of treaty rights. That persistent reality has contributed to a compilation of adverse effects – or as is said – "death by a thousand cuts."
>
> [1781] The Province has not, to date, shown that it has an appropriate way of taking into account Blueberry's treaty rights, assessing the cumulative impacts of development on the exercise of these rights, and developing a way to ensure that Blueberry can continue to exercise these rights in a manner consistent with their way of life, such that the promises made in Treaty 8 can be upheld, implemented and respected today.
>
> [1782] The Province's existing process for authorizing industrial development does not contain sufficient or in many cases, any guidance for discretionary decision makers, to ensure the taking up of lands by industrial development protects the meaningful exercise of treaty rights. Meanwhile, as pointed out by Blueberry, the Province has continued to promote intensive use and authorized development on a project-by-project basis without regard to the scale of cumulative impacts on Blueberry's rights from forestry, oil and gas and other industries.
>
> [1783] I find that the Province's work on the development of a cumulative effects framework has been plagued by inordinate delay. …
> …
> [1786] I therefore conclude that the Province has breached its obligations to Blueberry under the Treaty in failing to act in accordance with the honour of the Crown to implement the Treaty promise that Blueberry's rights to hunt, fish and trap would continue and that its mode of life would not be forcibly interfered with. The Province has failed to diligently implement the Treaty promise to protect the Plaintiffs' treaty rights and ways of life from the cumulative impacts of development on the land.[755]

Justice Burke granted Blueberry First Nation's declarations, "that the Province has failed to:

a) develop processes to assess whether the ecological conditions in Blueberry's traditional territories are sufficient to support Blueberry's way of life;
b) develop processes to assess or manage cumulative impacts to the ecosystems in Blueberry's traditional territories and/or on their treaty rights;

[755] *Ibid* at 1779 to 1786

c) implement a regulatory regime or structure that will take into account and protect treaty rights, and that will guide decision-making for taking up lands or granting interests to lands and resources within Treaty 8; and,
d) put in place sufficient interim measures to protect Blueberry's treaty rights while these other processes are developed."[756]

Province's Fiduciary Duty and Justification Defence

Blueberry also sought a declaration that the Province had breached its fiduciary duties to them. Justice Burke noted that this argument was not expressed as clearly as their other arguments, although Blueberry did advise they intended to raise this issue in response to the Province's justification arguments –but the Province did not raise a justification defence.[757] In light of the Pleadings, she undertook a review of relevant jurisprudence that said the Crown's "*sui generis* [unique] fiduciary relationship with Indigenous people is about protecting the interests of Indigenous people, especially when the level of Crown discretion or control leaves their interests vulnerable to government ineptitude or misconduct… [that] includes the protection of Indigenous peoples' pre-existing, and still existing, Aboriginal and treaty rights within s. 35 of the *Constitution Act, 1982*."[758] Noting that Blueberry appears to rely on the fiduciary obligations attaching generally to s. 35 rights, although as the Province noted this duty only arises when the Crown assumes discretionary control over a specific or cognizable aboriginal interest, Justice Burke, citing *Williams Lake* at 53, considered that rights under s. 35 "satisfy the requirement of an 'independent legal interest' appears to be cognizable interest relied on by Blueberry – being a pre-existing legal interest in exercising their hunting, trapping, and fishing rights in their territory.[759] She turned to considering whether to Province had assumed or undertaken discretionary control in relation to Blueberry's rights to hunt, trap and fish, citing among others *Grassy Narrows*, and determined that the Province had,

…discretionary control in relation to Blueberry's treaty rights when it:
a) exercises its power to take up lands in the Blueberry Claim Area;
b) develops and implements natural resource decision-making structures that affect Blueberry's exercise of its rights; and,
c) makes individual natural resource decisions that affect the lands, water and wildlife Blueberry relies on for the exercise of their treaty rights.

Blueberry is correspondingly vulnerable to the Province's exercise of discretionary control.[760]

Having determined the Province was a fiduciary, and reviewing the relevant jurisprudence, she said in this case that "the Province's fiduciary duty required that it act with good faith to seek to

[756] *Ibid* at 1787.
[757] *Ibid* at 1788 to 1789.
[758] *Ibid* at 1790 to 1791. Citing *Tsilhqot'in, supra* note 69 and *Wewaykum Indian Band v. Canada,* 2002 SCC 79.
[759] *Ibid* at 1792 to 1793. This is an interesting interpretation, particularly given the Natural Resources Transfer Agreements (1930) transfer to the Prairie provinces, where in Clause 1 the interest of Canada in "all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, … belong to the Province, subject to any trusts existing in respect thereof, and *to any interest other than that of the Crown in the same.*"
[760] *Ibid* at 1798

address Blueberry's concerns regarding *the cumulative impacts of development* on the exercise of its treaty rights" and the evidence discloses a breach of that duty.[761]

Justification of Infringement Evidence

The Province ultimately did not lead any evidence as to the justification of the Provinces infringement of Blueberry's Treaty rights – although the Pleadings, litigation plan, Blueberry's and the Court's reasonable expectation was that the Province would do so.[762] It argued that "it could not justify any infringements of Blueberry's treaty rights until, first, the scope of the rights were known, and, second, the specific infringements were identified."[763]

The Court rejected the Province argument: firstly, the Treaty 8 promises were interpreted by a significant body of jurisprudence; and secondly, the Pleadings and Particular responses did disclose the scope of rights claimed and the Province was put on notice that justification for their infringements were anticipated, indeed the bulk of the Province evidence was tendered to justify their processes consideration of Treaty Rights – this was not a bifurcated trial and the Court found the infringements were not justified.[764]

Remedy

Justice Burke made the following declarations:

> 1. In causing and/or permitting the cumulative impacts of industrial development on Blueberry's treaty rights, the Province has breached its obligation to Blueberry under Treaty 8, including its honourable and fiduciary obligations. The Province's mechanisms for assessing and taking into account cumulative effects are lacking and have contributed to the breach of its obligations under Treaty 8;
>
> 2. The Province has taken up lands to such an extent that there are not sufficient and appropriate lands in the Blueberry Claim Area to allow for Blueberry's meaningful exercise of their treaty rights. The Province has therefore unjustifiably infringed Blueberry's treaty rights in permitting the cumulative impacts of industrial development to meaningfully diminish Blueberry's exercise of its treaty rights in the Blueberry Claim Area.
>
> 3. The Province may not continue to authorize activities that breach the promises included in the

[761] *Ibid* at 1804, reasons were at 1799 to 1808.
[762] *Ibid* at 1821 to 1827. The Court canvassed the justification jurisprudence in the *Sparrow/Badger* approach and the consequences of not providing a justification defence at 1810 to 1820.
[763] *Ibid* at 1828. The Province also argued "that Blueberry had failed to clearly articulate its rights and was essentially asserting "a generalized right to a poorly defined 'mode of life,' which fails to account for the modern context." In its closing submissions the Province noted that justification does not arise until there has been a finding of infringement, which is "why a justification defence is not being advanced at this time."
[764] *Ibid* at 1829 to 1858.

> Treaty, including the Province's honourable and fiduciary obligations associated with the Treaty, or that unjustifiably infringe Blueberry's exercise of its treaty rights; and,
>
> 4. The parties must act with diligence to consult and negotiate for the purpose of establishing timely enforceable mechanisms to assess and manage the cumulative impact of industrial development on Blueberry's treaty rights, and to ensure these constitutional rights are respected.
>
> I have suspended declaration #3 for 6 months so that the parties may negotiate changes that recognize and respect Blueberry's treaty rights.[765]

She stated that "the parties are at liberty to negotiate any further resolution or apply for further direction and/or clarification of the remedy."[766]

Implications of *Yahey* for Alberta

A case like *Yahey* is sure to have implications for Alberta. Alberta has received its own *Yahey* case on July 2022 where the Duncan's First Nation (DFN) filed a claim[767] against Alberta on the basis of cumulative effects causing infringement of treaty rights. Both DFN and the Blueberry are Treaty 8 Nations, although they are based in different provinces. As BC did not appeal *Yahey*, there is no appellate authority, and so the Alberta treatment of parallel arguments will have significant implications, and even more so if the case is eventually considered at an appellate level.

Lower Athabasca Regional Plan Issues

The Lower Athabasca Regional Plan (2012) [LARP] is an Alberta Cabinet level Regional Land Use Plan, covering the oilsands region with incomplete and ineffective environmental Management Frameworks intended to assess and advise on cumulative environmental impacts. [768] The development of LARP was strictly controlled by Alberta with limited public and "stakeholder consultation, with a separate and with deliberately limited aboriginal consultation."[769] While First Nations and Métis Communities input was that the Lower Athabasca region was their traditional

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[765] *Ibid* at 1894 to 1895. Blueberry had sought a permanent injunction as to the subject of declaration #3 but this was denied as Justice Burke, while acknowledging the Crown was subject to injunctions, preferred declaratory remedies.
[766] *Ibid* at 1889.
[767] See Killoran et al, "Treaty infringement claims for cumulative effects come to Alberta" (29 August 2022), Osler: at <https://www.osler.com/en/resources/regulations/2022/treaty-infringement-claims-for-cumulative-effects-come-to-alberta>. See also Bob Weber, "Northern Alberta First Nation suing province over cumulative environmental effects" (6 September 2022), CBC: at <https://www.cbc.ca/news/canada/edmonton/first-nation-alberta-provincial-duncans-first-nation-environmental-impacts-1.6573368>
[768] Laidlaw, "LARP – 10 year Review, *supra* note 223.
[769] For example public and stakeholder comments were publicly available before for the 3 Rounds of government directed consultations, aboriginal and Métis communities were consulted individually and the 6,450 word summary was published after LARP was enacted. See Alberta, *Response to Aboriginal Consultation on the Lower Athabasca Regional Plan* (2013).
At:<https://landuse.alberta.ca/LandUse%20Documents/Response%20to%20Aboriginal%20Consultation%20on%20the%20Lower%20Athabasca%20Regional%20Plan%20-%202013-06.pdf> [Alberta Response]

territories and their treaty and aboriginal rights were eroding with the cumulative impacts of development - that input was ignored.[770]

The *Alberta Land Stewardship Act* [*ALSA*] [771] under which Regional Land Use Plans are promulgated, has review provisions in section 19.2 that allow for a person who is directly and adversely affected to request a review of a Regional Plan within one year of approval by Alberta's Cabinet, and the Minister must appoint a Review Panel to consider the request and provide a public Report with recommendations, to be forwarded by the Minister to the Alberta Cabinet that may or may not adopt the any or part of the recommendations. In other words, the Report is non-binding.

Review Panel Report 2015

Alberta received First Nation and Métis communities Requests for Review of LARP from the Athabasca Chipewyan First Nation, Cold Lake First Nations, Mikisew Cree First Nation, Onion Lake Cree Nation, Fort McKay First Nation and Fort McKay Métis Community Association, and Chipewyan Prairie Dene First Nation and the Review Panel evaluated each submission and prepared a *Review Panel Report 2015: Lower Athabasca Regional Plan* (June 2015) [Review Panel: LARP] made recommendations to the Alberta Cabinet – with no results.[772] The Review Panel: LARP's Executive Summary said,

> The Applications reviewed by the Panel included assertion and evidence the cumulative effects of rapid change in the Lower Athabasca Region are having an impact on the First Nation Applicants.
> …
> One of the difficulties encountered by the Review Panel in assess the Applications was that, Alberta, in its responses to the concerns raised by the Applicants, frequently disputed the jurisdiction of the Panel to address those First Nations' concerns. Alberta's response was essential the same to each of the Applications. Alberta chose to rely on its legal argument and filed little in the way of rebuttal evidence.[773]

To address the jurisdiction issues raised by Alberta, it issued an Information Request under the Rules and determined that the Panel had jurisdiction to consider LARP's impact to treaty rights.[774] The Province's standard form legal arguments for all of the First Nation Applicants was to assert

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[770] Alberta Response at page 9 and Monique Passelac-Ross and Karin Buss, *Water Stewardship in the Lower Athabasca River: Is the Alberta Government Paying Attention to Aboriginal Rights to Water?* (Calgary: Canadian Institute of Resources Law, 2011), at: <http://dspace.ucalgary.ca/bitstream/1880/48638/1/StewardshipOP35w.pdf> at 37-40.

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

[772] Alberta LUS, *The Review Panel Report 2015: Lower Athabasca Regional Plan* at <https://landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%20Review%20Panel%20Recommendations%20-%202016-06.pdf> [Review Panel: LARP]. See also: Alberta LUS, "Request for Review of LARP", at: <https://landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/LARPRequestReview/Pages/default.aspx>

[773] Review Panel: LARP, *supra* note 773 at page 4.

[774] *Ibid* at page 5. Details were given at 22 to 25 The Jurisdiction Ruling was appended as Appendix 3, and the Panel decided among other things that it was entitled to consider effects on Treaty 8 rights but not to determine them at 243.

they are *not* affected by LARP, but the Panel disagreed and made specific rulings on each Applicant.[775] The Panel also made a general recommendation based "[u]pon review of the Applications, it was evident to the Review Panel that the Traditional Lands described in the submission of each First Nation Applicant were being, for the most part, encroached upon and reduced by rapid industrial development of the Lower Athabasca Region."[776] Consequently, in its general recommendations:

> The Review Panel suggests to the Minister that, in order to achieve the purposes described in ALSA, a must be developed and included as an important component of the LARP. This will recognize and honour the "constitutionally-protected rights" of the First Nation communities residing in the Lower Athabasca Region.
> …
> The Review Panel strongly suggests to the Minister that to achieve effective cumulative impact management in the Lower Athabasca Region, as prescribed by LARP, an equalization must be achieved to find a balance between industrial activity and the "constitutionally-protected rights" of the First Nation Applicants which must be achieved in order for the LARP to attain its prescribed "vision" and "purpose."[777]

The Review Panel gave consideration to the phrase "*person who is directly and adversely affected*" as a foundational consideration of its jurisdiction: it noted that *ALSA* was drafted with broad purposive intent but did not include a definition of "harm" which the Panel equated with that phrase.[778] The Panel went on to say,

> Consideration of Treaty rights is within the Review Panel's jurisdiction, to the extent that it is necessary to consider treaties while ruling on Applications made by First Nations for a review of the LARP. In order to decide whether the First Nation Applicant's Treaty rights are "directly and adversely affected" by the LARP, the Review Panel must address these Treaty rights.
>
> The Review Panel does not have the jurisdiction whether the LARP, or any government action has infringed Treaty Rights, as this is a determination of law, however, the Review Panel should be sensitive to the potential for Alberta to authorize activity that would infringe Treaty Rights.[779]

The Panel also analogized Treaty rights to property rights in circumstances where they could find tortious claims in nuisance or, for example, the right to quiet enjoyment of property. This is not unprecedented in Alberta as the Gross-Royalty Trust Claims demonstrate where various contractual Royalty arrangements were interpreted in diverse cases to constitute in effect a property right.[780] The Review Panel expanded on its recommended Traditional Land Use Management

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[775] *Ibid*.
[776] *Ibid* at page 6. It gave the example of the Fort McKay First Nation with, at that time, 70% of their Traditional Territory being taken up in oil-sands leases.
[777] *Ibid*.
[778] *Ibid* at page 26. This was based on a legal opinion generated at the Panel's request and was formally adopted, see footnote 1.
[779] *Ibid* at page 27.
[780] David Legeyt, Ashley Weldon, Natasha Wood, & Brendan Downey, "Let's Talk About Royalties: The Continued Uncertainty Surrounding the Creation and Legal Status of the Overriding Royalty" (2019) 57:2 Alta L R 335. Full disclosure, David Laidlaw was an associate at Lang Michener on the *Dynex* file.

Framework in LARP, saying, among other recommendations, that it should be developed by Alberta in conjunction with the Government of Canada, other stakeholders and *all* Aboriginal Peoples affected by development activities in the Lower Athabasca Region.[781]

In the seven years since this Review Panel Report was leaked, no public information has been available as to the development of a Traditional Land Use Management Framework – this is not surprising as LARP has been waiting 10 years for the missing Biodiversity Framework.

LARP Review

ALSA has provisions in section 6 for a periodic 10 year renewal. LARP was approved on August 22, 2012 and became effective on September 1, 2012. It is up for renewal in 2022.[782] We are not confident of any changes being made to LARP – especially with the current government.

Conclusions

This Report has provided an update to the *Alberta First Nations Consultation & Accommodation Handbook* (2014), and *Update to Alberta First Nations Consultation and Accommodation Handbook* (2016). It has considered the UNDRIP as implemented in Canada by the UNDRIP Act, new developments in the Crowns' constitutional duty to consult and accommodate aboriginal peoples under judicial and regulatory consideration.

Indigenous concerns over Crowns' consultation law and practices have been elaborated in the Report. It has addressed practical considerations including the use of Impact Benefit Agreements, Indigenous Consultation Protocols, and corporate responses to the TRC Call to Action #92.

The Report has reviewed updates in Alberta and Federal law and policy, notably the new *Impact Assessment Act*. It has considered the 2021 BCSC case of *Yahey*, which resulted in declarations that the BC government had, by virtue of cumulative effects of development authorizations, infringed Treaty rights. The Report has further addressed the 10-year review of Alberta's LARP, the first 10-year review of a regional plan under ALSA currently underway.

Indigenous consultation remains an active area of development in law, policy and regulation in Alberta and Canada. We will continue to monitor developments in this area.

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[781] Review Panel: LARP, *supra* note 773 at page 184, consideration of this TLU and First Nation's visions begin at page 172, mention was made of the joint AFCN/MCFN at page 184. Other considerations were reflected in its detailed Report.

[782] Alberta LUS, "[LARP] 10 year Review", at: <https://landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/10YearReview/Pages/default.aspx>.

Appendix A

Consultation Policies and Agreements in Canadian Jurisdictions – List

Jurisdiction	Policy	Responsible Ministry	Link to Policy
Canada	Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (2011)	Crown-Indigenous Relations and Northern Affairs Canada <https://www.canada.ca/en/crown-indigenous-relations-northern-affairs.html>	<https://www.rcaanc-cirnac.gc.ca/eng/1100100014664/1609421824729>
Yukon	Umbrella Final Agreement (1993)	Executive Council Office <https://yukon.ca/en/executive-council-office>	<https://yukon.ca/sites/yukon.ca/files/eco/eco-ar-umbrella-final-agreement.pdf>
Northwest Territories	The Government of the Northwest Territories' approach to consultation with Aboriginal Governments and Organizations (2007)	Executive and Indigenous Affairs <https://www.eia.gov.nt.ca/en>	<https://www.eia.gov.nt.ca/sites/eia/files/aboriginal_consultation_approach.pdf>
Nunavut	Nunavut Land Claims Agreement (1993)	Department of Executive and Intergovernmental Affairs <http://gov.nu.ca/eia>	<https://www.gov.nu.ca/sites/default/files/Nunavut_Land_Claims_Agreement.pdf>
Newfoundland & Labrador	The Government of Newfoundland and Labrador's Aboriginal Consultation Policy On Land and Resource Development Decisions (2013)	Office of Indigenous Affairs and Reconciliation <https://www.gov.nl.ca/exec/iar/>	<https://www.gov.nl.ca/exec/iar/files/aboriginal_consultation.pdf>
Nova Scotia	Nova Scotia Interim Consultation Policy (2007)	Office of L'nu Affairs <https://novascotia.ca/abor/> The beta website is <https://beta.novascotia.ca/government/lnu-affairs>	<https://novascotia.ca/abor/docs/Nova-Scotia-Interim-Consultation-Policy-June-1807.pdf>
(NS)	Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process (2010)	Office of L'nu Affairs	<https://novascotia.ca/abor/docs/MK_NS_CAN_Consultation_TOR_Sept2010_English.pdf>
New Brunswick	Government of New Brunswick Duty to Consult Policy (2011)	Department of Aboriginal Affairs <https://www2.gnb.ca/content/gnb/en/departments/aboriginal_affairs.html>	<https://caid.ca/NBDuttoConPol2011.pdf>
Prince Edward Island	Ila'mati'k ("We Reconcile") / Mi'kmaq – Prince Edward Island – Canada Framework Agreement (August 24, 2018) – for Modern Treaty/Accord	Department of Intergovernmental and Public Affairs – Indigenous Relations Secretariat <https://www.princeedwardisland.ca/en/information/executive-council-office/indigenous-relations-secretariat>	<https://www.princeedwardisland.ca/sites/default/files/publications/executed_framework_agreement_-_mikmaq-pei-canada.pdf>
(PEI)	Consultation Agreement (2012)	Department of Intergovernmental and Public Affairs – Indigenous Relations Secretariat	<http://www.gov.pe.ca/photos/original/aas_consult.pdf>

Jurisdiction	Policy	Responsible Ministry	Link to Policy
Manitoba	Interim Provincial Policy For Crown Consultations with First Nations, Métis Communities and Other Aboriginal Communities (2009)	Manitoba Indigenous Reconciliation and Northern Relations <https://www.gov.mb.ca/inr/>	<https://www.gov.mb.ca/inr/resources/pubs/interim%20prov%20policy%20for%20crown%20consultation%20-%202009.pdf>
Saskatchewan	First Nation and Métis Consultation Policy Framework (2010)	Government Relations – Indigenous and Northern Relations <https://www.saskatchewan.ca/government/government-structure/ministries/government-relations>	<https://publications.saskatchewan.ca/api/v1/products/84792/formats/98187/download>
Alberta	The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management (2013) & The Government of Alberta's policy on consultation with Metis settlements on land and natural resource management (2015)	Ministry of Indigenous Relations <https://www.alberta.ca/indigenous-relations.aspx>	FN Policy: <https://open.alberta.ca/publications/6713979> FN Guidelines (2014): <https://open.alberta.ca/publications/3775118-2014> Métis Policy: <https://open.alberta.ca/publications/policy-on-consultation-with-metis-settlements-2015#summary> Métis Guidelines (2016): <https://open.alberta.ca/publications/guidelines-on-consultation-with-metis-settlements-2016>
Québec	Interim guide for consulting the Aboriginal Communities (2008)	Secrétariat aux affaires autochtones <https://www.quebec.ca/en/government/departments-and-agencies/secretariat-aux-affaires-autochtones>	<https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/conseil-executif/publications-adm/saa/administratives/orientations/en/guide_inter_2008_en.pdf?1605704816>
(Qué)	Aboriginal Community Consultation Policy Specific To The Mining Sector (2019)	Minister of Energy and Natural Resources	<https://mrnf.gouv.qc.ca/wp-content/uploads/PO-consultation-mines_MERN-ANG.pdf>
Ontario	Draft Guidelines For Ministries on Consultation With Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights (2006)	Ministry of Indigenous Affairs <https://www.ontario.ca/page/ministry-indigenous-affairs>	<https://www.ontario.ca/page/draft-guidelines-ministries-consultation-aboriginal-peoples-related-aboriginal-rights-and-treaty>
(ON)	Aboriginal Consultation Guide for preparing a Renewable Energy Approval (REA) Application (2013)	Ministries of Environment and Energy <https://www.ontario.ca/page/environment-and-energy> Ministry of the Environment, Conservation and Parks <https://www.ontario.ca/page/ministry-environment-conservation-parks>	<https://www.ontario.ca/page/aboriginal-consultation-guide-preparing-renewable-energy-approval-rea> And <https://dr6j45jk9xcmk.cloudfront.net/documents/919/3-3-4-aboriginal-consultation-guide-en.pdf>
(ON)	Consultation framework: Implementing the duty to consult with Aboriginal	Mines & Minerals Division, Ministry of Northern Development, Mines,	<https://files.ontario.ca/co/ndmnrf-consultation-framework-en-2021-12-08.pdf>

Jurisdiction	Policy	Responsible Ministry	Link to Policy
	communities on mineral exploration and mine production in Ontario (2021)	Natural Resources and Forestry	
British Columbia	Updated Procedures for Meeting Legal Obligations When Consulting First Nations Interim (2010)	Ministry of Indigenous Relations and Reconciliation <http://www.gov.bc.ca/arr/>	<https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/legal_obligations_when_consulting_with_first_nations.pdf>
(BC)	Treaty 8 Long Term Oil and Gas Agreement (2016) Note: BC has separate agreements with Saulteau and Halfway River First Nations in Treaty 8, and McLeod Lake Indian Band	BC Oil and Gas Commission <https://www.bcogc.ca> Note: After the *Yahey* Settlement Agreements this is one of the Regulatory Agencies that will change its consultation policies.	<https://www.bcogc.ca/files/first-nations/Agreements/treaty-8-long-term-oil-gas-agreement.pdf>

Appendix B

Consultation Policies and Agreements in Canadian Jurisdictions – Comparison

Jurisdiction	Level of Detail	Responsibility	Basis of Consultation	Rights Considered	Initial Determination	Consultation Design	Strategic
Canada	Detailed Policy Guidelines	Distributed	Legal and good governance	Treaty and aboriginal rights including title	Government determined but if uncertain ask	Government designed, preference for EIA process	Yes
Yukon	Land Claims Agreement	Distributed	Contractual	All aspects	Parties	Contractual source	Yes
Northwest Territories	Broad Policy	Distributed	Legal	Treaty and aboriginal rights	Government determination	Government designed	Silent
Nunavut	Land Claims Agreement	Distributed	Contractual	All aspects	Parties	Contractual source	Yes
Newfoundland & Labrador	Broad Policy with Guidelines	Distributed	Legal	Treaty and aboriginal rights	Government determination – no details	Guidelines in negotiation	Silent
Nova Scotia	Broad Policy	Distributed	Legal and policy	Treaty and aboriginal rights	Government determination	Limited details	Silent
NS Agreement (2010)	Framework Consultation Agreement (Optional)	Joint Design Committee	Contractual	Treaty and aboriginal rights on a with prejudice basis	Party led	Joint design	Silent
New Brunswick	Broad Policy	Centralized (Aboriginal Affairs)	Legal	Treaty and aboriginal rights, including title	Government determined – no details	No Details	Yes
Prince Edward Island (policy status unclear)	Broad Policy	Distributed	Legal	Mi'kmaq treaty or aboriginal rights	Government determined – no details	No Details	Silent
PEI Agreement (2012)	Consultation Agreement (Optional)	Centralized (Department of Aboriginal Affairs)	Contractual	Mi'kmaq treaty or aboriginal rights on a with prejudice basis	Party led	No Details	Silent
Manitoba	Broad Policy	Distributed	Legal and good governance	Treaty and aboriginal rights and a broad consideration of "interests"	Government determined but if uncertain ask	Required FN input and for large projects make an agreement with First Nations	Yes

Jurisdiction	Level of Detail	Responsibility	Basis of Consultation	Rights Considered	Initial Determination	Consultation Design	Strategic
Saskatchewan	Detailed Policy	Distributed	Legal and policy	Treaty rights, asserted Métis rights and traditional uses (not including aboriginal title)	Government lead – no delegation to proponents	Consultation Matrix – short timelines	Yes
Alberta	Broad Policy with Guidelines and Consultation Matrix	Centralized (ACO)	Legal	First Nation Treaty rights and traditional uses & Métis Harvesting Rights	Government determined	Consultation Matrix with short timelines)	Yes
Québec	Detailed Policy	Distributed	Legal	Treaty and aboriginal rights including title	Collaboration with the Aboriginal communities if possible	Government lead – timelines to be agreed with First Nations prior to consultation	Yes
Québec Mining	Department Detailed Policy	Department Policy	Legal	Treaty and aboriginal rights including title	Collaboration with the Aboriginal communities if possible	Government lead – timelines to be agreed with First Nations prior to consultation	Yes
Ontario	Broad Policy	Distributed	Legal and policy	Treaty and aboriginal rights including title	Government determination	First Nations will have input into the design process in some circumstances	Silent
ON Mining	Department Detailed Policy	Department Policy	Legal	Treaty and aboriginal rights	Government determination	Government approved – proponent led	Limited
ON REA Policy (2013)	Department Detailed Policy	Department Policy	Legal	Treaty and aboriginal rights	Government determination	Detailed procedure	No
British Columbia	Detailed Policy	Distributed	Legal	Treaty and aboriginal rights including title	Government notification and First Nations response	Government notification and First Nation response will set the consultation level and process	Yes

Jurisdiction	Level of Detail	Responsibility	Basis of Consultation	Rights Considered	Initial Determination	Consultation Design	Strategic
BC OGC Policy (2011) Note: After the *Yahey* Settlement Agreements this is subject to change	Department Detailed Policy	Department Policy	Legal	Treaty and aboriginal rights	Government notification and First Nation response	Government notification and First Nation response will set the consultation level and process	Yes
BC OGC Agreement (2016 Note: After the *Yahey* Settlement Agreements this is subject to change)	Agreement	Centralized (MEMPR & OGC)	Contractual	Treaty and aboriginal rights	Party led	Contractual source	Silent

Appendix C

Court consideration of the UNDRIP Act

We have appended a summary of the Court Cases considering the Federal UNDRIP Act, as of December 31, 2022, demonstrating the breadth of potential application:

1. *George v Heiltsuk First Nation*, 2022 FC 1786 (2022-12-21)

This was an administrative law case, where an unsuccessful application by the *Heiltsuk First Nation*, described as self-governing First Nation and Band under the *Indian Act*, to dismiss a judicial review of the Heiltsuk Tribal Council [HTC] for Band Council Resolutions [BCR] brought by Haydn George. He was a former employee of the Bella Bella Community School on Reserve and was terminated on October 1, 2021- he had filed separate pleadings for wrongful dismissal. The first BCR terminated his residency on the Reserve, which he was entitled to by virtue of his employment, Mr. George moved off of the Reserve but the second BCR claimed he still resided in *Heiltsuk First Nation*'s Traditional Territory. The Court dismissed the HTC application at 10, saying "that the jurisdictional issues raised by the Applicant [Haydn George] should be decided at the hearing of the Application on its merits."

As to UNDRIP, the Court said,

> [64] In support of its position that HTC was not acting as a federal board, commission or other tribunal, the Respondent raises several arguments concerning the nexus of common law administrative law principles, Aboriginal law, Indigenous law, and how they interact. Among others, the HTC argues that an expanded Indigenous government role for band council, which in this case flows from HTC's participation in a Joint Leadership table with the Nation's hereditary chiefs, is consistent with the Heiltsuk Nation's inherent right of self-determination and self-government, as recognized in Articles 3 and 4 of the *United Nations Declaration on the Rights of Indigenous Peoples* [UNDRIP].
>
> [65] HTC also argues that this Court has not yet recognized Indigenous laws as an "effectual" part of Canadian common law without more: *Alderville First Nation v Canada*, 2014 FC 747 at para 40 [Alderville]. As such, HTC submits that the Court cannot both refuse to recognize Indigenous laws as laws to which courts may give effect, yet also take jurisdiction to review exercises of powers under Indigenous laws on the basis that they reflect state authority.
>
> [66] I agree with the Respondent that there are "difficult questions" that the Court has to grapple with when it comes to recognizing Indigenous laws and legal traditions. Nor has this Court had the occasion of analysing the role UNDRIP plays when deciding whether and how to give effect to Indigenous laws, and whether to decline jurisdiction in recognition of the right to self-determination and self-government under Articles 3 and 4 of UNDRIP. The

same precedential limits are true of this Court's consideration of how the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [UNDRIPA] would apply in a case like this, or generally its implications on this Court's jurisdiction.

[67] However, I disagree with the Respondent's proposition that this Court has not yet recognized Indigenous laws as an "effectual" part of Canadian common law. The Respondent, in my view, has taken the comment by Justice Mandamin, as he then was, in *Alderville* out of context.

[68] The issue before Justice Mandamin in *Alderville* was the admissibility of a statement by an expert witness for the plaintiff with respect to the First Nations' historical regard for their hunting grounds. Justice Mandamin began his analysis by considering the relationship of Indigenous legal systems in Canadian law. He examined specific instances of Indigenous law as "Aboriginal customary law" and the recognition of such law in "common law decisions, statutory enactments, and more recently, Section 35 Aboriginal rights and title jurisprudence": *Alderville* at paras 22-25.

[69] After an extensive review, Justice Mandamin concluded at para 39:

> [39] In all of the above, it would appear that Aboriginal customary law which has not been extinguished is given legal effect in Canadian domestic law through Court declarations, including Aboriginal title or right jurisprudence, or by statutory provisions. I would also suggest Aboriginal customary law may also be given legal effect by incorporation into Indian treaties. It may be that there are other means by which Aboriginal customary law could be recognized but that is not a question for me to address here.

[70] Thus, far from refusing to recognize Indigenous laws as an "effectual" part of Canadian common law, *Alderville* examines the various ways through which Indigenous laws are given legal effect in Canadian domestic law including "through Court declarations."

[71] Justice Mandamin's observation that Aboriginal customary laws "are not an effectual part of Canadian common law or Canadian domestic law" must be read in conjunction with the rest of his comment that there needs to be "some means or process by which the Aboriginal customary law is recognized as part of Canadian domestic law": at para 40. Acknowledging that such recognition "may at times have the effect of altering or transforming the Aboriginal customary law so that it and Canadian law are aligned", Justice Mandamin ended by noting at para 40:

> It seems to me this is an aspect of reconciliation as discussed in recent post section 35 Aboriginal jurisprudence.

[72] As the process of reconciliation continues, the jurisprudence also continues to evolve, resulting in an increasing recognition of Indigenous legal

traditions by this and other Canadian Courts. As Justice Grammond noted in *Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 8:

Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land. Chief Justice McLachlin of the Supreme Court of Canada wrote, more than fifteen years ago, that "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty" (*Mitchell v MRN*, 2001 SCC 33 at para 10, [2001] 1 SCR 911). In a long line of cases, from *Connolly v Woolrich* (1867), [1867] Q.J. No. 1, 11 LCJ 197, 17 RJRQ 75 (Que SC), aff'd (1869), 17 RJRQ 266, 1 CNLC 151 (Que QB), to *Casimel v Insurance Corp of BC* (1993), 1993 CanLII 1258 (BC CA), 106 DLR (4th) 720 (BCCA), Canadian courts have recognized the existence of Indigenous legal traditions and have given effect to situations created by Indigenous law, particularly in matters involving family relationships (for a survey, see Sébastien Grammond, Terms of Coexistence: Indigenous Peoples and Canadian Law (Toronto: Carswell, 2013) at 374-385; see also *Alderville Indian Band v Canada*, 2014 FC 747).

[73] A recent article by Justice Grammond provides a conceptual framework for recognizing Indigenous law in the Canadian legal system: Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can Bar Rev. Justice Grammond proposes different models for Canadian courts to recognize Indigenous peoples' pre-existing, or inherent, law-making powers and to analyse the interface between the Indigenous and Canadian legal systems: at 9-22. Justice Grammond also describes how Canadian courts judicially review decisions made by Indigenous decision-makers regarding Indigenous law: at 22-24. He notes that courts have begun to develop principles to help delineate the jurisdiction of Indigenous decision-makers, and that respect for Indigenous self-government has become a factor considered by judges when assessing various aspects of judicial review: at 24.

[74] Thus, contrary to the Respondent's submission, this Court has recognized the existence of Indigenous legal traditions and has given effect to Indigenous law in certain situations. The question is whether the impugned actions raised by the Application fall under those situations.

[75] The issues of Indigenous rights to self-government and self-determination, and what the affirmation of these rights means for jurisdictional boundaries, will no doubt continue to pose challenging questions for this Court. However, I do not think that the Court should dodge these challenging questions and refuse to hear the Application altogether just because the issues raised by the parties are difficult, and the hearing may be complex and lengthy, as the Respondent suggests. On the contrary, the complexity is precisely why the Application should be heard on its merits, instead of being dismissed on a summary basis.

[76] As this Court is increasingly called upon to create space for Indigenous law within our jurisdiction, the Court will endeavour to delineate its

> jurisdictional boundary in a manner that is respectful of Indigenous peoples and their legal traditions, while taking into account their assertion of self-government and the Government of Canada's endorsement of the UNDRIP through the federal UNDRIPA.

These observations are foundational to administrative law, as it is currently understood.

2. *Servatius v Alberni School District No. 70*, 2022 BCCA 421 (2022-12-12)

This was a freedom of religion case under the *Charter* where the plaintiff, an evangelical Protestant complained, among other things, that her children were subjected to an Indigenous smudging ceremony and prayer at a school assembly that violated their religious rights. The Trial Court disagreed, at paragraph 122 in *Servatius v Alberni School District No. 70*, 2020 BCSC 15 and in a subsequent costs ruling, the Trial Court departed from the normal rule as the claim was in the public interest in *Servatius v Alberni School District No. 70*, 2020 BCSC 424 [*Servatius* Costs Ruling] saying the parties would bear their own costs. The plaintiff appealed and the defendant cross-appealed the costs.

On appeal, the unanimous Court, after stating the facts and unusual nature of the proceedings at 1 to 19, set out to describe what it calls the *Legal Framework for Consideration of Religious Freedom* at 20 to 98. In terms of UNDRIP, the Court said,

> [42] Also relevant to s. 25 of the *Charter* and the context of this case, is the *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2009, A/RES/61/295 (adopted 2 October 2007) ("UNDRIP").
>
> [43] In BC, the *Declaration On The Rights Of Indigenous Peoples Act*, S.B.C. 2019, c. 44 [Declaration Act] was passed into law in November 2019. The purpose of the Declaration Act includes affirming the application of UNDRIP to the laws of BC: s. 2(a). The government must take "all measures necessary" to ensure the laws of BC are consistent with UNDRIP: s. 3.
>
> [44] Federally, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 [UNDRIPA] received Royal Assent and came into force in June 2021. The UNDRIPA affirmed UNDRIP as a universal international human rights instrument with application in Canadian law: UNDRIPA, s. 4(a). Similarly, it provided that the Government of Canada must "take all measures necessary to ensure" that the laws of Canada are consistent with UNDRIP;UNDRIPA, s. 5.
>
> [45] Article 15 of UNDRIP is relevant to the present appeal as it sets out the right of Indigenous peoples to the dignity and diversity of their culture, traditions, histories and aspirations, as appropriately reflected in education:
> ….

> [46] The courts in BC have not decided on the extent to which UNDRIP creates substantive rights under s. 25 of the *Charter*, [that protect aboriginal groups from the Charter] and it is not necessary to decide it here as the issue is not raised on this appeal.
>
> [47] Nevertheless, as will be seen when I summarize the background facts, BC seeks to incorporate Indigenous culture and perspectives into the public school curriculum, which is consistent with UNDRIP.

Noting the Trial Judge's careful reasons at 126 to 138, the Court of Appeal identified, at 128 "the key question was whether the children were "forced to participate" in a "religious ceremony", which was Ms. Servatius's position, or whether they simply were exposed to educational experiences, which she admitted was not objectionable." The Trial Judge found against Ms. Servatius on all matters, and the Court of Appeal said at 145, "Appellate courts will not interfere in findings of fact absent the appellant showing that the judge made a "palpable and overriding" error." The Court of Appeal canvassed the arguments and evidence carefully in upholding the trial decision finding no palpable and overriding error and dismissed the appeal at 243.

However, in the *Servatius* Costs Ruling appeal, new evidence was disclosed as to the involvement of "Justice Centre for Constitutional Freedoms" who "was funding her fees and disbursements in the litigation, as well as agreeing to help her pay any award of costs by agreeing to fundraise for her if costs were awarded against her" at 256. In light of this effective indemnity, the cross-appeal was granted ordering the Ms. Servatius to pay the ordinary costs.

In this decision, the BC Court of Appeal, appears to have overruled *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15, defendants position, at 211, that UNDRIP legislation has no current application to BC law.

3. *Wesley v Alberta*, 2022 ABKB 713 (2022-10-26)

As noted in the Report, this was a partially successful summary judgement in the Kings Bench in an expansive constitutional case and long running dispute (~45+ years) between the Stoney Nakoda First Nations and the Crowns, where the applicant Crowns' succeeded in dismissing damages claims that were barred by the limitation legislation and equitable *laches*, while preserving declaratory relief. As to UNDRIP, the Court said,

> [12] The first is whether the relief sought in the Statement of Claim is essentially declaratory or remedial. The second is whether some of the relief sought is severable, such that if parts of the claim are time-barred, the remaining parts can be salvaged. The third is whether limitations legislation and laches apply at all in in this case if they would operate to prevent the claim from being fully heard, given the provisions in s. 35(2) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK),

1982, c 11 ("the *Constitution*"), the UNDRIP Act, and the *Natural Resources Transfer Act*, 1930.

Further,

Question No. 3

Are the LAA [the previous act] and the *Limitations Act* the appropriate legislation applying to the issues raised for determination in the Summary Dismissal Applications in light of Canada's unqualified endorsement of the United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007) and the enactment of the [UNDRIP Act]?

If no, are the Defendants entitled to:

Rely on the LAA and the *Limitations Act*, and the specific sections being relied on by the Defendants, in their Summary Dismissal Applications to have the claims of the Stoney Nakoda summarily dismissed?

[137] This question posits that limitations statutes cannot be relied upon by provincial and federal governments because summary dismissal of actions commenced by Indigenous people would be contrary to UNDRIP and the [UNDRIP Act].

[138] … The Declaration acknowledges that the rights are not absolute and can be subject to some limitations (Article 46). There are no provisions in UNDRIP that specifically address limitations legislation and the claims of Indigenous peoples.

[139] Canada endorsed UNDRIP in May 2016 and undertook to adopt and implement the Declaration in accordance with the Constitution. The federal government enacted the UNDRIP Act on June 21, 2021. Under the UNDRIP Act, the federal government agreed to the following legal obligations, which are to be carried out in consultation and cooperation with Indigenous peoples: a) to take all measures necessary to ensure consistency of federal laws with UNDRIP (section 5); b) to develop an action plan within two years to achieve the objectives of the Declaration (section 6, with the plan due in June 2023); and c) to submit annual progress reports to Parliament (section 7).

Notably, the Court did not reference section 2(3) providing "[n]othing in this Act is to be construed as delaying the application of the Declaration in Canadian law" or the purpose of the UNDRIP act in section 4.

[140] The Stoney say that UNDRIP now forms part of the Constitution, at least as an underlying constitutional principle. Canada, it says, has breached its commitments under the UNDRIP Act by relying on section 32 of the *Crown Liability and Proceedings Act*, RSA 1985, c C-50 (the "CLPA")

which states that the limitation laws of a province apply to proceedings against Canada, without first reviewing whether the CLPA is consistent with UNDRIP. The Stoney also argue that such reliance is in breach of the international obligations of both levels of government.

[141] The Stoney refer to two specific provisions of UNDRIP that they say are at play: Articles 28 and 40. The right to redress in Article 28, they argue, is being thwarted by Canada's attempt to prevent the adjudication of their rights and remedies related to the use and occupation of their lands based on limitations. Similarly, Article 40, on prompt and just resolution of disputes through fair procedures is thwarted by Canada's reliance on limitations legislation. The Stoney argue that the principles from these two Articles should instead inform the interpretation of the CLPA, and Alberta's limitations legislation, such that their claims are not dismissed, relying on *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at paras 350-354.

[142] Alberta's attempt to rely on limitations legislation is also problematic, say the Stoney, because the principles in UNDRIP are expressions of customary international law that are incorporated into Canadian common law, which are binding in Alberta: *Nevsun Resources Ltd v Araya, 2020 SCC 5* at para 95 [Nevsun].

[143] Alberta and Canada reply that reliance on limitations legislation is not contrary to UNDRIP, and that UNDRIP does not represent customary international law. Alberta emphasizes that UNDRIP is an aspirational declaration that creates no substantive rights in Canada and has no constitutional status.

[144] The Stoney are correct that the Declaration can be used to inform the interpretation and application of Canadian law, including the *Constitution*, the CLPA, and limitations legislation in Alberta. This is affirmed in the UNDRIP Act itself and has been acknowledged in the jurisprudence: see the Preamble to the UNDRIP Act and *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342 at paras 122-123, per Feehan JA, concurring.

[145] However, I agree with the Applicants that UNDRIP is, on its face a non-binding, aspirational document. The preamble proclaims UNDRIP to be a "standard of achievement to be pursued in a spirit of partnership and mutual respect". Although it may be used as an interpretive aid, it has no legal force in Canada or Alberta, and is not part of the law of Alberta: *East Prairie Metis Settlement v Canada (Attorney General)*, 2021 ABQB 762 at para 35 [East Prairie]. This means that even if the CLPA or the limitations legislation in Alberta violated UNDRIP, this would not be a basis to challenge those pieces of legislation: East Prairie at para 35.

Notably, the Court did not reference UNDRIP Act section 2(3) providing "[n]othing in this Act is to be construed as delaying the application of the Declaration in Canadian law" or the purposes of the UNDRIP Act in section 4.

> [146] Further, the Stoney argument that the Declaration has constitutional status, even as an underlying constitutional value, is not supported in the case law. The case cited in support of the argument, *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217, is from 1998 and predates UNDRIP by almost a decade. It emphasizes the protection of Aboriginal and treaty rights as an underlying constitutional value, as reflected in s. 35 of the *Constitution*, but goes no further.
>
> [147] As noted, the UNDRIP Act provides that Canada will take all measures necessary to ensure consistency of federal laws with UNDRIP, and that Canada must develop an action plan prior to June 23, 2023, a date which has not yet arrived. Presumably this will include reviews to ensure the right to access justice and prompt decision-making through just and fair procedures for the resolution of conflicts and disputes. However, there is no evidence to suggest that the review will include limitations legislation or find time limits for pursuit of remedial relief are unjust or unfair, nor can it be assumed that the resolution mechanisms will be focused on court processes or procedure.
>
> [148] I adopt the following comments from Phelan J. of the Federal Court in *Watson v Canada*, 2020 FC 129 at paras 351-352:
>
> Although Canada's endorsement of UNDRIP and the Principles may be perceived as a positive public policy step towards reconciliation, neither UNDRIP or the Principles can change or overturn limitation periods set out in statute. ... Although UNDRIP and the Principles might be able to aid in the interpretation of Canadian domestic law, the Watson Plaintiffs have not pointed to any area of limitations statutes where either would be a relevant interpretive aid (*Nunatukavut Community Council Inc v Canada (Attorney General)*, 2015 FC 981 at paras 103-106, 260 ACWS (3d) 651).
>
> Although the Supreme Court of Canada in *Manitoba Métis* at para 141 indicated that reconciliation must "weigh heavily in the balance" when applying limitation periods, it only carved out a narrow exception to limitation periods for constitutional declarations. The Supreme Court did not indicate that the Court could ignore applicable statutory limitation periods generally for the purpose of furthering reconciliation.
>
> [149] The Court adopts *Prairie East* and *Watson* in these reasons. I am not prepared to accept that the provisions of the Declaration and the UNDRIP Act apply and displace the clear statutory language of Alberta's limitations legislation. The Stoney did not satisfy the Court on how the doctrine of adoption applies, its interpretative effects on domestic law, and its implications on the division of powers: see *Interlake Reserves Tribal Council et al v The Government of Manitoba,* 2020 MBCA 126 at paras 36-38. Further, the Stoney have not satisfied me that the Declaration is part of

> customary international law and that it therefore binds this Court: *Nevsun* at paras 77-79.

Notably, *Prairie East* and *Watson* are 2020 decisions that predate the UNDRIP Act passage on June 21, 2021. We are given to understand this decision will be appealed.

4. *RS v Alberta (Child, Youth and Family Enhancement Act, Director)*, 2022 ABPC 176 (2022-08-19)

This was a child custody case, where the reasoning in *SK v Alberta* was approved in a contested private guardianship in the case of a 6 year old Indigenous child who was subject to a Permanent Guardianship Order (PGO) granted by the court under the provisions of the *Child Youth and Family Enhancement Act*, RSA 2000, c C-12 (CYFEA) as it then was, on January 23, 2019 being placed in the home of the child's biological uncle and wife.

The contesting parties include the paternal great aunt to through her marriage to child's biological uncle, from whom she is now divorced and child's paternal grandmother. All of the parties, including the child were represented by counsel and the while not a party to the proceedings, Sagkeeng First Nation (SFN) in Manitoba, of which Nation both the child and the paternal grandmother are members. The paternal great aunt was Cree and endeavoring to recover her ancestry. SFN is an Indigenous Governing Body (IGB) as defined in *An Act Respecting First Nations, Inuit and Metis Children Youth and Families*, SC 2019, c.24 (the *Federal Act*). Not having at that time any family care service provider, their role in the trial was limited to filing written representations concerning, and asking questions about, issues pertaining to child's indigenous identity, heritage, spirituality, language, and traditions. (I would note, in the interests of full disclosure, I was engaged by an Alberta First Nation in the early 1990's to apply in a PGO proceeding for a watching brief that was granted)

A significant issue in the trial was the applicability of *Federal Act*. The paternal great aunt relied on recent decisions from this court to support her contention that the *Federal Act* does not apply, including: *SL v Alberta*, 2021 ABPC, 2021, *ZB (Re),* 2022 ABPC 66 (which applied and followed *SL*), and *PPM (Re)*, 2020 ABPC 243. Judge J.M. Filice said "[i]n each of these decisions, this court concluded, on a very strict reading of the legislation, that the provisions of the *Federal Act* did not apply to applications for private guardianship under the CYFEA as, in such instances, the Director was not providing "child and family services" as defined in the *Federal Act*." Noting that these cases were decided in the early aftermath of the *Federal Act* coming into force, given the notice requirements and attendant delay, those close readings may have been justified in the interests of justice. However,

> [34] In my view, each of these cases can be distinguished on their facts. Further, each of them can be seen as representative of the challenge faced by courts in digesting and applying the underlying principles, as well as the interplay between the *Federal Act* and the operational provisions of provincial child protection legislation. I consider these cases and the matters

> before me to be "transitional" in nature as we move toward integration and a more fulsome application of the Federal Act from the start of proceedings.
>
> [35] More time has now passed since the *Federal Act* came into force and cases are being decided which say that the *Federal Act* does apply to post-PGO proceedings. In *SK v Alberta*, 2022 ABPC 144, for instance, my colleague, Lloyd, J. provides a purposeful and contextualized reading of the *Federal Act*. The *Federal Act*, she found, must be read together with the provisions of the *United Nations Declaration of the Rights of Indigenous Persons Act*. S.C. 2021, c.14, which affirms the articles of the *United Nations Declaration of the Rights of Indigenous Persons*. Both are referenced in the preamble to the *Federal Act* as is the following:
>
> *Whereas the Truth and Reconciliation Commission of Canada's Calls to Action calls for the federal, provincial and Indigenous governments to work together with respect to the welfare of Indigenous children and calls for the enactment of federal legislation that establishes national standards for the welfare of Indigenous children.*
>
> [36] I, therefore, concur with Judge Lloyd's statement as follows:
>
> *That the law and its many sources is complex is perhaps not surprising as the problem the law seeks to redress is long standing, systemic, and vast.* (para 24)
>
> [37] All of these laws seek to redress the harm caused by colonization and the effects of residential schools, among other such policies. Given this context, it seems entirely appropriate to say that the provisions of a federal statute - the *Federal Act* - whose explicit purpose is to redress the harms caused, applies to all child welfare matters which concern Indigenous children.

The trial judge noted that the application of the *Federal Act* is not inconsistent with the CYFEA and said at 39 "[o]n a more specific reading of the *Federal Act*, I also agree with Judge Lloyd that the definition of child and family services as set out in the *Federal Act* contemplates and encapsulates post-PGO applications such as those before me." This interpretation accords with the principles of statutory interpretation (*Rizzo & Rizzo Shoes Ltd., Re*, 1998 CanLII 837 (SCC), [1998]1 S.C.R. 27; *Interpretation Act*, RSC 1985, c.I-21).

The judge did note at 45 the decision *Asikiw Mostos O'Pikinawasiwin Society v BL*, 2022 ABPC 76 (CanLII), where Judge Holmstrom, dealt with the issue of an application for private guardianship under the CYFEA in the face of Asikiw Mostos O'Pikinawasiwin Society (AMO) – one of four Nations on Maskwacis near Edmonton, Alberta – asserting authority over the proceedings by virtue of having, in fact, passed its own laws and served notice on both the Federal Minister and the provincial government in accordance with section 20 of the *Federal Act* by staying the private guardianship applications under the CYFEA as that was the only remedy requested by AMO.

In the result, the best interest of the child under the CYFEA and the *Federal Act* militated that the paternal great aunt in Edmonton be granted guardianship rather than relocating to Manitoba with the paternal grandmother with access specified to the order at 95.

5. *SK v Alberta (Child, Youth and Family Enhancement Act, Director)*, 2022 ABPC 144 (2022-07-05) (*SK v Alberta*)

This was a child welfare case involving a private guardianship application of an Indigenous child born in Edmonton in late January 2017. Due to safety concerns the Director was involved early and the child was placed by the mother with the maternal grandmother in July of 2018. Safety concerns resulted in the placement of the child in the care of a non-indigenous foster mother on January 24, 2019. The Director determined to apply for permanent guardianship in November of 2019. It expanded its reach, given the parents connection to First Nations' in Saskatchewan and arranged for a,

> … Family Group Conference was held in February of 2020. At that meeting were maternal and paternal family members, and a representative of the Kanaweyimik Child and Family Services, an agency that provided service to Mosquito First Nation (Kanaweyimik). At around the same time, the Director was in contact with the Keyanow Child and Family Centre, an agency contracted to provide service to the Poundmaker First Nation. The purpose of this and other Family Group Conferences was to engage the family, community, and First Nations in service decisions and to find family and community members who might be available to be placement or permanency options for the child. [at 5]

Still unable to contact the father the Director published a substitutional service notice in North Battleford, Saskatchewan in June 2020 which came to the attention of the child's paternal grand-aunt and a further Family Group Conference was held in August of 2020. The child continued to live with the foster-mother who applied in March of 2021 for private guardianship and in July of 2021 the paternal grand-aunt filed for private guardianship of the child. In November of 2021, the Director relocated the child from the foster-mother's care in the Edmonton area to paternal grand-aunt's care on the Mosquito First Nation in Saskatchewan.

The paternal grand-aunt was reluctant to proceed with the private guardianship application and said more than once that should a suitable family member be found for the child; she would withdraw her application. The trial started on June 20, 2022 and the paternal grand-aunt dropped the application of the first day of trial. The lawyer for Kanaweyimik asked for an adjournment to find another family member willing to apply for guardianship but the Trial judge refused and as neither the mother nor the father was in attendance and granted the Director's application in the absence of the parents. After canvassing section 56 in Division 5 of the *Child, Youth and Family Enhancement Act*, RSA 2000, c 12 (CYFEA), the trial judge noted,

> [18] Where the child is Indigenous there are other laws that have application, namely, *An Act Respecting First Nations, Inuit and Metis Children, Youth and Families* (S.C. 2019, c. 24) ("the Federal Act") and *the United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021 c. 14 ("the UNDRIPA"). I am aware that some of my colleagues have said that the Federal Act has no application for private guardianship applications (see *SL v Alberta*, 2021 ABPC 202 and *Ze(Re*), 2022 ABPC 66). My colleagues argue that the Federal Act governs child protection services provided to Indigenous children and that as private guardianship is not a service provided to children the Federal Act has no application. With respect, I disagree.
>
> [19] Children subject of a private guardianship application are in the custody of the director. The Director's guardianship is terminated only after a private guardianship order is granted and so the child remains in the Director's custody until that moment. I note that the CYFEA says that private guardianship orders will not be granted without the Director's consent unless that consent is waived for an appropriate reason. As the Director's consent is a requirement, the CYFEA clearly contemplates that the Director will assess and review private guardianship applications and articulate a position to the court. This assessment and review requirement is a service; indeed, this is the penultimate service the Director will provide should the private guardianship be granted. Finally, it cannot escape notice that the most devastating weapon of colonialism employed in Canada against First Nations children and families was the removal of children from their families and communities. The preamble of the Federal Act clearly identifies that its purpose is to recognize and redress the devastating effects of colonialism, for all these reasons I find that the Federal Act has application to private guardianship.

As to the UNDRIP Act, the court noted at 23 that,

> Article 8 says: "(e)very indigenous individual has the right not to be subjected to forced assimilation or destruction of their culture." This and other articles of the UNDRIPA are relevant and have application to the child protection schemes in Canada and are particularly relevant to private guardianship applications because of the risks of assimilation inherent in the adoption of Indigenous children, particularly by non-Indigenous persons.

In the event the foster-mother's application for private guardianship was approved, given her voluntary Cultural Connection Plan which, while unenforceable in the normal course under the CYFEA was included in resultant order in 49.

6. *Chambaud v Dene Tha' First Nation*, 2022 FC 970 (2022-06-29)

This was an administrative law case involving a judicial review of the Dene Tha' First Nation BCR extending the terms of office for the Chief and Council in accordance with the *Dene Tha' First Nation Election Regulations* allowing election by custom and Covid Regulations allowing the

extension by BCR. The complainants argued, amongst other things that the Covid Regulations violated the UNDRIP Articles 19 and 46. This was dismissed for lack of standing and mootness as elections were held.

7. *Flette et al. v. The Government of Manitoba et al.*, 2022 MBQB 104 (2022-05-18)

This was a proposed class action case that invovled a consolidated hearing of four actions, one of them a proposed class action, regarding the constitutionality of s. 231 of *The Budget Implementation and Tax Statutes Amendment Act, 2020*, S.M. 2020, c. 21 ("BITSA"). At issue, in paragraph 6 was,

> …certain inappropriate conduct by Manitoba relating to the administration of the Children's Special Allowance (the "CSA Benefit"), which is a federal statutory, tax free monthly payment that is payable in respect of each child who is maintained by a department or agency of the federal or provincial Government, as described in the *Children's Special Allowances Act*, S.C. 1992, c. 48 (the "CSA Act").

As noted at 15,

> Section 231 is deemed to have come into force on April 1, 2019. It retroactively addresses the provincial "Rates for Services" that were payable to CFS Agencies [Children and Family Services Agencies] for the "funding period" (January 1, 2005 to March 31, 2019). In effect, it formalizes into legislation a provincial funding practice that was started by Manitoba in 2005. BITSA does not apply in the future as effective April 1, 2019, Manitoba changed the practice of requiring CFS Agencies to remit the CSA Benefits to Manitoba.

The plaintiffs, had among other arguments, said:

> [154] The moving parties rely on the UNDRIP Act. UNDRIP was adopted by the United Nations General Assembly on September 13, 2007, and endorsed by Canada in 2016. Manitoba committed to being guided by the principles of UNDRIP through *The Path to Reconciliation Act*, C.C.S.M. c. R30.5.

> [155] Article 40 of UNDRIP states that, "Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights ...".

> [156] In my view, there is no doubt that s. 231 of BITSA affects Indigenous peoples because the vast majority of children in care are Indigenous. *Applying Article 40 of UNDRIP does not change the analysis of the constitutional rights noted above*. The moving parties have had access to the superior courts through just and fair procedures for the resolution of the conflict in this case.

Ultimately at 261, while section 231 of BITSA was within provincial jurisdiction, it was found unconstitutional as violating the *Charter* guarantees of equality in section 15.

8. *Métis Child, Family and Community Services v CPR et al*, 2022 MBCA 40 (2022-05-06)

This was a child welfare case involving the Peguis First Nation (Peguis FN) is a self-governing Treaty 1 First Nation, led by chief and council, located in Manitoba. Peguis Child and Family Services (Peguis CFS) is the legal representative of Peguis FN in matters of child and family services, and successfully applied to have intervenor status in a private guardianship dispute, as a matter of *public interest* under the *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 and the differing treatments in the provinces. Notably, Alberta has decided the opposite in Provincial Court in *SL v Alberta (Child, Youth and Family Enhancement Act, Director),* 2021 ABPC 202 (see below) while in New Brunswick the same prevails in *MSD v AC and KV and Eel River Bar First Nation*, 2021 NBQB 14 although there is no reference to the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [UNDRIP Act].

9. *Attawapiskat First Nation v. Ontario,* 2022 ONSC 1196 (2022-02-24)

This was a duty to consult case. The applicant for judicial review was the Attawapiskat [AFN] is a Cree nation whose traditional territory is located on the west side of James Bay with 3,679 members, 2,000 of whom live on their Reserve. The Respondents were Ontario's Ministry of Northern Development, Mines, Natural Resources and Forestry with The Director of Exploration (the "Director") as a statutory decision-maker under the *Mining Ac*t, R.S.O. 1990, c. M.14 [Mining Act], responsible for issuing exploration permits under s. 78.3(2) governed by O. Reg. 308/12: *Exploration Plans and Exploration Permits* (the "Exploration Regulation".); and Juno Corp [Juno] a mining exploration company with 2 two projects: East Block Project with nine locations of mechanized drilling, and the Jupiter Block Project, for 50 locations of mechanized drilling and 20 geophysical surveys on mining claim cells located in the Ring of Fire area in northern Ontario (at 10 to 21). (This is one of the Regions covered by a Federal Regional Assessment in the Ring of Fire Area #80468 currently underway under *Impact Assessment Act*, sections 92 and 93.

The AFN, at 95 to 96, claimed that Ontario had failed to uphold its duty to consult and accommodate by not providing the requested funding to obtain,

> …targeted archaeological assessment and a traditional land use and occupancy study to provide details of the community's rights and values in

> the Project areas … that it could not respond to the request for information about caribou, moose and fish habitat in the area without obtaining external studies.
>
> [96] Attawapiskat relies on the [UNDRIPA], which is a source of interpretation of Canadian law, and provides that Indigenous peoples have the right to "have access to financial and technical assistance from States" for the enjoyment of their rights, including to participate in consultation and decision-making engagements about projects affecting their territories: [UNDRIPA] Sched, Articles 18, 32, and 39.

The Respondents submitted that Ontario fulfilled its duty to consult by demonstrating a willingness to receive and discuss AFN's concerns about the proposed Projects; granting temporary holds to give AFN further time to respond and that the Director considered and responded to AFN's position that funding was required for further studies. Ontario noted that there are no cases to recognized a general right to consultation funding, but acknowledges that where a community cannot meaningfully engage in consultation due to resource constraints, the Crown must do what it can to facilitate meaningful dialogue (citing *Platinex Inc v Kitchenumaykoosib Inninuwug First Nation*, 2007 CanLII 20790 (ON SC) and *Saugeen Ojibway Nation v Ontario*, 2017 ONSC 3456) at 98.

The Court noted at 100, that "the decision on funding is the Crown's, as "part of its design and implementation of a consultation process" and will be reviewed on a standard of reasonableness," deprecating the practice of funding brinksmanship. Given the lack of AFN information, as there only one family had historically trapped in the Project Area with no current information and Treaty 9's ability to take up tracts in this particular case, saying at 102,

> [w]e are satisfied that Ontario's approach to the funding issue was reasonable in this case. It is not the case that substantial funding for research is required every time there is activity on lands covered by Treaty 9. If there is no reasonable basis to conclude that there is something requiring study, funding is not required.

The Court noted that this ruling should not be applied broadly, for example a tailored request with evidence as to the inability of contacting this family without funding may have changed this at 103 to 104. While fresh evidence was provided in the judicial review, including evidence from the affected family, "none of which includes further information from the potentially affected family of potential impacts on trap lines of the Projects …[or] any information about material costs required to obtain such information" at 105. The Court characterized the funding requests as being related to broader issues with the Projects, saying at 106,

> [w]e simply do not accept this argument. It is premised on presumptions that almost any resource activity may be disruptive of the environment, and that

> almost any disruption of the environment must be studied as an incident of the duty to consult and accommodate. We do not accept that argument.

It rejected the request for judicial view, saying at 107, the "Ministry's assessment of the scope of the proposed exploration activities and the potential availability of information from other sources within the community, the Ministry's refusal to provide funding was not unreasonable in the circumstances. Given the limited time, nature and geographic scope, and the absence of information about site-specific consequences, the need for funding was not apparent."

10. *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 (2022-02-10)

This was a reference question whether the *Act Respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 [Act] was constitutional. In the unofficial English translation, the Québec Court of Appeal, unanimously found that it was, except for provisions in section 21 that held that aboriginal legislation would have the force of federal legislation (engaging federal paramountcy) and sub-section 22(3) that expressly legislated the same. In the course of that decision it found at 198 that the UNDRIP Act "strengthens the basis on which Parliament has established the policy that the Act is intended to embody" citing section 5 of the UNDRIP Act. This reference case has been appealed to the Supreme Court of Canada.

11. *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 as described in the text of this Report. The Plaintiffs appealed and in *Thomas v Rio Tinto Alcan Inc*, 2022 BCCA 415 (CanLII) the appeal hearing was scheduled for June 19–23, 2023 with leave granted to intervene on a limited basis for the First Nations' Nadleh Whuten; Council of the Haida Nation; the Heiltsuk Tribal Council; and Chippewas of Saugeen First Nation and Chippewas of Nawash Unceded First Nation (jointly, the "Saugeen Ojibway Nation").

Tribunal Decisions in Alberta

In *Three Sisters Mountain Village Properties Ltd v Town of Canmore,* 2022 ABLPTR 673 (CanLII) (Alberta Land and Property Rights Tribunal),[783] the appellants appealed a decision of the town of Canmore to reject a housing development. The NRCB had approved a related application relating to a golf course. Intervenors included Stoney Nakoda Nations and the NRCB. The Alberta Land and Property Rights Tribunal found that the development proposal in question was consistent with the related NRCB approval, and ordered the Town of Canmore to adopt the proposal. While the decision included discussions on application of honour of the Crown, the tribunal held that "The LPRT does not have authority to consider the Honour of the Crown or to reconsider the NRCB's 1992 public interest determination."[784] The Court of Appeal granted leave to appeal this matter in

[783] *Three Sisters Mountain Village Properties Ltd v Town of Canmore,* 2022 ABLPTR 673 (CanLII) (Alberta Land and Property Rights Tribunal) (May 16, 2022)
[784] Ibid at para 203

October 2022.[785] While there is no determination of the appeal yet, a decision relating to intervenor status is on record, [786]in which Stoney Nakoda Nations was granted intervenor status to address points of reconciliation and the honour of the Crown within the filed grounds of appeal.

A CER regulatory decision contemplated cumulative effects following *Yahey*, in *NOVA Gas Transmission Ltd – Application dated 22 October 2020 for NGTL West Path Delivery 2023 Project*, 2022 CanLII 80963 (CA CER).[787] In this regulatory decision, the CER recommended approval and issuance of a s.186 certificate for an expansion of the existing NGTL system, a project located within Alberta. In the matter, Piikani Nation advanced an argument relating to cumulative effects on section 35 rights, after *Yahey*. Although not central to the decision, the regulatory body remarked on the issue of cumulative effects on Indigenous rights. The CER noted the relevant concerns were included throughout the Commission's analysis, and that a "broader context" of "holistic concerns" was better handled by governments taking proactive measures. Two Commissioners also recommended development of an Indigenous Oversight Cooperative Committee, [788] noting in part the CER's announced move "away from project-by-project compliance and oversight with Indigenous peoples toward co-development of a broader, systemic model for enhanced engagement on the NGTL System," however the third Commissioner disagreed on the basis that this was not in the CER's purview.

The decision discusses *Yahey* and cumulative development as follows:

> 1.4.2 Regional Assessment in or around the Project area
>
> Relying on *Yahey v. British Columbia*,[11] Piikani Nation argued that the Crown has a responsibility to take proactive measures to address and monitor cumulative effects on Section 35 Rights. Samson Cree Nation and Bearspaw, Chiniki, and Wesley First Nation (collectively the Stoney Nakoda Nations) cited the same case to suggest there are flaws in the ways in which such effects are currently assessed. In as much as these arguments relate to the Project itself, the Commission's analysis and findings are provided throughout this Report. As to a broader context of these arguments, the Commission is of the view that outcomes such as that of the *Yahey* decision can be avoided by governments taking proactive measures to address the type of holistic concerns raised here.
>
> Section 93 of the IA Act allows the Minister of the Environment to enter into an agreement or arrangement with certain jurisdictions, including the government of a province, if the Minister is of the opinion that it is appropriate to conduct a regional assessment of the effects of existing or future physical activities carried out in a region that is outside federal lands. As the Crown exists both within federal and provincial authority (under Canada's Constitution), it is vital that any meaningful regional assessment incorporate the kinds of physical activities and land uses that fall within the jurisdiction of both the federal and provincial governments.
>
> On the limited record of this hearing, the Commission may be poorly placed to prescribe the scope, nature, or boundaries of a specific regional assessment. The Commission can, however, observe that the

[785] *Canmore (Town of) v Three Sisters Mountain Village Properties Ltd.* 2022 ABCA 346
[786] *Town of Canmore v Three Sisters Mountain Village Properties Ltd.*, 2022 ABCA 274 (August 22, 2022)
[787] *NOVA Gas Transmission Ltd – Application dated 22 October 2020 for NGTL West Path Delivery 2023 Project*, 2022 CanLII 80963 (CA CER) File No. GH-002-2020 (May 24, 2022)
[788] At 1.4.1

> concerns we have heard in this hearing, and likely to repeated elsewhere in future hearings, are not simply going to fade away. As such, the Commission recommends that the Minister, in partnership with any jurisdiction referred to in paras (a) to (g) of section 2 of the IA Act, with interests in the area of the Project, or in a broader regional area which includes the area of the Project, work to establish an agreement or arrangement to conduct the type of regional assessment contemplated by the IA Act.

Another CER decision, not in Alberta, contemplates the role of UNDRIP, in *ITC Lake Erie Connector LLC 2021 Variance Request*, 2022 CanLII 80964 (CA CER).[789] In this CER decision, the Commission approved the 2021 Variance Application. In determining that the Crown's duty to consult was met, the CER notes that the Haudenosaunee Development Institute [HDI] made submissions relating to UNDRIP, and noted that "[t]he Commission's process was informed by the UN Declaration and the CER's commitment to advancing Reconciliation. […] The Commission is of the view that the UN Declaration does not permit the Commission to reassess the original Project approval in this application."

[789] *ITC Lake Erie Connector LLC 2021 Variance Request*, 2022 CanLII 80964 (CA CER) File No. OF-Fac-IPL-1175-2015-01-03 (August 25, 2022)

Appendix D

Type	Name of Document	Date
GC	Métis Nation of Alberta – Canada Consultation Agreement	July 19, 2018
GOA	Memorandum of Understanding: Fort McKay Métis Nation Association and Her Majesty the Queen in Right of Alberta, as represented by the Minister of Indigenous Relations	September 14, 2021
GOA	The Government of Alberta's Policy on Consultation with Métis Settlements on Land and Natural Resource Management, 2015	2015
GOA	Protocol Between the Government of Alberta and the Confederacy of Treaty Six First Nations in Alberta: for Discussion on Matters of Mutual Concern	December 16, 2020 (dissolved June 2021)
GOA	Protocol Between the Government of Alberta and Stoney Nakoda – Tsuut'ina Tribal Council for Discussion on Matters of Mutual Concern	October 2, 2020
GOA	Protocol Between the Government of Alberta and the Blackfoot Confederacy for Discussion on Matters of Mutual Concern	September 23, 2019
GOA	Métis Nation of Alberta – Government of Alberta Framework Agreement	February 1, 2017
ICP	Alexander First Nation Consultation Policy	October 30, 2006
ICP	Aseniwuche Winewak Nation Consultation Guide: Living in Two Worlds: A Balanced Approach to Aboriginal Consultation	2006
ICP	Asini Wachi Nehiyawak (Mountain Cree) / Bobtail Descendants Traditional Band: Process for Consultation (v13.01)	Undated, used in 2015
ICP	Ermineskin Cree Nation Consultation Policy	Undated, online at October 21, 2021
ICP	Kapawe'no – assorted Kapawe'no First Nation Consultation Process; ICRCC documents; Good Relations Agreement Template	2015 (multiple docs)
ICP	Consultation Protocol of the Mikisew Cree First Nation	November 24, 2009
ICP	Sawridge First Nation: *An Act for the Protection of the Nation's Rights and Interests Through a Process of Consultation, Accommodation, Compensation and Reconciliation*	2015
ICP	Swan River Updated Consultation Package for Companies	2007
ICP	Treaty 8 Chiefs Position paper on Consultation	September 30, 2010
ICP	Woodland Cree First Nation Consultation Protocol	March 19, 2013
GC	The Mackenzie Gas Pipeline (MGP) Consultation Protocol (Dene Tha' First Nation)	2008
GC	The Federal Authorizations Consultation Protocol (Dene Tha' First Nation)	2008