Best Practices For First Nation Involvement In Environmental Assessment Reviews Of Development Projects In British Columbia

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A report to:

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EXECUTIVE SUMMARY

The practice of environmental assessment (EA) in BC is guided by the BC *Environmental Assessment Act* and the *Canadian Environmental Assessment Act*, and their accompanying regulations and guidelines. While these two Acts clearly describe the EA processes, they do not prescribe clearly how First Nations should be involved. With case law on aboriginal rights with respect to land and resources rapidly evolving in BC, the governments of Canada and BC have come a long way in recent years in including First Nations in EA review processes. Nonetheless, in this atmosphere of legal uncertainty without prescribed and agreed upon roles for First Nations' involvement, many First Nations are frustrated in their current role in EA review of proposed Projects that occur on their territories and that so directly affect their rights and interests. These frustrations include, but are certainly not limited to:

- unsatisfactory aspects of the environmental assessment process, e.g. the way in which Terms of Reference are developed and used;
- legislated time lines for various steps in the environmental assessment process that aren't consistent with First Nation decision making processes;
- an inability of the environmental assessment process, or an unwillingness of public governments or Proponents, to meaningfully consider many values of importance to First Nations;
- lack of clarity and consistency on how the significance of Project effects is determined;
- an unsatisfactory cumulative effects process, that does not properly take into account impacts of all types of development that have occurred in the past;
- an unsatisfactory role for First Nations in decision-making;
- unsatisfactory funding mechanisms and insufficient levels of funding for meaningful participation in environmental assessment review processes; and
- some Project proponents who are unenlightened about First Nation rights and interests, or who merely see First Nation participation as another obstacle to overcome in the pursuit of their Project.

As an inaugural task, the New Relationship Trust (NRT) travelled across BC to identify issues of common concern to First Nations that needed to be addressed. The role of First Nations in the EA process was identified as one topic of serious and common concern. In response, the NRT commissioned this study to summarize Best Practices for the involvement of First Nations in the EA process. "Best Practices" were defined in the Request for Proposal as:

> " … *methodologies, strategies, procedures, practices and/or processes that consistently produce successful results.*"

In developing these Best Practices, we used three primary sources of information: 1) interviews with those who are involved in EA review on behalf of First Nations, including First Nation members and advisors to First Nations, as well as some government personnel; 2) case studies of three EA processes in British Columbia; and 3) other background research. We also called on our own experience and expertise in EA, both as practitioners of EA, and as advisors to First Nations in EA reviews and on other land and resource issues.

In Table 1 we list 75 proposed Best Practices for engagement of First Nations in the EA review process in British Columbia. For each Best Practice we identify which of the primary Parties to EA in British Columbia (Canada, British Columbia, Proponents, or First Nations) have the primary responsibility for implementing the Best Practice, and whether it is a Best Practice that can be implemented under existing circumstances (i.e., now) or whether it is a Practice that will take some time to implement (i.e., future). Rationale for each proposed Best Practice is provided in Section 5 of the main body of the report.

We believe that the Best Practices reported herein are relevant for most First Nations in BC. However, we are aware that most First Nations that are in treaty negotiations wish to preserve the ability to pass their own laws with respect to environmental assessment, as first achieved by the NIsga'a in their treaty. If a First Nation puts into effect its own laws on environmental assessment, some of these proposed Best Practices may no longer be relevant.

The Best Practices recommended in Table 1 should be used together with the toolkit that has been developed by the First Nations Environmental Assessment Technical Working Group to assist First Nations in their participation in EA processes in British Columbia.

Table 1. Summary of Proposed Best Practices for First Nation Involvement in Environmental Assessment Reviews.

BP#	Best Practice	Primary Responsibility	Can be Implemented Now or in Future?
ABORIGINAL AND TREATY RIGHTS, AND CONSULTATION			
1	Canada and British Columbia must ensure that their environmental assessment legislation, policies, and guidelines reflect the constantly evolving law of the land with respect to Aboriginal and Treaty rights.	BC; Canada	Now
2	The BC *Environmental Assessment Act* should be amended to specify and define the inclusion of First Nations in the environmental assessment process, consistent with recent case law in respect of aboriginal rights and title.	BC	Future
3	As a first step in engaging in an environmental assessment review process, a First Nation should communicate in writing to Canada, British Columbia, and the Proponent a clear assertion of its rights and interests, including title where appropriate, in the Project area.	FN	Now
4	A Proponent should be well informed about the law of the land regarding aboriginal rights and title before approaching a First Nation about a potential Project in that First Nation's territory.	Proponent	Now
5	Section 27 of the *BC Environmental Assessment Act*, regarding environmental assessment agreements with other jurisdictions, should be amended to include First Nations as "jurisdictions".	BC	Future
6	"Affected" First Nations should be considered to include both those First Nations in whose territories a proposed Project is located and those First Nations that are indirectly affected by the Project.	All	Now
7	To fulfill its fiduciary obligations to First Nations, Canada should take a more active role in environmental assessments in British Columbia given that most projects in BC will be located within the territories of one or more First Nations.	Canada	Now

BP#	Best Practice	Primary Responsibility	Can be Implemented Now or in Future?
8	Each First Nation should design its own consultation guide to inform and instruct other parties to the environmental assessment review process.	FN	Now
9	Canada, BC, and proponents must acknowledge the government-government relationship with First Nations and must not view First Nations as "stakeholders".	Canada; BC; Proponent	Now
10	At the onset of an environmental assessment process, affected First Nations should be consulted by provincial and federal governments in respect of potential issues related to aboriginal interests, rights and title, and the fiduciary obligations of governments to First Nations.	BC; Canada	Now
11	Consultation with First Nations is the responsibility of Canada and BC and should not be delegated to Project Proponents.	BC; Canada; FN	Now
RESTRUCTURING BC ENVIRONMENTAL ASSESSMENT OVERSIGHT			
12	The BC Environmental Assessment Office should be restructured as an agency, politically and functionally independent of BC Government ministries.	BC	Future
13	The BC Environmental Assessment Office should continue its initiative to establish regional offices which would allow easier access by and communication with First Nations.	BC	Now
14	First Nations should be represented in the oversight of a newly designed and independent BC Environmental Assessment Office.	BC	Future
15	A committee, including First Nation representation, should immediately be formed to examine ways to make the environmental assessment process more efficient and effective.	BC	Future

BP#	Best Practice	Primary Responsibility	Can be Implemented Now or in Future?
16	The newly formed Environmental Assessment Committee should decide whether and how the forestry and the oil and gas industries should be covered by the environmental assessment process to better capture, mediate and regulate their cumulative effects on First Nations and the environment.	BC; Canada	Future
17	A standing First Nations' Environmental Assessment Advisory Committee should be created to provide ongoing advice to the BC Environmental Assessment Office on First Nation issues with respect to environmental assessment.	BC; FN	Future
BUILDING AND MAINTAINING GOOD WORKING RELATIONSHIPS			
18	Proponents can assist in developing a good working relationship with First Nations by meaningfully involving First Nations in all phases of a Project's planning, permitting, construction, operation, and de-commissioning.	Proponent	Now
19	All parties engaged in an environmental assessment review process should make best efforts to utilize the same staff throughout the process so that a productive working relationship can be developed among the various environmental assessment review entities.	All	Now
20	Some environmental assessment review meetings should be held in the communities of affected First Nations.	All	Now
FIRST NATION MANAGEMENT OF ITS PARTICIPATION IN THE EA PROCESS			
21	Each First Nation should develop its own strategic vision in respect of development in its territory and should use this vision to guide its participation in environmental assessment.	FN	Now
22	Each First Nation should complete its own land use planning on its territory to give direction to environmental assessment and other land-based processes.	FN	Now

BP#	Best Practice	Primary Responsibility	Can be Implemented Now or in Future?
23	Each First Nation should complete its own territory based social, economic, and cultural baseline studies to inform and give direction to environmental assessment and other processes.	FN	Now
24	Each First Nation should develop its own guidelines, based on its specific needs, to inform project proponents about how it wishes to be approached and engaged in the environmental assessment process. This should be formalized in an ”Environmental Assessment Participation Agreement” between the First Nation and the Proponent (see also BP #70).	FN	Now
25	First Nations should be engaged early in the process by the Proponent in early stages of Project planning, so that they have appropriate input in the identification of valued ecosystem components, the scoping of geographic and temporal bounds, and the planning of baseline studies.	Proponent	Now
26	If more than one First Nation is affected by a Project, pooling of resources and development and communication of common positions may be helpful in achieving a stronger voice in environmental assessment reviews.	FN	Now
27	If a First Nation chooses to engage legal or other consulting assistance in participating in an environmental assessment review process, this engagement should be formalized in a contractual agreement including an appropriate “Scope of Work”.	FN	Now
28	Each First Nation should develop its own list of criteria against which it can measure the adequacy of environmental assessments and the importance and acceptability of predicted Project impacts.	FN	Now
29	Each First Nation should develop its own internal communication and community feedback plan with respect to environmental assessment specific to its own needs.	FN	Now

BP#	Best Practice	Primary Responsibility	Can be Implemented Now or in Future?
30	Each First Nation should develop an easily accessible library of documents pertaining to a particular environmental assessment for the use and benefit of its staff and members.	FN	Now
31	First Nations staff members who have responsibility for environmental assessment should not be the same staff members who have responsibility for developing economic agreements with the Proponent (see also BP #71).	FN	Now
THE ENVIRONMENTAL ASSESSMENT PROCESS			
	General Process Issues and Scoping		
32	Commission or panel environmental assessment reviews, as contemplated in Section 14 of the *BC Environmental Assessment Act*, should be more frequently used for complex or more contentious Projects.	BC	Now
33	To achieve cultural relevancy, alternative environmental assessment process models suggested by First Nations should be considered.	BC	Future
34	Environmental assessment, whether under the *BC Environmental Assessment Act* or the *Canadian Environmental Assessment Act*, must include evaluation of Project effects on all aspects of the environment including the biological, chemical, physical, social, heritage, cultural, spiritual, economic, and health environments.	BC; Proponent	Now
35	Terms of Reference for an Environmental Assessment Application should be developed in consultation with affected First Nations early in the environmental assessment process, as part of a scoping exercise and in advance of baseline or other field studies, and should be specific to the nature of the proposed Project and the local environment.	BC; Proponent	Now

BP#	Best Practice	Primary Responsibility	Can be Implemented Now or in Future?
36	Environmental Assessment Applications should be concise, with a maximum page limit set at the Terms of Reference stage, should focus on the important Project effects, their mitigation, residual effects, and the significance of the residual effects, and should be written in non-technical language. Background studies should be appendices to the Environmental Assessment Application. See also BP #37.	BC; Proponent	Now
37	Environmental Assessment Applications should not serve as Permit Applications, and should not include the detailed information that is required for permitting.	Proponent; BC	Now
38	Important First Nation values must be considered to be valued ecosystem components, whether they are biological, chemical, physical, economic, social, cultural, spiritual, heritage, or health values.	Proponent	Now
	Traditional Knowledge and Traditional Use Studies		
39	Traditional knowledge and information on traditional use must be collected early in the process to inform the design of other environmental assessment-related studies, and must be given the same consideration as scientific knowledge in evaluating potential effects of a proposed Project.	FN; Proponent	Now
40	A Proponent should give affected First Nations the opportunity to conduct traditional knowledge and traditional use studies for use by the Proponent in the environmental assessment of a proposed Project.	FN; Proponent	Now
41	Prior to the collection of any traditional knowledge or traditional use information as part of an environmental assessment, a First Nation and a Proponent should formalize their understanding about the ownership, confidentiality, and use of this information in a legally binding agreement.	FN; Proponent	Now

BP#	Best Practice	Primary Responsibility	Can be Implemented Now or in Future?
	Baseline and Other Background Studies		
42	Baseline and other background studies must adhere to acceptable standards of data collection and analysis, and must adequately consider traditional knowledge and spatial and temporal variation in their design.	Proponent	Now
43	Multi-year field studies should allow for between-year review and comment by First Nations of field season results before finalizing plans for the subsequent year.	Proponent	Now
44	First Nation representatives should be included on all field study teams.	Proponent; FN	Now
45	The results of baseline studies should be summarized and presented to First Nations in clear, non-technical language.	Proponent	Now
	Significance of Residual Effects		
46	In an Environmental Assessment Application, the methods for determining the significance of residual effects must be clearly documented, and analyses of significance should be done in consultation with First Nations.	All	Now
47	Criteria for evaluation of the significance of residual environmental effects should be reviewed and standardized to ensure that the sustainability of First Nations' heritage, social, spiritual, and cultural values are properly considered in environmental assessment, along with biological, chemical, and physical values.	All	Future
	Cumulative Effects Assessment		
48	Given the ineffectiveness of cumulative effects assessment as it is practiced today, one task for the committee recommended in BP #15 should be to examine the existing cumulative effects methodology and make recommendations for its improvement.	All	Future
49	Given their long association with the land and its resources, First Nations must play a meaningful role in cumulative effects assessment.	All	Now

BP#	Best Practice	Primary Responsibility	Can be Implemented Now or in Future?
50	The significance of some cumulative effects must be measured against pre-determined thresholds developed in land use planning, regional cumulative effects assessment, or other processes.	All	Now and Future
51	Oral evidence of past impacts of development Projects must be given due consideration in the assessment of cumulative effects.	All	Now
52	Remediation of environmental problems from past Projects may provide more "room" for development, and should be given due consideration in cumulative effects assessment.	All	Now
	Commitments		
53	An Environmental Assessment Application must lay out commitments made by the Proponent and public governments in respect of First Nations in the development, operation, and post-operation phases of a proposed Project, and these commitments must be carried over into Environmental Assessment Certificates, permits, or other authorizations, or into agreements between First Nations and public governments, or First Nations and the Proponent, as appropriate.	Proponent; BC; Canada	Now
54	The BC Environmental Assessment Office should develop a system to track and enforce compliance of the commitments made by the Proponent in an Environmental Assessment Application and subsequent permits or other authorizations, and should annually review compliance with affected First Nations.	BC	Now
55	Understandings made outside of the environmental assessment process between a Proponent and a First Nation should be captured in a legally binding agreement.	Proponent; FN	Now

BP#	Best Practice	Primary Responsibility	Can be Implemented Now or in Future?
	Decision Making		
56	First Nations should communicate their concerns, recommendations, and decision to the BC and federal Ministers independently of BC Environmental Assessment Office or Canadian Environmental Assessment Agency recommendations.	FN	Now
57	Canada and BC must acknowledge that First Nations have a decision-making role about the environmental acceptability of Projects within their territories and find suitable mechanisms to give effect to this role.	Canada; BC	Now and Future
58	The BC Environmental Assessment Office Certificate decision making process should be re-designed to better consider and incorporate the views and decision-making role of First Nations, and should include a dispute resolution mechanism when the views of First Nations and public governments are at odds.	BC	Future
59	Each First Nation should develop its own policies and guidelines to provide direction on internal environmental assessment decision making.	FN	Now
60	First Nations must be allowed sufficient time, consistent with their own processes of internal consultation, to allow for environmental assessment decision making.	BC; Canada	Now
MONITORING AND FOLLOW-UP			
61	An environmental assessment must include a monitoring plan for all phases of the Project that includes a commitment to engage First Nation monitors.	Proponent	Now
62	First Nation monitors should be independent contractors or employees of the First Nation with obligations to report their monitoring results, including infractions, to the Proponent, to public governments, and to affected First Nations.	Proponent; FN	Now

BP#	Best Practice	Primary Responsibility	Can be Implemented Now or in Future?
63	A Project Proponent should be responsible for funding the training and engagement of First Nation monitors.	Proponent	Now
64	Government regulators should, in a timely manner, investigate First Nation monitors' reports of environmental assessment commitment or permitting infractions and, if necessary, take appropriate remedial actions.	BC; Canada	Now
REMEDIATION OF UNANTICIPATED ADVERSE IMPACTS			
65	A mechanism, separate from and in addition to the BC bonding mechanism currently in place for mine reclamation, should be developed to collect and hold financial resources from Project proponents for remediation of unanticipated adverse Project effects.	BC; Canada	Future
FINANCIAL CAPACITY FOR PARTICIPATION IN EA			
66	To avoid any real or perceived conflict of interest issues, it is not a good practice for First Nations to receive funding directly from Proponents to participate in environmental assessment processes.	FN	Now
67	Funding First Nation participation in environmental assessment processes or in processes that will facilitate future environmental assessment processes (such as First Nations' Land Use Plans, Socio-Economic Baseline Studies, Traditional Use Studies) is primarily the responsibility of governments.	BC; Canada	Now
68	Funding for First Nation participation in environmental assessment processes should be held in trust for distribution to First Nations.	BC; Canada	Future
69	First Nations must be funded in amounts sufficient to cover the reasonable costs of their participation in environmental assessment processes.	BC; Canada; Proponent	Now

BP#	Best Practice	Primary Responsibility	Can be Implemented Now or in Future?
70	In the interim period before Governments develop appropriate mechanisms to properly fund First Nation participation in the environmental assessment process, Proponents should fund First Nation participation through "Environmental Assessment Participation Agreements" negotiated with First Nations (see also BP #24).	Proponent	Now
71	Environmental Assessment Participation Agreements should not be confused with or combined with Economic Benefit Agreements (see also BP #31).	Proponent; FN	Now
72	In the absence of other funding mechanisms, First Nations should consider a fee for service (personnel time plus expenses) system for invoicing public governments for their participation in environmental assessment review processes.	FN	Now
CAPACITY BUILDING			
73	First Nations should develop their own capacity building plans to enhance their abilities to effectively participate in environmental assessment processes.	FN	Now
74	First Nations should support and utilize the services of First Nation organizations, such as the First Nations Environmental Assessment Technical Working Group (FNEATWG), that are meant to assist in building First Nation capacity in environmental assessment or other governance functions.	FN	Now
75	The governments of BC and Canada should fund environmental assessment capacity building in First Nations.	BC; Canada	Now

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D. Useful Websites and Other Sources of Information.

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Even though the input of these contributors has helped immensely in framing ideas around Best Practices for First Nations in the environmental assessment process, none of the ideas presented herein can be attributed to any one individual or contributor. The authors take full responsibility for the Best Practices suggested herein and in any deviation in ideas for Best Practices suggested by other contributors.

We also wish to thank Lisa Webster-Gibson of the First Nation Environmental Assessment Technical Working Group (FNEATWG) for insight she provided in early discussions on this project, and for her co-ordination of FNEATWG participation.

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Finally, we wish to thank Mr. Cliff Fregin of the New Relationship Trust (NRT) and Mr. Derek Sagima, formerly of the NRT, for initiating, funding, and managing this project and for providing us with valuable direction and advice throughout the project.

ABBREVIATIONS USED IN REPORT

BC	British Columbia
BCEAO	British Columbia Environmental Assessment Office
BCEA Act	British Columbia Environmental Assessment Act
CEAA	Canadian Environmental Assessment Agency
CEA Act	Canadian Environmental Assessment Act
EA	Environmental Assessment
EAO	Environmental Assessment Office
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
IA	Impact Assessment
NRT	New Relationship Trust
TEK	Traditional Ecological Knowledge
TK	Traditional Knowledge
TUS	Traditional Use Study

1. INTRODUCTION

> *"EIA (Environmental Impact Assessment) and EIS (Environmental Impact Statement) practices vary from study to study, from country to country, and best practice is constantly evolving."*[1]

As an inaugural task, the New Relationship Trust (NRT)[2] travelled across BC to identify issues of common concern to First Nations that needed to be addressed. First Nations' involvement or lack of involvement in the Environmental Assessment (EA) process was identified as one topic of serious and common concern. In response, the NRT commissioned a study to summarize Best Practices for the involvement of First Nations in the EA process. This report summarizes the Best Practices that resulted from this work, where the definition of Best Practices, as defined in the Request for Proposal, was:

> *" … methodologies, strategies, procedures, practices and/or processes that consistently produce successful results."*

The practice of EA in BC is guided by the BC *Environmental Assessment Act*[3] and the *Canadian Environmental Assessment Act*[4], and their accompanying regulations and guidelines. While these two Acts clearly describe the EA processes, they do not prescribe clearly how First Nations should be involved. With case law on aboriginal rights with respect to land and resources rapidly evolving in BC, the governments of Canada and BC have come a long way in recent years in including First Nations in EA review processes. Nonetheless, in this atmosphere of legal uncertainty without prescribed and agreed upon roles for First Nations' involvement, many First Nations are frustrated in their current role in EA review of proposed Projects that occur on their territories and that so directly affect their rights and interests. This becomes a serious frustration on large, complex Projects with serious environmental effects, as expressed in one of the presentations given during the BC First Nations Mining Summit in October of 2008 in Prince George, BC:

> *"The involvement of First Nations in the EA process works well for projects that do not have many impacts and it breaks down when a project becomes more complex and many impacts need to be mitigated."*

In this report, we suggest Best Practices for a meaningful involvement of First Nations in the EA process. These suggestions have been founded in discussion with several EA practitioners, mostly from First Nations in BC, but also from government and industry.

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[1] Glasson, John et al: Introduction to Environmental Impact Assessment: Principles and Procedures, Process, Practice, and Prospects. Routledge, 1999, p. 7
[2] http://www.newrelationshiptrust.ca/
[3] http://www.qp.gov.bc.ca/statreg/stat/E/02043_01.htm
[4] http://laws.justice.gc.ca/en/c-15.2/text.html

Our proposed Best Practices have also been informed by case studies of actual environmental assessments and from general information review.

We believe that the Best Practices reported herein are relevant for most First Nations in BC. However, we are aware that most First Nations that are in treaty negotiations wish to preserve the ability to pass their own laws with respect to environmental assessment, as first achieved by the NIsga'a in their treaty. If a First Nation puts into effect its own laws on environmental assessment, some of these proposed Best Practices may no longer be relevant.

2. METHODS

The information base for this report was gathered through desk top studies of the existing literature and public information on the BC Environmental Assessment Office (BCEAO) and the Canadian Environmental Assessment Agency (CEAA) websites in addition to the professional EA experience of the authors and colleagues. However, interviews with contributors and case studies of EA review examples were the main information sources for this report.

2.1 Interviews

All persons interviewed for this report were asked for their consent to publish the information that they provided before the interview began. Consent was given under the following conditions:

- Comments made were not to be connected to the names of specific respondents; instead a list of contributors is included in the “Acknowledgements”;
- The report was to be preceded by a preamble that clearly states that not all contributors agree with all statements made in the report (see “Acknowledgements”);
- The comments made during discussions were to be summarized and e-mailed back to the interviewees for review; and
- A final draft of the report was to be provided to all contributors for review and comment before the final report was published.

The authors of this report had the choice to either use a very structured approach guided by detailed questions or to suggest topics and let the interview process take its course within the topics. After consulting with several First Nations’ EA practitioners, it was decided that the topic guided and more informal approach was more culturally appropriate and would likely result in a greater variety of comments.

All but one of the interviews for this report were conducted face to face, mostly on the territories of First Nations. During each interview all comments were written down by the authors of this report and later summarized in digital form.

The topics chosen for discussion were:

- Do you think the harmonized provincial-federal EA process adequately involves First Nations?
- Did you feel prepared when you engaged/will engage in the EA process?
- What worked? What did not? Please explain using examples.
- Timelines

- Funding
- Arm's-length relationship with a proponent
- Consultation
- Rights and title
- Territorial overlap
- Communication
- Understanding of the EA process and its deadlines
- Consultants
- Lawyers
- Capacity building
- Information exchange with other organizations
- Cultural appropriateness
- Economic benefits
- Staking and exploration
- Technical tips
- Organization of data
- General suggestions for changes or additions to existing EA policy.

It was also mentioned by the interviewer in the interviews that the NRT indicated that this report was to be the first step in a process that aimed to strengthen First Nations' abilities to become stronger EA review participants and that additional funding might be available in the future. We then asked for suggestions on where future funding should flow.

2.2 Case Studies

Information for the case studies was collected through interviews with participating First Nations and non-First Nation EA practitioners and through the specific case study information on the BC EAO or other websites.

Case studies in this report were selected based on the following criteria:

- The cases covered a variety of examples of EA processes;
- The cases involved First Nations and/or proponents that were willing to divulge their experiences and lessons learned from the project;
- At least one case study that demonstrated a high standard of involvement of First Nations to the satisfaction of both the First Nation(s) and the Proponent;
- At least one case study that demonstrated a break down of the EA process that led to frustration of both the First Nations and the Proponent; and
- At least one case study that was instrumental in shaping the Canadian or BC EA process.

2.3 Other Research

In addition to the interviews that provided the information backbone for this report, we researched the internet for Canadian and international EA best practice suggestions and encouraged all interviewees to suggest additional written information sources. Examples of these written information sources were EA application documents accessible on the BC EAO or the CEAA websites, international case study descriptions and peer-reviewed publications.

3. EXISTING EA PROCESSES

In the following sections we summarize the current environmental assessment processes in British Columbia.

3.1 BC Environmental Assessment Process

Figure 1 shows a simplified flow chart of the BC EA process based on the BC EA Act. Detailed information on the BC EA Act and BC EA process is publically available on the BCEAO website in the following documents:

- The *British Columbia Environmental Assessment Act*[5]
- Guide to the British Columbia Environmental Assessment Process[6]
- Supplementary Guide to First Nations[7]
- Supplementary Guide to Proponents[8]
- Supplementary Guide to the Public[9]
- For an overview of the EA process and EA tools for First Nations also see the "First Nations Environmental Assessment Toolkit" published by the First Nations Environmental Assessment Technical Working Group[10]

In general, the BC EA process is initiated by a Proponent approaching the BCEAO with a request for information to identify whether a planned Project needs to be reviewed under the BC EA Act. Usually this informal approach is followed by a written Project description by the Proponent submitted to the BCEAO. At this time, the BCEAO suggests that the Proponent approach First Nations that may be affected and initiate discussion about the Project and its EA. Projects that trigger the provincial EA process are listed in the *Reviewable Projects Regulation*[11]. If a provincial EA is necessary a Section 10 Order is issued to the Proponent, followed by a Section 11 Order that outlines the EA review process for a particular Project in detail. The Project specific EA process described in the Section 11 Order has a standardized format but can be very project specific and flexible. At this point, the BCEAO and the Proponent often enter into consultation agreements with affected First Nations. A Terms of Reference for an EA Certificate Application is then developed by the Proponent and submitted to the BCEAO for review and approval. First Nations and the general public are given the opportunity to comment on the Terms of Reference. Baseline field studies are then carried out to determine the status quo of the ecological and social components that may be affected by the Project. Once the Terms of

[5] http://www.qp.gov.bc.ca/statreg/stat/E/02043_01.htm
[6] http://www.eao.gov.bc.ca/guide/2003/final-guide1-2003.pdf
[7] http://www.eao.gov.bc.ca/guide/2003/sections/sup-guide-fn.pdf
[8] http://www.eao.gov.bc.ca/guide/2003/sections/sup-guide-prop.pdf
[9] http://www.eao.gov.bc.ca/guide/2003/sections/sup-guide-pub.pdf
[10] http://www.fneatwg.org/pdf/First_Nations_EA_Toolkit.pdf
[11] http://www.qp.gov.bc.ca/statreg/reg/E/EnvAssess/370_2002.htm

Reference have been approved, an EA Certificate Application is written by the Proponent and submitted to the BCEAO. Within a 30 day review period, the BCEAO determines whether the EA Certificate Application is compliant with the Terms of Reference and, if so, it will be accepted for detailed review over a 180 day review period. It is within this period that First Nations and the Public can provide detailed comment on the EA Certificate Application. At the end of this period, the BCEAO prepares an Environmental Assessment Report that summarizes the results of the environmental assessment and sends this, with recommendations, to the relevant Ministers for decision-making. The Ministers then have 45 days to grant or deny an EA Certificate to the Proponent.

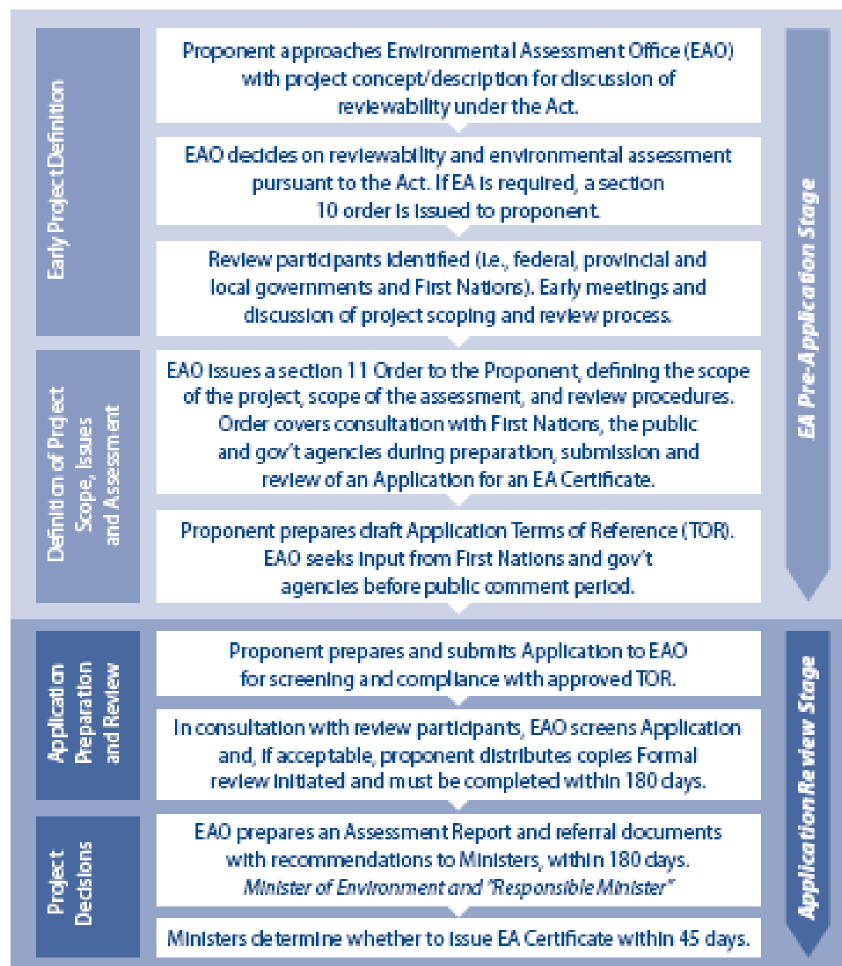

Figure 1. Simplified flow chart of the BC EA process (Source: BC EAO, Environmental
Assessment Office: Fairness and Service Code[12]).

[12] http://www.eao.gov.bc.ca/pub/pdf/EAO_FairnessAndServiceCodeBooklet.pdf

3.2 Canadian Environmental Assessment Process

Figure 2 shows a flow chart of the decision making process to determine whether the Canadian EA Act is triggered and the main steps of the federal EA process. The main steps of the provincial and federal EA process are similar and since most Projects that are subject to the BC EA process are also subject to the federal EA process, the BC EAO commonly takes the lead in a harmonized EA process (see Section 3.3).

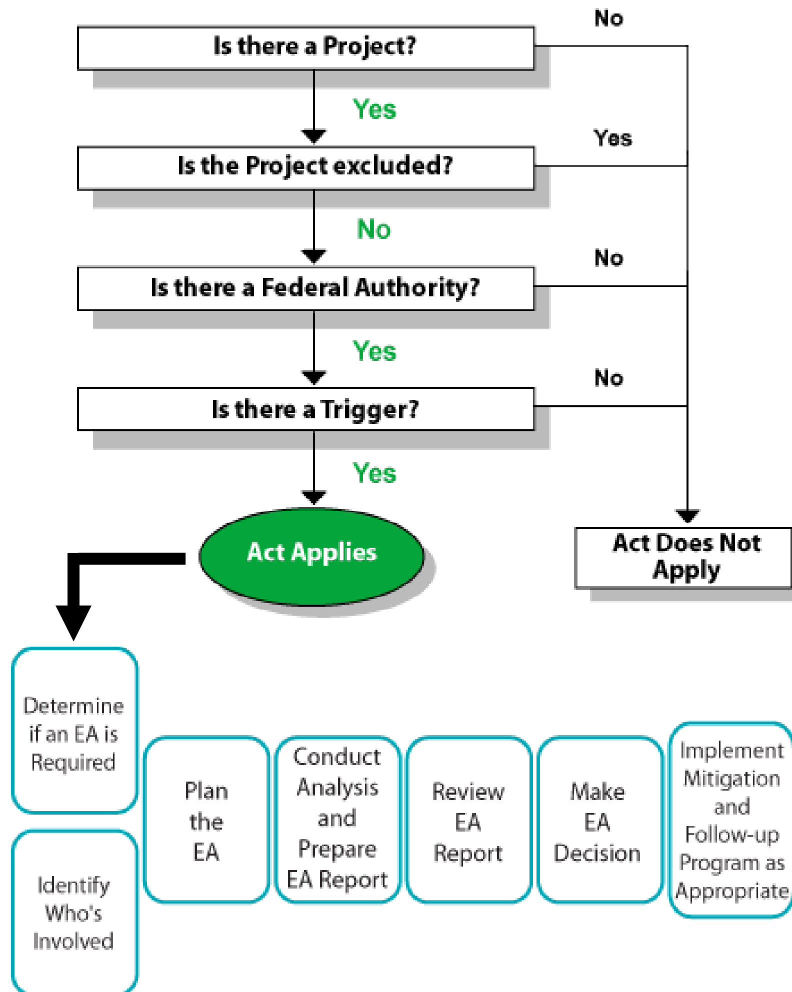

Figure 2. Simplified flow chart of the CEAA process (Source: CEAA Website: http://www.ceaa.gc.ca/010/basics_e.htm#1).

CEAA review is triggered when the Proponent is a federal agency, when the proposed Project requires federal funding, when the Project is located on federal land, or when the Project requires federal authorizations. Examples of Projects that trigger the federal EA process are Projects in National Parks, nuclear Projects, Projects on First Nations' reserves, and Projects that affect fish habitat. Three regulations define whether or not CEA Act review is triggered:

- the *Law List Regulation*[13]
- the *Inclusion List Regulation*[14]
- the *Exclusion List Regulation*[15]

3.3 BC/Canada Harmonization Agreement

If both the federal and the provincial EA processes are triggered the EA will be carried out as described in the 2004 Canada-British Columbia Agreement on Environmental Assessment Cooperation[16]. Environmental assessments conducted under this agreement are referred to as harmonized EAs. Typically, larger projects in BC trigger an assessment under the BC EA Act and the CEA Act but the BC EAO will normally take the lead in the EA process. CEAA co-ordinates federal input into harmonized EAs, and federal departments that are often involved include the Department of Fisheries and Oceans, the Department of Environment, the Department of Health, the Department of Transport, and the Department of Natural Resources. As a result of the harmonized process, only one Terms of Reference and one EA Application or report for a Project EA is produced.

More detailed information on the federal, provincial and harmonized EA processes is provided on the websites of the BC EAO[17] and the CEAA[18] and in the First Nations' EA Toolkit[19] developed by the First Nations Environmental Assessment Working Group (FNEATWG).

3.4 First Nations as a Proponent

First Nations are expressly recognized as potential Proponents of reviewable Projects in the BC EA Act definition of "proponent" and by necessary implication as a "person, body … or government that proposes a project" in the CEA Act. When a First Nation acts as a Project Proponent, either independently or in some form or business arrangement with another party, the First Nation will be responsible in the same way as any other

[13] http://www.ceaa.gc.ca/013/lawlist08_e.pdf
[14] http://laws.justice.gc.ca/en/c-15.2/sor-94-637/index.html
[15] http://laws.justice.gc.ca/en/c-15.2/sor-2007-108/index.html
[16] http://www.eao.gov.bc.ca/pub/can-bc_agreement/can-bc-agree_mar1104.pdf
[17] http://www.eao.gov.bc.ca/ea_process.html
[18] http://www.ceaa.gc.ca/012/index_e.htm
[19] http://www.fneatwg.org/pdf/First_Nations_EA_Toolkit.pdf

Proponent for preparing the necessary EA Certificate Application, study reports and other documentation, and for conducting consultations with the public and other First Nations.

4. RESULTS OF INTERVIEWS AND CASE STUDIES

The results of the interviews and case studies conducted to gather information for the development of Best Practices are briefly summarized in the following sections.

4.1 Summary of Interview Sentiments

A detailed summary of interview observations and suggestions is provided in Appendix A of this report. It is clear from the interviews that many First Nations are frustrated in their current role in EA review of proposed Projects that occur on their territories and that so directly affect their rights and interests. These frustrations include, but are certainly not limited to:

- unsatisfactory aspects of the environmental assessment process, e.g. the way in which Terms of Reference are developed and used;
- legislated time lines for various steps in the environmental assessment process that aren't consistent with First Nation decision making processes;
- an inability of the environmental assessment process, or an unwillingness of public governments or Proponents, to meaningfully consider many values of importance to First Nations;
- lack of clarity and consistency on how the significance of Project effects is determined;
- an unsatisfactory cumulative effects process, that does not properly take into account impacts of all types of development that have occurred in the past;
- an unsatisfactory role for First Nations in decision-making;
- unsatisfactory funding mechanisms and insufficient levels of funding for meaningful participation in environmental assessment review processes; and
- some Project proponents who are unenlightened about First Nation rights and interests, or who merely see First Nation participation as another obstacle to overcome in the pursuit of their Project.

Many of the suggestions made about Best Practices by interview respondents have been captured in the Best Practices proposed in this report. However, no one Best Practice can be attributed to any specific respondent, and the authors are ultimately responsible for the Best Practices as proposed herein.

4.2 Summary of Lessons Learned from Case Studies

Case studies for three environmental assessments are presented in Appendix B. Lessons learned from these EA reviews are summarized briefly in this section.

Polaris Minerals: Orca Sand and Gravel Project

The Orca Sand and Gravel Project is located on the territory of the Namgis First Nation. The details of the Orca Sand and Gravel Case Study can be found in Appendix B. Important information learned from this case study included the following points:

- A well prepared First Nation will be able to negotiate from a strong and informed perspective.
- Relationship building between the representatives of First Nations and Proponents before the onset of the official EA process will build trust.
- Legally binding exploration and access agreements and the recognition of time limited veto rights will speed up the EA process.
- First Nations should be involved in the EA scoping and Terms of Reference drafting processes to make the EA process culturally sensitive.
- The approach to EA should be flexible and local needs might require that regulatory standards be exceeded.
- The EA process needs to emphasize procedural fairness and respect for First Nations.
- The opportunities to create economic development from a Project for a First Nation must be carefully weighed against the long-term environmental impacts of the Project.

Northgate Minerals Corporation: Kemess North Project

The proposed Kemess Project was located within the use areas of the members of the Tsay Keh Nay (Kwadacha First Nation; Takla Lake First Nation; and Tsay Keh Dene). The details of the Kemess North Case Study can be found in Appendix B. Key pieces of information gained from this case study included the following points:

- The culturally influenced perception of risk must be taken seriously.
- Positive economic effects must always be weighed against adverse effects on First Nations.
- Natural and fish bearing water bodies should not be tailings ponds.
- Continuous and in depth communication between Proponents and First Nations is necessary.
- Oral agreements are perceived to be legally binding in First Nations' traditions and need to be seen as such.
- Panel reviews with First Nations' participation can make EAs culturally sensitive.
- Detailed and long-term (post-closure) Project monitoring and remediation planning in collaboration with First Nations is essential for the issuance of an EA Certificate.

Imperial Oil, Shell Canada, ConocoPhilips and ExxonMobil: McKenzie Valley Pipeline Project

The proposed McKenzie Valley gas pipeline will affect the rights and interests of several First Nations or Métis groups: Deh Cho, Sahtu, Gwich'in, Inuvialuit, Akaitcho, Dogrib, Salt River, Dene Tha First Nations, and the North Slave Métis and South Slave Métis Alliances. The details of the McKenzie Valley Pipeline Case Study can be found in Appendix B. Key points learned from this study in relation to EA Best Practices include:

- Large trust funds that provide resources to mitigate potential bio-physical and socio-economic impacts will build trust in an EA process.
- First Nations as partial owners of large Projects should try to create a long-term economic legacy for their people as part of the EA process.
- The active participation of many First Nations in a large scale EA process can change policy and make the EA process more First Nations sensitive.

5. PROPOSED BEST PRACTICES FOR FIRST NATION PARTICIPATION IN EA PROCESSES

In the following sections we present recommended Best Practices for participation of First Nations in EA review processes with a brief explanation of the rationale behind their recommendation. We emphasize that these Best Practices are recommendations of the authors, after carefully considering information gathered in interviews, from case studies, and from other research conducted during the course of the study. We have also utilized our lengthy experience in practicing EA, in assisting First Nations to participate in EA processes, and in assisting First Nations in treaty negotiations and other processes to help shape the Best Practices proposed herein. Although the interviews provided highly valuable insight about the limitations of existing practices in respect of First Nation involvement in EA, and provided many suggestions for Best Practices, it would be inappropriate to attribute any single Best Practice recommended herein to any one interviewee.

In this Section we recommend and describe those Best Practices that are most directly related to the environmental assessment process. However, many other issues were identified by interview respondents or through case studies or other research that while not environmental assessment issues *per se*, are nonetheless relevant to a discussion about improving First Nation participation in the environmental assessment review process. These related issues are briefly discussed in Section 6 of this report.

We emphasize that the Best Practices recommended herein are not on how to conduct an environmental assessment but how First Nations can meaningfully engage in environmental assessment review and decision-making processes.

A summary of proposed Best Practices in relation to First Nation participation in the environmental assessment process is presented in Table 1, in the Executive Summary. A total of 75 recommendations for Best Practices are made and categorized under 8 general topics. For each of these Best Practices, we provide in the following sections a brief explanation of the rationale used to propose that Best Practice. We also provide an indication of the Party or Parties with the primary responsibility for implementing the Best Practice.

5.1 Aboriginal and Treaty Rights, and Consultation

In British Columbia, proposed Projects that are subject to environmental assessment often occur in the territories of First Nations where aboriginal rights and title issues have not been resolved. While the environmental assessment is not the forum to resolve these issues, the nature of adequate consultation and accommodation during environmental assessment, as is required to preserve the honour of the Crown or to satisfy its fiduciary duty, remains unclear. This lack of clarity arises because there are

often differing opinions between the Crown and a subject First Nation about the strength of the First Nation's rights and title claim (see Appendix C for a summary of the Common Law in respect of First Nation participation in environmental assessment). Often these differing opinions result in dissatisfaction on the part of First Nations in their role in the final decision making about whether or not a proposed project should be granted an Environmental Assessment Certificate or otherwise be allowed to proceed.

We present the following Best Practices in respect of these issues.

BP #1: Canada and British Columbia must ensure that their environmental assessment legislation, policies, and guidelines reflect the constantly evolving law of the land with respect to Aboriginal and Treaty rights.

There is a long lag time between the issuance of important court decisions about aboriginal rights and title and the application of that decision at the operational levels of public governments. While it is understandable that it will take some time to reflect changes in case law in government legislation, it is frustrating for First Nations when the law of the land is not reflected in governments' operational approaches, particularly if delays in reflecting these changes result from lengthy appeals to higher courts. We believe that it is possible for public governments to change their policies and operational guidelines following court decisions to be consistent with the current law of the land much more quickly than is currently the case.

The public governments (British Columbia and Canada, in this case) have the responsibility for implementing this Best Practice. It is a Best Practice that can be implemented now.

BP #2: The BC Environmental Assessment Act should be amended to specify and define the inclusion of First Nations in the environmental assessment process, consistent with recent case law in respect of aboriginal rights and title.

As clarified in several recent court decisions, First Nations have aboriginal rights, including perhaps title, over most of British Columbia. Even though the nature and extent of these rights may not yet have been determined, it is clear that First Nations need to be consulted and play a role in land or resource based planning processes such as the environmental assessment process. BC Government policy, according to the "New Relationship", also recognizes that First Nations must play a meaningful role in decision-making about lands and resources. As a result we believe that it would be useful for the role of First Nations in the EA process to be defined within the *BC Environmental Assessment Act*.

The BC Government has the responsibility for implementing this Best Practice. It is a Best Practice that will take time to implement.

BP #3: As a first step in engaging in an environmental assessment review process, a First Nation should communicate in writing to Canada, British Columbia, and the Proponent a clear assertion of its rights and interests, including title where appropriate, in the Project area.

First Nations must do their part in communicating their interests and concerns to the BC EAO, CEAA, and the Project Proponent. An important first step in the EA process is for a First Nation to make a clear written declaration of its rights and interests, including title where appropriate, in the Project area or in the area affected by the Project. Apart from providing a "paper trail" should it be required, this Best Practice also puts the other Parties to the EA on notice that Aboriginal rights will be important issues during the environmental assessment process.

First Nations are responsible for implementing this Best Practice. This is a Best Practice that can be implemented now.

BP #4: A Proponent should be well informed about the law of the land regarding aboriginal rights and title before approaching a First Nation about a potential Project in that First Nation's territory.

In a "first contact" situation, it is frustrating for a First Nation to be confronted by a Proponent with little or no understanding about the First Nations of British Columbia nor of the Constitutional, statutory, and common law of the land in respect of First Nation rights and interests. Proponents of proposed Projects in the territories of First Nation(s) must expend effort in educating themselves about these issues before approaching a First Nation about their proposed Project. Not only will this help to establish a good working relationship, but it will help to facilitate the EA process.

This Best Practice is a responsibility of the Proponent. This is a Best Practice that can be implemented now.

BP #5: Section 27 of the BC Environmental Assessment Act, regarding environmental assessment agreements with other jurisdictions, should be amended to include First Nations as "jurisdictions".

First Nations are often frustrated by the "cookie-cutter" approach to the environmental assessment process in BC that does not properly take into account the specific

requirements of individual First Nations. The proposed Best Practice would provide a legislative basis and make it easier for the BC Government to customize an EA process according the needs and circumstances of a particular First Nation.

This Best Practice is a responsibility of the BC Government. It is a Best Practice that will take time to implement.

BP #6: "Affected" First Nations should be considered to include both those First Nations in whose territories a proposed Project is located and those First Nations that are indirectly affected by the Project.

First Nations may be affected by a Project even if it is not on their territory. An obvious example would be where a proposed Project affects the quality of surface water which then flows downstream into the territory of a First Nation. Projects can often also affect the socio-economic environment of First Nations other than the First Nation in whose territory the Project is located.

It is the responsibility of all the Parties to ensure that all potentially "affected" First Nations have the opportunity to participate meaningfully in a Project EA. There is no reason why this Best Practice cannot be implemented now.

BP #7: To fulfill its fiduciary obligations to First Nations, Canada should take a more active role in environmental assessments in British Columbia given that most projects in BC will be located within the territories of one or more First Nations.

As a consequence of the 2004 harmonization agreement between Canada and British Columbia[20], the CEAA takes a backseat in most EA processes in BC. Commonly, only a few federal ministries provide feedback on a very narrow scope of issues. Examples are input about fish stocks and/or habitat by the Department of Fisheries and Oceans or input on ocean transportation requirements by Transport Canada. Beyond these types of statutory obligations, we believe that Canada has a fiduciary obligation to protect the rights and interests of First Nations and, until First Nation rights and interests are reconciled through treaties or other processes, should maintain a strong presence in EAs in British Columbia.

Canada is responsible for this Best Practice. This Best Practice could be implemented now.

[20] http://www.ceaa.gc.ca/010/0001/0003/0001/0002/2004agreement_e.htm

BP #8: Each First Nation should design its own consultation guide to inform and instruct other parties to the environmental assessment review process.

While the BC and federal governments have their own policies and guidelines regarding Consultation with First Nations, it is often not the case that individual First Nations have developed their own Consultation guidelines. It would be helpful for all Parties if, at the initiation of an EA for a Project within a First Nation's territory, the First Nation were able to hand over to the Proponent (and public governments) its own specific requirements for meaningful Consultation.

This Best Practice is the responsibility of First Nations. This Best Practice could be implemented now.

BP #9: Canada, BC, and proponents must acknowledge the government-government relationship with First Nations and must not view First Nations as "stakeholders".

Being tagged as a "stakeholder" along with the Guide Outfitters Association of British Columbia, environmental NGOs, the Association for Mineral Exploration British Columbia, etc. is a particular frustration for First Nations. First Nations are governments, with rights and interests in respect of land and resource use, and they must be treated as such in EA processes through appropriate government-government processes.

Canada, British Columbia, and Proponents are all responsible for acknowledging that First Nations are not stakeholders but are governments with rights and interests about how the land and resources on their territories will be used. This Best Practice can be implemented now.

BP #10: At the onset of an environmental assessment process, affected First Nations should be consulted by provincial and federal governments in respect of potential issues related to aboriginal interests, rights and title, and the fiduciary obligations of governments to First Nations.

It would be useful, early in the EA process, for the provincial and federal governments to consult with affected First Nations about how the First Nations wish to be consulted (see also BP# 8) and about potential issues related to aboriginal rights, interests and title. By identifying issues pertaining to aboriginal rights and interests early in the process, and by working out acceptable Consultation processes, a better working relationship will ensue and potential problems down the line in the EA might be avoided.

British Columbia and Canada have the primary responsibilities with respect to this Best Practice. This Best Practice can be implemented now.

BP#11: Consultation with First Nations is the responsibility of Canada and BC and should not be delegated to Project Proponents.

It is often a frustration to First Nations that the responsibility for Consultation is delegated to Proponents without concurrence of affected First Nations. This can become a particular problem when the Proponent is not fully educated about First Nations and their rights and interests or when the Proponent views First Nations as just another impediment to getting approval for their Project.

The implementation of this Best Practice is the responsibility of Canada, British Columbia, and First Nations. This is a Best Practice that can be implemented right away.

5.2 Restructuring BC Environmental Assessment Oversight

There is a strong sentiment within First Nations (and outside of First Nations, as well), that for EA to have value as a decision making tool it must be undertaken outside of the public government political framework, where it currently sits in BC. The BC EAO is housed within the Ministry of Environment; it also provides a summary of the Project effects (the Environmental Assessment Report) to the Minister of Environment (and the Minister responsible for that type of Project) for a decision regarding the issuance of an EA Certificate. An EA Certificate is required before a Project can proceed.

There is a perception that there is potential in this reporting and decision making structure to bias a decision regarding the acceptability of a Project's environmental effects. The Minister of Environment oversees and provides direction to the BC EAO; he or she also is one of the two ultimate decision makers. There is concern that a Minister of the Environment, through his/her role in directing the BC EAO could, for political reasons, influence the content or tone of an EA Report prepared by the BC EAO.

There is also a strong sentiment that First Nations, who have constitutionally protected aboriginal rights in respect of land and resources, should play a role in the oversight of the BC EAO that plays such a pivotal role in evaluating the effects of a Project on the environmental, social, economic, and cultural environments of First Nations.

BP #12: The BC Environmental Assessment Office should be restructured as an agency, politically and functionally independent of BC Government ministries.

The BC EAO is housed within the Ministry of Environment, and the current BC EA Act allows project directors to seek ministerial input throughout the EA process, leaving the perception that ministerial direction can influence the process. This does not give

confidence to First Nations who desire an unbiased evaluation of the effects of a Project in a process that is not going to be influenced by politics.

The BC Government has the primary responsibility for implementing this Best Practice. This Best Practice will take time to implement.

BP #13: The BC Environmental Assessment Office should continue its initiative to establish regional offices which would allow easier access by and communication with First Nations.

It is our understanding that the BC EAO is in the process of establishing regional referral offices to facilitate information exchange between First Nations, provincial and federal EA offices, and proponents. These offices will be knowledgeable about local conditions and be in constant contact with First Nations EA practitioners, trying to build effective working relationships. We believe that this initiative will be helpful.

The BC Government is already implementing this Best Practice.

BP #14: First Nations should be represented in the oversight of a newly designed and independent BC Environmental Assessment Office.

Because they have constitutionally protected rights in respect of the land and resources of BC, First Nations require a greater role in the oversight of the EA process to ensure that First Nation concerns are adequately evaluated.

The BC Government has the primary responsibility for implementing this Best Practice. It is a Best Practice that will take time to implement.

BP#15: A committee, including First Nation representation, should be formed to examine ways to make the environmental assessment process more efficient and effective.

The BC Environmental Assessment Process has become a very time consuming process that is costly to public governments, First Nations, and the Proponents. We believe that the process could be made more efficient, while at the same time increasing its effectiveness. It would be useful if a committee of EA experts, including First Nation representatives, be struck to examine the existing EA process and make recommendations to the federal and provincial governments to make the BC EA process more efficient and effective.

It is primarily the responsibility of the BC Government to initiate the implementation of this Best Practice. It will take time to implement it.

BP #16: The newly formed Environmental Assessment Committee should decide whether and how the forestry and the oil and gas industries should be covered by the environmental assessment process to better capture, mediate and regulate their cumulative effects on First Nations and the environment.

There can be little doubt that forestry and oil and gas activities have resulted in massive changes to the landscape that have, in addition to their environmental effects, had an adverse effect on the use of the land by First Nations people. Yet these development types are not subject to EA in BC, but are regulated solely through permitting processes. This has allowed piece-meal development to take place without adequate evaluation of overall cumulative effects of these development types. Neither are the adverse effects of these development types properly evaluated in cumulative effects assessments of other development types. It may be time to capture some aspects of these development types under EA, and we recommend that this be examined by the committee recommended in BP #15.

BC and Canada must play lead roles in implementing this Best Practice. This Best Practice will take time to implement.

BP#17: A standing First Nations' Environmental Assessment Advisory Committee should be created to provide ongoing advice to the BC Environmental Assessment Office on First Nation issues with respect to environmental assessment.

In addition to the multi-party EA committee recommended in BP#15, a standing First Nations' Advisory Committee should be created to work with the BC EAO to provide ongoing advice and recommendations regarding First Nation specific issues in respect of the EA process and contentious Project EAs. This Committee would be separate from the current BC EAO Advisory Committee which has representatives from a number of stakeholders, as well as the First Nation Environmental Assessment Technical Working Group (FNEATWG). This would provide First Nation oversight input to the BC EAO that would better reflect a government-government relationship.

The BC Government and First Nations have the primary responsibility for implementing this Best Practice. It will take time to implement it.

5.3 Building and Maintaining Good Working Relationships

A comfortable working relationship, in which a high level of trust among the Parties is established, can go a long way to making a complex process proceed in an effective and efficient manner. The following Best Practices are recommended to help in building and maintaining good working relationships.

BP #18: Proponents can assist in developing a good working relationship with First Nations by meaningfully involving First Nations in all phases of a Project's planning, permitting, construction, operation, and de-commissioning.

Many Projects that are subject to EA in BC are complex, taking many years of planning and pre-development (e.g., mining exploration) before they enter the EA process. A Proponent should meaningfully involve First Nations in these early planning and pre-development phases, and should be prepared to make commitments to meaningfully involve them in development, operations, and closure activities if the proposed Project receives an EA Certificate and appropriate permits.

The implementation of this Best Practice is largely the responsibility of the Proponent. This Best Practice can be implemented now.

BP #19: All parties engaged in an environmental assessment review process should make best efforts to utilize the same staff throughout the process so that a productive working relationship can be developed among the various environmental assessment review entities.

Effective person-person working relationships take time to develop. For this reason, all Parties to an EA should strive to use the same staff members (as long as they are being effective) throughout the EA process.

All Parties are responsible for implementing this Best Practice, and it can be implemented now.

BP #20: Some environmental assessment review meetings should be held in the communities of affected First Nations.

For convenience to most participants, EA review meetings are commonly held in larger centres, far from the Project site and far from the First Nation communities that are often closest to and potentially affected the most by the Project. To build effective working relationships with First Nations it would be useful to have some of these EA review

meetings in the First Nation communities. It would demonstrate respect for the First Nations and would allow community members to become better informed about the EA process, and about Project-specific issues and potential mitigation measures.

All Parties must work toward implementing this Best Practice, and it can be implemented now.

5.4 First Nation Management of Its Participation in the EA Process

For many First Nations effective engagement in EA review processes creates a large demand on their available governance resources, including financial resources and the time of leadership and their staff. We suggest the following Best Practices to improve efficiencies in the internal management of First Nations' participation in the environmental assessment review process.

BP #21: Each First Nation should develop its own strategic vision in respect of development in its territory and should use this vision to guide its participation in environmental assessment.

It is often difficult for a First Nation to begin an evaluation of the acceptability of a particular Project because it has no guidance documents that can provide at least general direction to leadership. One type of document that can provide general direction is a strategic vision that would lay out the First Nation's philosophy about development of the land and resources of its territory. For instance, one First Nation might welcome the economic advantages that development might bring, whereas another First Nation might put more emphasis on protecting traditional land use values. We would recommend that each First Nation develop such a strategic vision to provide a philosophical underpinning to guide reviews of proposed Projects in its territory.

First Nations are responsible for implementing this Best Practice, and it can be implemented now.

BP #22: Each First Nation should complete its own land use planning on its territory to give direction to environmental assessment and other land-based processes.

One of the most useful types of document for providing general guidance to leadership about a proposed Project is the land and resource use plan. In its simplest form, such a plan would lay out where development can occur and where it can't occur because of environmental or cultural sensitivities. A more complex plan might delineate particular areas where development might be allowed: the conditions under which development

could occur; development limits; environmental thresholds; standard mitigation measures; etc. We recommend that First Nations, if they have not already done so, make land and resource use planning a high priority.

First Nations have the primary responsibility for implementing this Best Practice, although the BC government has an important role in funding this work and in helping to reconcile these First Nation plans with land use plans developed through BC government processes (e.g., Land and Resource Management Plans – LRMPs). This Best Practice can be implemented now.

BP #23: Each First Nation should complete its own territory based social, economic, and cultural baseline studies to inform and give direction to environmental assessment and other processes.

In the past, EAs in British Columbia have included "socio-economic" assessments that have been, for the most part, inadequate from a First Nation's point of view. Typically, regional statistics on employment, the workforce, health, social issues, etc. are rolled up to provide a baseline for these assessments. Because the "regions" often include at least one town or city where non-aboriginals dominate the population, the particular issues faced by a small First Nation are often lost in the roll-up. It would be valuable for First Nations to conduct their own territory-specific social, economic, and cultural baseline studies for use in EA processes. These would need to be updated periodically, say every 5 years.

First Nations have the primary responsibility for implementing this Best Practice, although Canada and BC may play important roles in funding this work. These baseline studies could be done now.

BP #24: Each First Nation should develop its own guidelines, based on its specific needs, to inform project proponents about how it wishes to be approached and engaged in the environmental assessment process. This should be formalized in an "Environmental Assessment Participation Agreement" between the First Nation and the Proponent (see also BP #70).

Proponents are often unsure about what is expected of them in dealing with First Nations. It would be useful if each First Nation could develop its own guidelines on how it wished to be approached and engaged in the EA process, and provide these to Proponents who are wishing to develop a Project on the First Nation's territory. These guidelines could include a "Code of Conduct" that would describe properly respectful ways in which Proponent staff would conduct themselves when working on the First Nation territory or when dealing with First Nation representatives. It might sometimes be

advisable to sign an "Environmental Assessment Engagement Agreement" with the Proponent to formalize these arrangements.

First Nations have the primary responsibility for implementing this Best Practice, and it could be implemented now.

BP #25: First Nations should be engaged early in the process by the Proponent in early stages of Project planning, so that they have appropriate input in the identification of valued ecosystem components, the scoping of geographic and temporal bounds, and the planning of baseline studies.

The earlier a First Nation can be engaged in an EA for a Project, the more likely it is that First Nation issues can be adequately addressed in the EA, and the less likely it is that these issues will become contentious in latter stages of the EA.

The Proponent has the primary responsibility for implementing this Best Practice, and it can be implemented now.

BP #26: If more than one First Nation is affected by a Project, pooling of resources and development and communication of common positions may be helpful in achieving a stronger voice in environmental assessment reviews.

For most First Nations, meaningful participation in EA reviews places large demands on the human resources of the First Nation and costs a great deal. It may sometimes be advantageous to co-operate with other affected First Nations on EA reviews to lessen these burdens and to achieve a stronger voice at the EA table. Of course, this may not always be possible because of different philosophical approaches to development or for other reasons.

The responsibility for implementing this Best Practice lies with First Nations, and the Best Practice could be implemented now.

BP #27: If a First Nation chooses to engage legal or other consulting assistance in participating in an environmental assessment review process, this engagement should be formalized in a contractual agreement including an appropriate "Scope of Work".

It is always a good practice for First Nations to formalize agreements with contractors, including consultants and lawyers, in a contract.

The primary responsibility for implementing this Best Practice lies with the First Nation, although contractors may require formal engagement agreements as well. The Best Practice can be implemented now.

BP #28: Each First Nation should develop its own list of criteria against which it can measure the adequacy of environmental assessments and the importance and acceptability of predicted Project impacts.

The acceptability of adverse project impacts is normally evaluated through a determination of "significance" in EA processes. These evaluations are often very subjective and the indicators used in assessing significance are not always easily applicable to the issues identified by First Nations. Each First Nation should develop its own system for evaluating the adequacy of the environmental assessment and the "significance" of adverse Project effects.

First Nations are responsible for implementing this Best Practice, and it can be implemented now.

BP #29: Each First Nation should develop its own internal communication and community feedback plan with respect to environmental assessment specific to its own needs.

It is important that First Nation community members are fully informed about the important environmental, social, economic, and cultural issues related to a Project, the measures being proposed to mitigate adverse impacts, and the nature of any adverse impacts that remain after mitigation. Communicating this information throughout the EA can be a demanding task, particularly if more than one community is involved. Each First Nation will have its own requirements for community consultation, and its own preferred methods of communicating information and getting feedback. These might include the use of community meetings and workshops, regular update meetings with political leadership, community advisory groups, elders councils, project site visits, newsletters, etc. It is recommended that each First Nation develop its own communication and community feedback plan to give direction to those leading the First Nation EA participation.

The responsibility for the implementation of this Best Practice lies with First Nations, and it can be implemented now.

BP #30: Each First Nation should develop an easily accessible library of documents pertaining to a particular environmental assessment for the use and benefit of its staff and members.

One EA can generate a mountain of documents. These can include BC Environmental Assessment Office Orders, terms of reference, baseline studies, the Environmental Assessment Application, and assorted correspondence. As a matter of efficiency, it is advisable to organize these documents in a way in which they can readily be identified and accessed. These documents should be available for use of any staff or community member, with safeguards in place to ensure the integrity of the library of documents. In some circumstances, a computer based library of documents may be the most efficient way to make documents available to a wide number of people and to ensure the integrity of the library.

First Nations have the responsibility for implementing this Best Practice, and it can be implemented now.

BP #31: First Nations staff members who have responsibility for environmental assessment should not be the same staff members who have responsibility for developing economic agreements with the Proponent (see also BP #71).

There is always a potential conflict when a person who is responsible for economic development also has the responsibility for leading an environmental assessment review. On the economic development side, his or her job is to create economic opportunities for the community, often through Projects that proceed after being issued an Environmental Assessment Certificate. On the EA side, his or her job is to evaluate the whole range of environmental, social, cultural, and economic effects, both positive and negative, and make an unbiased recommendation to leadership on whether or not a Project should be allowed to proceed. These tasks can be in conflict, particularly when the potential economic return to the community from the Project is high, but the environmental consequences of the Project are severe. It is good practice to separate these jobs.

First Nations have the responsibility for implementing this Best Practice, and it can be implemented now.

5.5 The Environmental Assessment Process

In the following sections, we propose Best Practices in respect of the existing environmental assessment process in BC under several sub-headings.

5.5.1 General Process Issues and Scoping

It is clear from the interviews conducted as part of this study that First Nations feel that existing EA processes are limited in their ability to address issues of concern to First Nations, and often provide impediments to First Nation participation. The following Best Practices are suggested in this regard.

BP #32: Commission or panel environmental assessment reviews, as contemplated in Section 14 of the BC Environmental Assessment Act, should be more frequently used for complex or more contentious Projects.

Panel Reviews with First Nations' representation are perceived to be more inclusive of local First Nations' concerns and thus to be more culturally adequate. An open discussion based process is also familiar to many First Nations in BC since it resembles the First Nations' discussion and decision making process in community meetings, or in meetings of councils or hereditary chiefs.

This Best Practice is primarily the responsibility of the Province, and it can be implemented now.

BP #33: To achieve cultural relevancy, alternative environmental assessment process models suggested by First Nations should be considered.

Section 27 (3)(d) of the BC EA Act allows for an agreement on the kind of EA process used and thus can give First Nations the opportunity to negotiate a process that is more applicable to their specific situations. A flexible EA approach, based on the needs of a First Nation, will likely lead to more meaningful participation of First Nations in the EA process.

BC has the primary responsibility for implementing this Best Practice, but it will take time to implement.

BP #34: Environmental assessment, whether under the BC Environmental Assessment Act or the Canadian Environmental Assessment Act, must include evaluation of Project effects on all aspects of the environment including the biological, chemical, physical, social, heritage, cultural, spiritual, economic, and health environments.

In 2002, the 1995 BC EA Act was replaced by a new BC EA Act that did not reference a separate role for First Nations in the EA review process and did not stipulate that "cultural effects" be considered. The current BC EA Act weakened the legislated role of First Nations in the EA process in this respect. Although it is the current practice of the BC EAO

to design processes that consider these kinds of effects, the fact that the obligation has been removed from the legislation is discouraging to First Nations.

The implementation of this Best Practice is the responsibility of BC and the Proponent. The Best Practice can be implemented now.

BP #35: Terms of Reference for an Environmental Assessment Application should be developed in consultation with affected First Nations early in the environmental assessment process, as part of a scoping exercise and in advance of baseline or other field studies, and should be specific to the nature of the proposed Project and the local environment.

The development of the Terms of Reference for an EA report should be a pivotal milestone of the EA process. The Terms of Reference provides direction to the Proponent on the required content of an EA Application and Proponents often consider the Terms of Reference to be an all-inclusive list of what they need to include in the EA Application. Yet, in current practice, the Terms of Reference is often not completed until an EA Application is about to be submitted, long after most baseline studies have been initiated and completed. In addition, Terms of Reference often appear to be constructed from a generic template and, as a result, often do not adequately address the specific issues of the particular Project and its environment, including the First Nations social, cultural, spiritual, and economic environments. If the Terms of Reference is to provide adequate direction to a Proponent, it must be completed much earlier in the EA process with First Nation input, before baseline studies are initiated, particularly those baseline studies that focus on Valued Ecosystem Components.

BC and the Proponent have the primary responsibility in implementing this Best Practice. It can be implemented now.

BP #36: Environmental Assessment Applications should be concise, with a maximum page limit set at the Terms of Reference stage, should focus on the important Project effects, their mitigation, residual effects, and the significance of the residual effects, and should be written in non-technical language. Background studies should be appendices to the Environmental Assessment Application. See also BP #37.

EA Applications are now often composed of thousands of pages of detailed and repetitive information, some of it necessary for permitting but not necessarily for environmental assessment, that tends to obscure the main purpose of environmental assessment. This often overburdens those who need to review the Application, including First Nations' EA reviewers. To address this unnecessary workload First Nations often have to seek the advice of consultants which adds another level of complexity to an often already

overwhelming EA participation process. We believe that there is a need to make the EA Application a more concise document that focuses on the primary elements of environmental assessment, e.g. important predicted Project effects, mitigation measures, residual effects, and the significance or importance of the residual effects. (see also BP #37).

The implementation of this Best Practice is the responsibility of BC and the Proponent. It can be implemented now.

BP #37: Environmental Assessment Applications should not serve as Permit Applications, and should not include the detailed information that is required for permitting.

One reason that EA Applications have become such long and unwieldy documents is that they now tend to include detailed information that is necessary for permitting but not necessarily for environmental assessment. While this is favoured by some (particularly regulatory agencies), it places a burden on the environmental assessment process that should rightly be placed on the permitting process. EA Applications should not include technical details and evaluations that are only necessary at the permitting stage.

The BC Government and the Proponent share the responsibility of implementing this Best Practice. It can be implemented now.

BP #38: Important First Nation values must be considered to be valued ecosystem components, whether they are biological, chemical, physical, economic, social, cultural, spiritual, heritage, or health values.

Many First Nation values are social or cultural or health related. These values sometimes do not fit easily into traditional notions of "valued ecosystem components" and it may be challenging to properly assess the impacts of a Project on these types of values. As a result, they are sometimes given only cursory consideration in the EA process or are sometimes left out all together. More care should be taken to identify First Nation valued ecosystem components and to rigorously assess the impacts of a Project on them.

While the Proponent has the primary responsibility for this task, First Nations must play their part in identifying the important values that they wish to protect to the Proponent. This Best Practice can be implemented now.

5.5.2 Traditional Knowledge and Traditional Use Studies

Although great strides have been made in recent years in respect of the utilization of traditional knowledge and use information in making decisions about land and resource use and management, there remain barriers in properly integrating this information into the environmental assessment process. The Best Practices listed below are meant to address this issue.

BP #39: Traditional knowledge and information on traditional use must be collected early in the process to inform the design of other environmental assessment-related studies, and must be given the same consideration as scientific knowledge in evaluating potential effects of a proposed Project.

Traditional knowledge and traditional use information is of importance because it identifies the aspects of the environment that are of cultural importance to First Nations, i.e. the “valued ecosystem components” from a First Nation’s point of view. It can therefore provide valuable direction for other types of baseline studies that might be required. For instance, if marmots are culturally important to a First Nation, then focused scientific baseline work on marmot populations, distribution, and habitat might be indicated to allow prediction of environmental impacts on this culturally important species. For this reason, the collection of traditional knowledge and use information must occur early in the environmental assessment process, to assist in identifying a full list of appropriate scientific baseline studies. In addition, the traditional knowledge of elders and other members of a First Nation must be considered, together with scientific information, in evaluating the environmental effects of a Project.

Both Proponents and First Nations bear responsibilities in implementing this Best Practice. It can be implemented now.

BP #40: A Proponent should give affected First Nations the opportunity to conduct traditional knowledge and traditional use studies for use by the Proponent in the environmental assessment of a proposed Project.

Most First Nations take the position, appropriately, that they are the owners of their own traditional knowledge, and that some of their traditional knowledge or use information needs to remain confidential. There is often a great deal of discomfort within a First Nation when a Proponent retains, without the First Nation’s concurrence, a consulting company to collect traditional knowledge and use information as part of the environmental assessment work for a Project. The Proponent should, instead, give the First Nation the opportunity to collect its own traditional knowledge and use information. In some cases, First Nations may wish to retain consultants of their choosing to assist in

the collection and documentation of this information. Ideally, in the future, each First Nation will have collected and documented its own traditional knowledge and use information so that it can quickly provide direction to Proponents with no or only minimal need for further study or collection.

While Proponents have the primary responsibility for implementing this Best Practice, First Nations must be willing to take on the responsibility of collecting the information. The Best Practice can be implemented now.

BP #41: Prior to the collection of any traditional knowledge or traditional use information as part of an environmental assessment, a First Nation and a Proponent should formalize their understanding about the ownership, confidentiality, and use of this information in a legally binding agreement.

Traditional knowledge and use information has been abused in the past. As examples, spawning streams have been fished empty or traditional fishing spots have been taken over by commercial or recreational fishing interests. Pharmaceutical companies have utilized traditional knowledge on the medicinal properties of plants to point the way for the development of new drugs that are then patented by the pharmaceutical company. To prevent this appropriation of a First Nation's traditional knowledge and use information, and before it is used in an EA process, a First Nation should insist on having a legally binding agreement with the Proponent with respect to the ownership, confidentiality, and use of the First Nation's traditional knowledge and use information.

Both Proponents and First Nations have responsibilities for implementing this Best Practice, and it can be implemented now.

5.5.3 Baseline and Other Background Studies

We recommend the following Best Practices in relation to baseline or other background studies.

BP #42: Baseline and other background studies must adhere to acceptable standards of data collection and analysis, and must adequately consider traditional knowledge and spatial and temporal variation in their design.

Because of time and cost constraints, EA baseline studies in British Columbia are often not done with sufficient statistical rigour to satisfy scientific standards. This can be a particular issue when trying to compare predicted environmental impacts of a Project against baseline conditions that may be highly variable in time or in space. For instance,

the use of a Project area by a particular species of wildlife cannot be adequately characterized without several years of observations. Traditional knowledge can often be helpful in designing scientifically acceptable base line studies, e.g. wildlife or wildlife habitat studies, or in filling information gaps caused by inadequate scientific sampling or observation.

The primary responsibility for implementing this Best Practice rests with the Proponent. The Best Practice can be implemented now.

BP #43: Multi-year field studies should allow for between-year review and comment by First Nations of field season results before finalizing plans for the subsequent year.

In multi-year field studies, there is an opportunity to improve study design through examination of the previous year's results before the subsequent field season. First Nations should be informed of these preliminary results and provided the opportunity to suggest improvements for subsequent years.

All Parties involved in an EA review have some responsibility for implementing this Best Practice, although the Proponent probably has the primary responsibility. The Best Practice can be implemented now.

BP #44: First Nation representatives should be included on all field study teams.

First Nation confidence in the results of EA field studies can be strengthened when First Nations representatives have the opportunity to participate in field studies and become familiar with the field methodologies and results. It is also a good practice to involve First Nation representatives in field studies to build capacity within the community and, possibly, to encourage First Nation representatives to pursue higher education in the subject area.

Both Proponents and First Nations have responsibilities in respect of the implementation of this Best Practice. It can be implemented now.

BP #45: The results of baseline studies should be summarized and presented to First Nations in clear, non-technical language.

The results of baseline studies should be communicated to the membership of all affected First Nations. Since the membership will consist of individuals with widely differing backgrounds and levels of formal education, the results should be presented in

clear, non-technical language. This holds for other aspects of the EA as well, including presentations on the results of the EA.

A Proponent bears the primary responsibility for implementing this Best Practice, and it can be implemented now.

5.5.4 Significance of Residual Effects

Despite many attempts and schemes to improve objectivity in the determination of significance in environmental assessment processes, the determination of the significance or importance of an environmental effect remains a murky and subjective process that is often unclear to First Nations or does not properly take into account First Nation values. We propose the following Best Practices in respect of this issue.

BP #46: In an Environmental Assessment Application, the methods for determining the significance of residual effects must be clearly documented, and analyses of significance should be done in consultation with First Nations.

EA comes down to identifying those effects of a Project that will remain after all means have been applied to reduce or mitigate these effects (i.e., the residual effects), and determining the importance or "significance" of these residual effects. In some instances, significance can be determined by comparing predicted effects to some threshold values, e.g. predicted contaminant concentrations in water against allowable levels of that contaminant as established in regulations. However, in most cases, the criteria for establishing significance are not so clear cut and can be very subjective in nature. In an EA, it is important that the methods for determining significance have been clearly documented. It is also important that First Nations have the opportunity to participate in the development of these methods for determining significance, and in their application in determining significance of residual effects.

All Parties to an EA review have a role to play in implementing this Best Practice, and it can be implemented now.

BP #47: Criteria for evaluation of the significance of residual environmental effects should be reviewed and standardized to ensure that the sustainability of First Nations' heritage, social, spiritual, and cultural values are properly considered in environmental assessment, along with biological, chemical, and physical values.

First Nations are in the best position to set criteria for the evaluation of the significance of Project effects on First Nation heritage, social, spiritual and cultural values. It would be

advantageous for a First Nation's group or committee to review criteria used to date and to standardize these criteria for future EAs.

Again, all Parties have a role to play in implementing this Best Practice. But it will take time to implement.

5.5.5 Cumulative Effects Assessment

Probably one of the dominant concerns of First Nations relates to cumulative effects assessment. Because a First Nation's culture and way of life is so integrally connected with the land and its resources, it is frustrating for First Nation peoples to see cumulative effects assessment being constrained so narrowly to examining the effects of a particular Project in combination with other past, or reasonably foreseeable Projects of a similar nature, when it is often obvious to First Nations that the combined impacts of past development of all kinds has drastically changed the landscape and natural ecosystems of their territory and severely limited their ability to practice their culture and traditional way of living. In addition to BP #16 the following Best Practices are suggested

BP #48: Given the ineffectiveness of cumulative effects assessment as it is practiced today, one task for the committee recommended in BP #15 should be to examine the existing cumulative effects methodology and make recommendations for its improvement.

Although cumulative effects assessment is a potentially valuable tool to use in environmental assessment, it has so far been largely ineffective in BC. A task for the committee recommended in BP #15 should be to examine the existing cumulative effects assessment process and make recommendations on how it can be improved. The following aspects should be included for consideration in this review:

- whether it is appropriate to conduct cumulative effects assessment as part of a Project EA, or whether it should be done by government as part of higher level land and resource use planning exercises;
- whether or not regional cumulative effects assessment would be more effective than individual Project cumulative effects assessments, or whether both can play a role;
- how to determine limits (thresholds) for various environmental effects, beyond which an individual Project's effects would be unacceptable (see also BP #49);
- should the scope of cumulative effects assessment include consideration of the effects of all development types, not just developments of the same type as a subject Project;

- the appropriate time to use as the baseline for evaluating cumulative effects (e.g. predevelopment or current situation).

It is the responsibility of all Parties to environmental review processes, as well as others knowledgeable about EA, to implement this Best Practice. This Best Practice will take time to implement.

BP #49: Given their long association with the land and its resources, First Nations must play a meaningful role in cumulative effects assessment.

Because First Nations have so long relied on the land and its resources, they are often in the best position to recognize and understand the cumulative effects of modern development, including commercial and sport fishing, hunting, forestry, mining, oil and gas development, land clearing, agriculture, transportation and utility infrastructure, and urban development, on their lands and on their way of life. First Nations must therefore be meaningfully involved in regional or project-specific cumulative effects assessment.

All Parties to environmental assessment must work towards implementing this Best Practice. It can be implemented now.

BP #50: The significance of some cumulative effects must be measured against pre-determined thresholds developed in land use planning, regional cumulative effects assessment, or other processes.

The main point of cumulative effects assessment is to determine whether or not the magnitude of a particular Project effect, when combined with similar effects from past projects and similar effects from other reasonably likely projects in the future, surpasses an acceptability limit or threshold. Although these limits or thresholds may have been established for some parameters (e.g., water quality objectives and criteria), they have not been for many others (e.g., area of critical habitat for particular wildlife species; social and cultural parameters). As a result, cumulative effects assessment as it is practiced today, is often ineffective because there are no acceptability thresholds against which to assess the acceptability of most adverse cumulative effects.

All Parties to an environmental assessment review must be involved in the implementation of this Best Practice, and it can be partially implemented now, where appropriate thresholds exist. In other cases, however, it will take time to develop the thresholds.

BP #51: Oral evidence of past impacts of development Projects must be given due consideration in the assessment of cumulative effects.

Just as oral evidence has become an acceptable form of evidence in assessing aboriginal rights and title issues, it must also be accepted as a valuable source of information in assessing cumulative effects.

All Parties to an EA review must play a role in ensuring the implementation of this Best Practice. It can be implemented now.

BP #52: Remediation of environmental problems from past Projects may provide more "room" for development, and should be given due consideration in cumulative effects assessment.

First Nations recognize that the adverse impacts of some Projects can be successfully remediated over time. For instance, roads can often be removed and the road corridor acceptably remediated (e.g., with removal of stream crossing structures and suitable re-vegetation) over time. The successful remediation of environmental effects should be given credit, effectively providing additional room for development in cumulative effects assessments.

All Parties to an environmental assessment review must be involved in the implementation of this Best Practice. It can be implemented now.

5.5.6 Commitments

The granting of an EA Certificate under the BC Environmental Assessment Act is accompanied by a list of legally enforceable commitments to which a Proponent must adhere or risk losing the Certificate and being ordered to stop work on the Project. In addition to these Certificate commitments, a Proponent often makes commitments to First Nations that are not captured in the Certificate. There may be no appropriate remedies to a First Nation when a Proponent fails to live up to these types of commitments in the absence of a legally binding agreement between the First Nation and the Proponent. Another issue is the lack of an appropriate system to track and report to First Nations on the compliance of a Proponent to commitments made in the EA Certificate.

The following Best Practices are proposed in relation to commitments made to First Nations during the EA process, either by proponents or by public governments.

BP #53: An Environmental Assessment Application must lay out commitments made by the Proponent and public governments in respect of First Nations in the development, operation, and post-operation phases of a proposed Project, and these commitments must be carried over into Environmental Assessment Certificates, permits, or other authorizations, or into agreements between First Nations and public governments, or First Nations and the Proponent, as appropriate.

Where there is appropriate legislative or constitutional authority for inclusion in an EA Certificate, commitments made by a Proponent in respect of First Nations issues should be laid out in the Environmental Assessment Application and carried over into the EA Certificate, BC permits, or federal authorizations. Commitments made by BC or Canada to First Nations, while not appropriate for inclusion in an EA Certificate, should be formalized through an agreement between the government and the First Nation.

A Proponent has the primary responsibility of ensuring that all commitments made to First Nations are captured in the EA Application, but the BC government (or Canada) has the responsibility for ensuring that these commitments are carried over into Permits, other authorizations, or other agreements, as appropriate. This Best Practice can be implemented now.

BP #54: The BC Environmental Assessment Office should develop a system to track and enforce compliance of the commitments made by the Proponent in an Environmental Assessment Application and subsequent permits or other authorizations, and should annually review compliance with affected First Nations.

It often appears to First Nations that there is little on-the-ground monitoring of a Proponent’s compliance to the conditions set out in an EA Certificate. This perception may occur, in part, because there is no formal mechanism in place for reporting to First Nations about a Proponent’s compliance with respect to the EA Certificate conditions.

The responsibility for implementing this Best Practice lies primarily with the BC Government. It can be implemented now.

BP #55: Understandings made outside of the environmental assessment process between a Proponent and a First Nation should be captured in a legally binding agreement.

Some commitments made by a Proponent to a First Nation may be of such a nature that they do not fall within the legislative authorities of the BC or the federal governments, and therefore may not be able to be included as conditions of an EA Certificate or other provincial or federal authorizations. These commitments should be formalized in legally

binding agreements that set out remedies to First Nations should the Proponent fall out of compliance with respect to these commitments.

The Proponent and affected First Nations both play a role in implementing this Best Practice, and it can be implemented now.

5.5.7 Decision Making

The extent to which First Nations have been able to participate in decision making in respect of the issuance of BC EA Certificates or federal authorizations following a CEAA assessment is presently limited by the position of public governments that the decision making powers of Ministers of the Crown cannot be fettered. This is obviously in conflict with the position of First Nations that they own, and have never surrendered, their lands and resources, and therefore should have decision making powers about development on their territories.

The passing of "Recognition" legislation as is being contemplated by the BC government may provide the impetus to develop mechanisms for shared decision making when it is recognized by the BC Government that First Nations have rights and title within their territories.

The following Best Practices are proposed in respect of decision-making in the environmental assessment context.

BP #56: First Nations should communicate their concerns, recommendations, and decision to the BC and federal Ministers independently of BC Environmental Assessment Office or Canadian Environmental Assessment Agency recommendations.

It is important that First Nations communicate their opinions, in their own words, about a Project and its environmental assessment directly to the ultimate decision makers, rather than through the filter of the BC EAO or the CEAA. This becomes even more important if a First Nation's views are not adequately reflected in the BC or federal recommendation documents, or where a First Nation's conclusions about the significance of residual effects of the Project differ from those of Canada or BC.

First Nations are responsible for the implementation of this Best Practice, and it can be implemented now.

BP #57: Canada and BC must acknowledge that First Nations have a decision-making role about the environmental acceptability of Projects within their territories and find suitable mechanisms to give effect to this role.

Even if one accepts the proposition that the decision-making powers of Ministers of the Crown cannot be fettered, mechanisms can be devised whereby a Minister must consider First Nation recommendations, must enter into a dispute resolution type process where his/her opinion differs significantly from that of the First Nation, and where he/she ultimately issues a decision contrary to the wishes of the First Nation, must provide appropriate justification for that decision.

British Columbia and Canada have the primary responsibility for implementing this Best Practice. It can be partially implemented now, although full implementation might not be possible until appropriate "Recognition" legislation is passed in British Columbia.

BP#58: The BC Environmental Assessment Office Certificate decision making process should be re-designed to better consider and incorporate the views and decision-making role of First Nations, and should include a dispute resolution mechanism when the views of First Nations and public governments are at odds.

See commentary on BP #57. It is the responsibility of the BC Government to implement this Best Practice. It will take time to implement.

BP #59: Each First Nation should develop its own policies and guidelines to provide direction on internal environmental assessment decision making.

As in any community, individual members of a First Nation community often have a wide variety of views concerning the impacts of a Project and their significance. To ensure that all views are given appropriate consideration and that the First Nation leadership adequately communicates the collective "will" of the community to the Proponent and public governments, a First Nation should develop its own policies and guidelines concerning environmental assessment review and decision making. Such policies and guidelines should include considerations of how to educate community members about the project and its effects, how best to determine the general opinion of the community, and the balance between environmental protection and economic development objectives. These policies and guidelines should be shaped by the governance system used by the First Nation, and its general philosophy about land and resource use.

The implementation of this Best Practice is a First Nation's responsibility, and it can take place now.

BP #60: First Nations must be allowed sufficient time, consistent with their own processes of internal consultation, to allow for environmental assessment decision making.

Timelines legislated for various steps of the EA process do not always work for First Nations because of their own internal decision making processes that are often based on traditional ways of making decisions. To make effective decisions, First Nations must also spend a significant amount of time and effort in educating their members about the Project, its environmental effects, and potential mitigation measures before informed decisions can be made about the acceptability of the Project.

The primary responsibility for the implementation of this Best Practice lies with the public governments. This Best Practice can be implemented now.

5.5.8 Monitoring and Follow-Up

Because many types of resource development take place in remote areas of the Province, populated primarily by First Nations' people, it is the First Nations that must live with the long-term after-effects of a Project. It is therefore not surprising that First Nations have a great interest in the long-term monitoring of the effects of a Project. The following Best Practices are proposed in respect of monitoring and follow-up activities.

BP #61: An environmental assessment must include a monitoring plan for all phases of the Project that includes a commitment to engage First Nation monitors.

As is currently required by provincial and federal legislation, environmental assessment applications must include follow-up plans that include a monitoring component. Where a First Nation's rights and interests are being adversely affected by a Project, it is appropriate that members of the First Nation be hired as environmental monitors.

A Proponent has the primary responsibility for implementing this Best Practice, and it can be implemented now.

BP #62: First Nation monitors should be independent contractors or employees of the First Nation with obligations to report their monitoring results, including infractions, to the Proponent, to public governments, and to affected First Nations.

It is not a good practice for First Nation monitors to be hired directly by the Proponent of a project because it creates a conflict of interest situation. In this situation, a First Nation

monitor might need to report on a Proponent's infractions or non-compliance with Permit conditions while collecting his/her paycheque from this same Proponent.

A First Nation monitor should be obliged to report his/her monitoring results, including infractions, directly to appropriate government ministries or agencies and all affected First Nations, as well as the Proponent. Apart from ensuring that all Parties are informed in a timely manner about monitoring results, including infractions, this Best Practice would remove any discretionary ability of a First Nation monitor to avoid reporting on infractions under overt or more subtle pressure from a Proponent or its employees.

The implementation of this Best Practice is primarily the responsibility of the Proponent and affected First Nations. The Best Practice can be implemented now.

BP #63: A Project Proponent should be responsible for funding the training and engagement of First Nation monitors.

It is appropriate that project proponents provide appropriate training to the First Nation monitors. It is also appropriate that project proponents cover the cost of engaging First Nation monitors but, as discussed in the commentary on BP#62, the funding to engage First Nation monitors should flow to the First Nation to hire the First Nation monitors. Because projects often occur in remote locations where the nearest communities are First Nation communities, the hiring of First Nation members as environmental monitors will often make economic sense. It is also of advantage to public governments, considering their personnel constraints, to be able to rely on locally based residents to provide monitoring information from often very remote parts of the Province.

A Proponent has the primary responsibility for implementing this Best Practice, and it can be implemented now.

BP #64: Government regulators should, in a timely manner, investigate First Nation monitors' reports of environmental assessment commitment or permitting infractions and, if necessary, take appropriate remedial actions.

There is little point to providing on the ground First Nation monitors if government regulators do not follow-up on infractions in a timely manner.

The implementation of this Best Practice is primarily the responsibility of government regulators, and implementation can take place now.

5.5.9 Remediation of Unanticipated Adverse Impacts

A common concern for First Nations was that, with the exception of mines, there was no pot of money set aside to remediate adverse effects of a Project should they express themselves in the future when the Proponent has long disappeared. In relation to this, we suggest the following Best Practice:

BP #65: A mechanism, separate from and in addition to the BC bonding mechanism currently in place for mine reclamation, should be developed to collect and hold financial resources from Project proponents for remediation of unanticipated adverse Project effects.

This Best Practice might best be implemented on a collective basis, whereby a fee is collected from each Proponent, the amount of the fee depending on the size and nature of the Project. These fees, collected from Proponents of all projects, would be held in trust to provide a funding source to remediate environmental effects that show up in the future in circumstances where there is no longer a responsible owner to shoulder the responsibility of the remediation. This would probably require legislative change.

The implementation of this Best Practice is primarily the responsibility of BC and Canada. Implementation will take time.

5.6 Financial Capacity for Participation in EA

In general, First Nations do not receive regular funding from either Canada or British Columbia to finance land and resource governance activities. EA review, as it is practiced today in British Columbia, is a complex, lengthy, and expensive process. Affected First Nations must be properly financed to participate meaningfully in EA processes in ways that do not fetter their ability to provide their own uncompromised views of EA results and the advisability of proceeding with Projects. The following Best Practices are proposed in relation to this issue.

BP #66: To avoid any real or perceived conflict of interest issues, it is not a good practice for First Nations to receive funding directly from Proponents to participate in environmental assessment processes.

The acceptance of funding directly from a Proponent to participate in the environmental assessment process for its project compromises a First Nation's ability to conduct a fair and unbiased evaluation of the environmental effects of the Project. It is difficult to offer

opinions contrary to the Proponent's opinions when you are dependent on the Proponent to pay for the costs of your participation.

First Nations have the primary responsibility for implementing this Best Practice, but Canada and BC must play the dominant roles in developing alternate funding mechanisms. The Best Practice can be implemented now.

BP #67: Funding First Nation participation in environmental assessment processes or in processes that will facilitate future environmental assessment processes (such as First Nations' Land Use Plans, Socio-Economic Baseline Studies, Traditional Use Studies) is primarily the responsibility of governments.

We believe that it is the responsibility of government to fund consultation costs, and that participation in environmental assessment processes is fundamentally about consultation. This is also true of regional studies that precede and allow effective participation in environmental assessment. These regional studies include land use plans, socioeconomic baseline studies, traditional use studies, regional cumulative effects studies, etc. We also believe that it is possible for public governments to recover their costs of funding First Nation participation in environmental assessments from Proponents.

BC and Canada have the primary responsibility for implementing this Best Practice, and it can take place now.

BP #68: Funding for First Nation participation in environmental assessment processes should be held in trust for distribution to First Nations.

It would be preferable if funding were collected from Proponents and held in trust to support a First Nation's participation in the EA process. This could be done by public governments (or other organizations) on a collective basis whereby funding for First Nations' participation in all EA processes was collected from Proponents and held in a collective trust.

This Best Practice provides an example of how funding might flow from Proponents through public governments to First Nations for participation in EA processes in a way that minimizes any undue influence of Proponents on First Nations, or any sense of obligation on the part of First Nations to Proponents. The responsibility for implementing the Best Practice lies primarily with BC or Canada. It will take time to put into place a new funding system, including trust arrangements for holding funds for First Nations.

BP #69: First Nations must be funded in amounts sufficient to cover the reasonable costs of their participation in environmental assessment processes.

To participate meaningfully in an environmental assessment, a First Nation must be funded at a level that realistically reflects the size and complexity of the Project. A "reasonable cost" for First Nation participation in an environmental assessment process could be determined by a funding committee (of the Trust, if following the model described in BP #68) on which First Nations have fair representation.

We expect that the responsibility of implementing this Best Practice would fall to the members of a trust funding committee which would, presumably include representatives of public governments, First Nations, and development proponents. The principle described by the Best Practice can be implemented now.

BP #70: In the interim period before Governments develop appropriate mechanisms to properly fund First Nation participation in the environmental assessment process, Proponents should fund First Nation participation through "Environmental Assessment Participation Agreements" negotiated with First Nations (see also BP #24).

If a First Nation is forced to accept funding directly from a Proponent for participation in the EA review of a Project, for instance in the period before other funding mechanisms can be developed as discussed above, the terms of that acceptance should clearly be laid out in a legally binding agreement. From a First Nation's point of view, it is important to make it clear, as part of the agreement, that the acceptance of funding from the Proponent by the First Nation does not imply First Nation agreement with conclusions made in the EA Application or First Nation consent of the Project.

The Proponent has the primary responsibility in the implementation of this Best Practice, and it can be implemented now.

BP #71: Environmental Assessment Participation Agreements should not be confused with or combined with Economic Benefit Agreements (see also BP #31).

An agreement between a Proponent and a First Nation for the Proponent to provide funding to the First Nation to participate in the EA review of the Proponent's proposed Project is not, and should not be confused with an economic benefit agreement. An agreement to provide funding for a First Nation to participate in the EA review of a proposed Project is an agreement to compensate the First Nation for its costs incurred in participating in the EA review. An economic benefits agreement can take many forms, but may include the training and hiring of First Nation's members, the purchase of services from First Nation companies, equity ownership in the Project, resource revenue

sharing, etc. The negotiation of economic agreements with a Proponent is a function of the First Nation's economic development department. The negotiation of an EA Participation Agreement is a governance function of a First Nation's land and resources department. Economic agreements should not be concluded until a First Nation has made a determination that the Project should be allowed to proceed, or otherwise until an EA Certificate has been issued despite the objections of the First Nation.

Both First Nations and Proponents must recognize the principle described in this Best Practice, and there is no impediment to it being done now.

BP #72: In the absence of other funding mechanisms, First Nations should consider a fee for service (personnel time plus expenses) system for invoicing public governments for their participation in environmental assessment review processes.

If a First Nation has not been able to attain adequate funding to allow meaningful participation in an EA process, and continues to participate at its own cost, it should track and invoice BC or Canada for its costs, including personnel time and expenses. While there is no guarantee that, in the absence of an agreement, public governments would pay these invoices, the First Nation would at least establish a paper trail that might help to fight a political battle to establish a fair funding mechanism for First Nation participation in EA reviews.

First Nations have the responsibility for implementing this Best Practice. It can be implemented now.

5.7 Capacity Building

Many First Nations have only small numbers of members who have both the educational or experiential background, and the interest, in participating in the governance activities of the First Nation. To effectively and meaningfully engage in EA reviews, a person must have a fairly broad level of knowledge in a wide variety of subject areas, and must be in tune with the direction provided by leadership and in the First Nation's philosophy, policies, guidelines, etc. For many First Nations, these types of requirements constitute significant capacity challenges. In the following sections, we propose some Best Practices with respect to capacity building.

BP #73: First Nations should develop their own capacity building plans to enhance their abilities to effectively participate in environmental assessment processes.

It would be advantageous for First Nations to develop their own capacity building plans so that they can effectively participate in environmental assessment processes. This may involve consideration of, among other things:

- how and at what level the First Nation wishes to participate in EA review processes;
- identification and hiring of Members with appropriate education or experience and interest;
- encouraging school age youth to pursue higher education in subject areas that would bring particular value to natural resource management, including EA participation;
- identification of personnel training needs in the short term and over the long term;
- identification of suitable training mechanisms (e.g., courses, mentor-ships, job shadowing, etc.) and sources of training (e.g. colleges or universities, on-line courses; governments; organizations such as FNEATWG; conferences and workshops; consultants; etc.);
- the development of long-term funding mechanisms so that personnel, once hired, can be retained in a permanent capacity;
- agreements with governments or proponents with respect to capacity building; and
- succession planning so that there is always someone prepared to move into a position when required.

The implementation of this Best Practice is primarily the responsibility of First Nations, and it can take place now.

BP #74: First Nations should support and utilize the services of First Nation organizations, such as the First Nations Environmental Assessment Technical Working Group (FNEATWG), that are meant to assist in building First Nation capacity in environmental assessment or other governance functions.

First Nations sometimes do not take advantage of existing organizations or mechanisms that are already in place to assist in building capacity in environmental assessment or other governance practices. This is sometimes because of a limited capacity to identify and keep track of all the funding and assistance programs available to First Nations.

The implementation of this Best Practice is primarily the responsibility of First Nations. The Best Practice can be implemented now.

BP #75: The governments of BC and Canada should fund environmental assessment capacity building in First Nations.

Governments have a responsibility to First Nations to assist them in becoming self-sufficient. Part of this responsibility includes the building of governance capacity, including governance in relation to land and resource matters, including effective and meaningful participation in environmental assessment processes. The governments of BC and Canada should work with organizations like FNEATWG and the New Relationship Trust to identify mechanisms to enhance First Nation capacity building with respect to environmental assessment, and to provide funding to support the implementation of such mechanisms.

The implementation of this Best Practice is primarily the responsibility of public governments. Implementation can take place now.

6. RELATED ISSUES

In the interviews used to assist in developing the Best Practices reported herein, respondents often identified issues that were not specifically EA issues. Included among these items were:

- the need for proving aboriginal title and need to resolve territory overlap issues with neighbouring First Nations;
- the need for amendments to non-EA legislation such as the *Metal Mining Effluent Regulation* of the *Fisheries Act*;
- the need for other development types, such as forestry and oil and gas development, to be evaluated through EAs (see BP #16, however);
- the monitoring and remediation of environmental impacts caused by development projects that were initiated and closed down prior to any requirement for EA review;
- the need for First Nation led land use planning;
- engagement of First Nations with project Proponents in respect of pre-development stages of planning a Project (e.g., mineral exploration);
- mineral claims staking and oil and gas land sales;
- the role of First Nations in various permitting processes; and
- important items to negotiate with Project proponents in economic benefits agreements.

Although we felt it was beyond the scope of this study to develop Best Practices in relation to these issues in most instances, we have reported on them in more detail in Section A3 of Appendix A.

APPENDIX A

SUMMARY OF INFORMATION ACQUIRED IN INTERVIEWS

by

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A1. INTRODUCTION AND BACKGROUND

As background to identifying "Best Practices" for participation of First Nations in environmental assessment (EA) reviews in British Columbia, we utilized four main sources of information:

- Information gained in interviews from the comments, suggestions, and ideas of a number of people involved in the EA process in BC;
- Case studies of a few selected EA processes;
- The general literature on the involvement of aboriginal peoples in EA reviews; and
- The knowledge of the authors gained from many years of experience in conducting environmental assessments, in assisting First Nations to participate in EA reviews, and in assisting First Nations in a variety of other capacities including treaty negotiations and other land and resource matters.

In the following Appendix, we present a summary of the information gained in the interview process. This is meant to be a summary of information gathered in the interviews and does not necessarily reflect the views of all those interviewed, nor does it necessarily represent the views of the authors.

All persons interviewed for this report were asked for their consent to publish the information that they provided before the interview began. Consent was given under the following conditions:

- comments made are not connected to names. Instead a general list of contributors precedes the report;
- the report is preceded by a preamble that clearly states that not all contributors agree with all of the statements made in this report;
- the comments made during discussions are summarized and e-mailed back to the interviewees for revision; and
- a final draft of the report is provided to all contributors for review and comment before the final report is published.

We have summarized the results of the interviews in two main sections. In Section C2, we summarize discussion points that are directly related to participation in the environmental assessment process. In Section C3, we summarize discussion points on other issues that are less directly related to environmental assessment.

A2. SUMMARY OF INTERVIEW COMMENTS PERTAINING TO EA

In the following sections, interview comments are summarized under several EA topics.

A2.1 Aboriginal and Treaty Rights, and Consultation

There is often differing opinion between First Nations and the BC and federal governments on what constitutes adequate Consultation in the context of environmental assessment, given First Nations' constitutionally protected rights and the constantly evolving common law with respect to Aboriginal rights and title (see also Appendix C).

Important points raised during the study interviews included the following:

- First Nations need to be recognized as governments, rather than stakeholders, in the EA process;
- Following from the first point, a First Nation should have a veto right over a Project on its territory if there is sufficient evidence that now or in the future ecological, social, economic, or cultural values may be adversely affected to a degree that is not acceptable to the First Nation;
- the First Nation veto should be based on a transparent process that considers the majority opinion of its population;
- strict criteria and guidelines should be developed and used to avoid the abuse of the veto right to gain other, non-related objectives;
- the definition of "jurisdiction" as used in Section 27 (3) of the BC EA Act should be amended to include First Nations with treaty or asserted aboriginal rights over a land base (i.e., its territory or treaty settlement area) in BC; this would give First Nations a greater ability to negotiate EA processes more applicable to their specific situations, thus encouraging greater participation of First Nations in the EA process;
- as a result of the 2004 harmonization agreement between Canada and British Columbia[21], the federal government generally takes a back seat in most EA reviews in BC;
- apart from involvement in EA reviews as a result of specific jurisdictional responsibilities (e.g., fish and fish habitat), Canada should be involved in all EA reviews in BC to preserve the Crown's honour and satisfy its fiduciary duties in respect of First Nations;
- Consultation as part of the EA process should be between the provincial and federal governments and First Nation governments and should not be off-loaded to Proponents as is currently practiced;

[21] http://www.ceaa.gc.ca/010/0001/0003/0001/0002/2004agreement_e.htm

- clarity and certainty that attracts investment is created when Proponents enter into a process where Consultation and the affirmation of aboriginal rights and title have been carried out;
- for engagement in EA, governments should proceed on the assumption that First Nations have rights and title over their claimed territories;
- most Projects will interfere with former or current cultural uses such as residing, hunting, fishing, gathering and travelling from one location to another; and
- if more than one First Nation assert rights in the area of a Project, Proponents need to deal with all these First Nations without judgment about the strength of the assertions.

A2.2 Legislative Concerns and Proposed Changes

Some of those interviewed identified the Carrier Sekani Tribal Council[22] critique of the 2002 BC EAO Act as being an important document for this study. In this critique, Carrier Sekani Tribal Council concluded that the 2002 BC EA Act, as compared to the previous Act, weakened the role of First Nations in the environmental assessment processes in the following ways:

- the current Act does not contain previous provisions that referenced a separate role for First Nations in the EA review process;
- the pre-2002 legislation required that representatives of any First Nation whose territory included the site of a Project or was in the vicinity of a Project, be members of a "Project Committee" struck for the purpose of providing the EAO with advice and recommendations during the EA review. In the current Act, there is no mandatory provision for First Nation inclusion in EA processes, nor any requirement that First Nations interests be considered;
- the pre-2002 Act provided for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects, and the definition of "effect" included cultural and heritage effects. In the current Act, there is no definition of "effect" nor direction on what type of impacts must be considered in an assessment of a Project;
- in the pre-2002 Act, an Application for an EA Certificate was required to describe information distribution and consultation activities undertaken by the Proponent with a First Nation and a summary of the First Nation's concerns;
- In the current Act, all decisions regarding scoping and methods of assessment are at the discretion of the BC EAO;
- the current BCEA Act should re-instate the obligation to form Project Committees with First Nation inclusion;
- the wording "cultural effects" should again be included as one benchmark against which to measure Project impacts;

[22] http://www.cstc.bc.ca/downloads/EAO%20Critique.pdf

- the establishment of First Nation monitoring positions should become a legislated part of the BC EA Act; and
- the involvement of First Nations in all stages of the EA process should be legislated.

Two additional points related to legislation were made during the interviews:
- the BC EAO as of late takes the position that unless First Nations are satisfied with an EA process and its outcome, a project is unlikely to proceed without revisions. This common practice needs to be prescribed in legislation; and
- the Consultation process needs to be clarified and prescribed in the BC EA Act.

A2.3 <u>Restructuring BC EA Oversight</u>

Interviewees often expressed concern about the potential for political interference in the existing BC EAO process, particularly in light of the pressure on governments to maximize economic development. Some also believed that there was too little input from First Nations in changing the EA process to better accommodate First Nations' ways of doing things. Specific point raised by interviewees included:

- the current process is housed in the Ministry of Environment, and the current BC EA Act allows Project Directors to seek Ministerial input throughout the process. Even though this may not occur very often, it does not instill confidence in First Nations who desire an EA process free of political interference.
- a politically independent authority that does not report to a Minister, possibly a non partisan parliamentary subcommittee composed of representatives generally trusted by First Nations, should lead the EA process;
- neutrality could also be ensured through the use of EA Panel reviews and Panel recommendations. While the option of Panel reviews is explicitly mentioned in the BC EA Act, it has been rarely used. It should be routinely used for bigger projects with high potential for adverse impacts.
- it was felt worthwhile to maintain the current Advisory Committee (with representatives from a broad variety of labour, health, industrial, business, environmental, legal, tourism, recreation, trade, and municipal government associations, as well as FNEATWG) that periodically provides advice to the BC EAO on the environmental assessment process; and
- it was also felt worthwhile to establish, based on a government to government relationship, a FN Advisory Committee to the BC EAO that also included representatives from CEAA.

A2.4 <u>Building and Maintaining Good Working Relationships</u>

It is clear from past experience that a fair evaluation of the environmental effects of a Project can be facilitated if there is a good working relationship among all the Parties,

including First Nations, to an EA review. A number of points were made by interviewees in relation to this:

- First Nations' support of a Project, gained through a mutually respectful working relationship and a fair evaluation of the environmental implications of a Project, can be a valuable marketing and public relations tool for a Proponent. It is worthwhile for a Proponent to put effort into fostering a good working relationship with First Nations;
- The development of a professional relationship of mutual trust between a Proponent and a First Nation through the EA review of one Project will assist in a more co-operative approach to future sustainable Projects that will, in turn, help to attract investment;
- a Proponent should not approach a First Nation with an attitude of "going through the motions" to acquire in as short a time period as possible a favourable EA decision, but rather should approach a First Nation as a government with land and other rights with whom it wishes to develop a mutually beneficial and long-lasting working relationship;
- Proponent or First Nation or government contact person(s) should, if possible, be maintained throughout the EA; changes in contact person(s) will require time for relationship building;
- if there is a change in the Proponent during an EA process, as a result of a merger or acquisition, the new Proponent should be well briefed on the status of the EA and associated agreements with and commitments to First Nations.

A2.5 First Nation Management of its Participation in the EA Process

For effective engagement in the review of EAs of Projects in their territories, First Nations must take control of their engagement through: 1) the development of appropriate policy and guidelines that will give direction to their participation in EA; 2) through the development of appropriate planning and background documents that will inform EAs and provide criteria for measuring the adequacy of EAs and the acceptability of a Project's predicted impacts; and 3) through a number of other internal initiatives and arrangements that will facilitate effective engagement in EA reviews.

Important points in this regard that were communicated during the interviews included the following:

- to avoid potential conflicts of interest, different entities within a First Nation should deal with economic and environmental assessment issues;
- the leadership of First Nations should strictly manage land use decisions and thus provide clear guidelines for economic developments through Land Use Plans or other measures;

- the following statement made in an interview summarizes well a prevalent First Nation perspective: *"Take care of the land first and then it will take care of you ever after";*
- a "code of conduct" as part of an "engagement agreement" should be developed by a First Nation to provide guidance to a Proponent on how to approach and work with the First Nation in a professional and culturally sensitive manner (see also "Related Issues", Section Page 49, Main Report). Items to consider in developing such codes or agreements include:
    - initial meetings between a Proponent and a First Nation should be face to face and a Proponent should be forthcoming with information, including worst case scenarios. Honesty is key to initiating a good working relationship;
    - a good way for a Proponent to develop a good relationship with community members is to combine presentations with a community feast;
    - community Presentations should be made in a culturally sensitive way using non-technical language and other guidance from leadership;
    - proponents should listen well and take all local concerns into account;
    - a written summary of a meeting that clearly addresses or at least initially mentions all First Nations' concerns will build trust;
    - a Proponent should work with a First Nation to design an EA process that meaningfully engages the First Nation in all stages of the EA process; and
    - upon invitation, and after agreeing to abide by a "code of conduct", the Proponent should maintain a presence on the land of the First Nation to build trust and a comfortable working relationship.
- If First Nations feel that their concerns have not been addressed properly in the EA process, they should feel free to present their "dissenting opinion" to the relevant Ministers;
- there is strength in numbers and it may be useful for First Nations, whose overlapping territories include a Project area, to co-operate in their participation in EA processes and in the communication of common positions;
- the work of technical or legal advisors should be guided by contractual agreements that specify duties and methods of communication;
- advisors are expected to build professional relationships with First Nations based on honesty and trust, in part by spending time to become knowledgeable about the communities with which they are working;
- it might be useful for a First Nation entering into its first EA process to get recommendations from other First Nations with EA experience about suitable technical advisors;
- external advisors must be prevented from pushing their own agendas;
- to prepare for participation in an EA process, a First Nation may wish to develop a legal strategy that includes the following aspects:
    - determine the role of lawyers and the point at which their advice is needed;

- ideally, lawyers should be staff members of a land planning or treaty negotiating office. Such long term relationships can build trust;
- lawyers who are on staff should keep informed about recent case law in respect of aboriginal rights and title; and
- the role of external lawyers should ideally be restricted to the drafting of complex contracts between a Proponent and a First Nation, (e.g., impact-benefit, revenue sharing or long-term monitoring agreements).

Some suggestions pertaining to the First Nation review of the Application for an EA Certificate were made during the interviews:

- the EA Application should initially be reviewed quickly by First Nations to decide whether external expertise is required to conduct a full detailed review;
- the EA Application should be measured against the parameters laid out in any First Nation policy or guidelines, including Land Use Plans;
- the BC Ministry of Environment provides good information on non-migratory fish and steelhead as well as on wildlife. This information may be valuable in evaluating potential impacts of a proposed project on fish and wildlife; and
- it is helpful to build a well organized and easily accessible library of all information gathered in an EA process.

A2.6 The EA Process

Comments and observations made during the interviews about the EA process itself are presented below under several sub-headings.

A2.6.1 *General Process Issues and Scoping*

A common issue raised in the interviews was the need for First Nations to be meaningfully involved in early stages of the EA process, in developing the Section 11 Order and in developing the Terms of Reference for an EA. This was considered necessary in order to ensure that First Nation values were adequately integrated into and considered in the EA process. Specific points raised in the interviews included the following:

- EA Applications need to become more Project specific, and not follow the cookie-cutter approach that is currently used;
- EA Applications are too long; they should be restricted to 200 pages;
- EA Applications should not provide the level of technical detail necessary for permitting; the EA Application is a planning and decision making tool, not a permitting tool;
- instead, the EA Application should focus on the most important potential Project impacts and how to mitigate or compensate for them;

- First Nations need to participate in scoping early in the EA process to ensure that their values are properly considered in the EA;
- spiritual and cultural values should be considered in the scoping process along with valued ecosystem and valued socio-economic components;
- no baseline studies should be carried out before the Terms of Reference for the whole EA report have been developed in collaboration with First Nations; and
- just like all other documents that need to be reviewed by First Nations, the Terms of Reference should be specific to the local conditions and written in easily understandable English rather than cut and pasted from a template.

A2.6.2 ***Traditional Knowledge and Traditional Use Studies***

Many interviewees emphasized the need to use traditional knowledge, along with western science, in EAs. More specifically:

- traditional knowledge and use studies need to be funded by BC and/or Canada as part of EAs; and
- more efficiently, territory-wide traditional knowledge and use studies could be done outside the EA process to inform future EA processes.

A2.6.3 ***Baseline Studies***

The following comments or observations were made in relation to the need for First Nation involvement in the baseline investigations that are commonly done to inform and support the EA Application:

- base line studies should be conducted following consultation with First Nations and not before First Nations have been engaged into consultation as is the current practice;
- First Nation members should be part of the baseline studies team;
- all results from baseline studies should be immediately reported to First Nations;
- the results from baseline studies should be presented in short, easily understandable summaries to First Nations;
- most base line studies should include field investigations, and not rely totally on existing information; and
- the design of baseline studies should be discussed with First Nations and generally be broken up into two seasons to allow for feedback between the two field seasons to address information gaps or otherwise to re-focus studies as necessary.

A2.6.4 **<u>Social, Economic and Cultural Assessment</u>**

Social, economic and cultural effects are sometimes considered as "environmental" effects when the term "environmental" is being used in its broad sense. However, these types of effects warrant some different considerations than the types of effects on the ecological aspects of the environment.

Interview participants advanced the following comments and suggestions in regard to social, economic and cultural assessment:

- ideally, social, economic, and cultural assessment should be carried as baseline studies in concert with First Nations Land Use planning outside of the EA process, so that goals and objectives can be formulated to inform subsequent EAs;
- funding for the execution of baseline social, economic, and cultural assessments of all First Nations in BC should be provided by the BC government;
- these baseline assessments should present the current and the desired social, economic, and cultural states of a First Nation;
- these baseline assessments will provide a Proponent with an understanding of the social, economic, and cultural conditions and goals of a First Nation when considering a Project for the First Nation's territory; and
- the existence of baseline social, economic, and cultural assessments will help to expedite the EA process and allow for a better understanding between First Nations and proponents.

Some considerations regarding cultural assessment, pertinent to this study, are suggested in an article entitled "Cultural Resource Management and EA on Reserve: A Wet'suwet'en Case Study"[23]:

- effects of a Project on cultural aspects of the environment need to be examined as carefully as effects on the natural and geophysical aspects of the environment;
- any EA that is conducted on Reserve should include a mandatory and comprehensive archaeological impact assessment;
- terms of reference, scoping or other EA guidance documents must be considered the starting point for development on reserve lands;
- archaeologists need to become more involved in the environmental impact assessment process;
- because indigenous populations have been marginalized, they require increased cultural sensitivity in dealing with cultural resources;
- natural and cultural resource management must be integrated equally during the EA process to allow for better informed and holistic interpretations of impacts to reserve lands; and
- for purposes of community consultation, the term "community" needs to be defined and made inclusive of the hereditary aspect of many communities.

A2.6.5 *Significance of Residual Effects*

It was clear from the interviews that the criteria used to determine the significance of adverse environmental impacts were not always clearly understood or particularly meaningful to First Nations, as indicated by the following comments:

- the criteria for assessing the significance of an impact need to be clearly documented in an Application;

[23] International Association for Impact Assessment BC Chapter, Vol. 1, Issue 2, 2005, p. 2

- First Nations would like the opportunity to do their own evaluation of significance based on their own criteria; and
- the BC EA Act needs to be amended by a sustainability test, that sets out specific criteria to measure sustainability for all highly valued ecological, social and cultural components that may be affected by a project.

A2.6.6 *Cumulative Effects Assessment*

The following points were made in the interviews in respect to cumulative effects assessment (CEA):

- CEA as practiced as part of BC EA, is inadequate;
- CEA does not take into account past disturbance of the land that has left, in some cases, only small fractions of territories available for cultural activities such as subsistence hunting and fishing;
- CEAs should consider all proposed future projects and deduct the area potentially impacted by future developments from the area of land available for development;
- CEAs should be conducted in close collaboration with First Nations to consider all of the small changes that have been caused by past development and that are commonly only noticed by local land users;
- oral evidence of past impacts needs to be fully accepted in the assessment of cumulative effects as per the *Delgamuukw vs. Canada*, 1997[24] decision;
- oral evidence or traditional knowledge (TK), when supported by western scientific data, could provide effective input for CEA;
- sustainability, as a feature that CEA, must not only take into account quantitative ecological measures (e.g., wildlife population size), but must also consider other more culturally related measures (e.g., wildlife contaminant levels);
- CEA could be made more meaningful if a trust fund were put in place to allow mitigation of foreseeable cumulative adverse impacts from a number of Projects; as an example, such funding could be used to clean up hydrocarbon contamination in a harbour used by oil tankers to load or deliver oil;
- once a threshold area of land has been disturbed, new development should only occur once other Projects have been completely remediated and area out of the "disturbed land account" has been freed up; and
- periodic regional environmental assessments of all development for defined regions are needed to provide realistic evaluations of cumulative effects. This should be a function of governments (rather than Proponents).

A2.6.7 *Internal First Nation Decision Making*

With recognition that different First Nations will have different practices and approaches to internal decision making, some suggestions were made in the interview process in this regard:

[24] http://csc.lexum.umontreal.ca/en/1997/1997rcs3-1010/1997rcs3-1010.html

- good internal communication channels should be established;
- regular community meetings are necessary;
- all EA information should be provided in plain, non-technical language;
- effort should be made to invite and transport elders to meetings;
- elders and other decision makers should visit the site of a proposed Project to refresh their memories of traditional use while standing on the land;
- there should be sufficient funding to ensure the participation of all First Nation decision makers in the EA decision making process; and
- a proponent should always allow a First Nation to make decisions in a comfortable environment in its territory, without the Proponent being present.

A2.6.8 *Monitoring and Follow-Up*

Interviewees made a number of observations and suggestions in respect to monitoring and follow-up:

- the involvement of First Nations in Project and reclamation monitoring should be described in the EA Application;
- a First Nation's involvement in monitoring should be negotiated and formalized in a contract by the First Nation and the Proponent before an EA Certificate is issued to the Proponent;
- a proponent that funds and encourages the participation of First Nation members in the monitoring of all Project activities on the land will be met with less suspicion and will achieve a better working relationship with the First Nation;
- if irregularities are detected, First Nations' monitors should be able to trigger audits by the responsible government authorities;
- government authorities that are contacted by First Nations to carry out audits should do so within a reasonable time frame and without warning to the Proponent;
- funding for First Nations' monitoring positions should be provided by proponents;
- whether the monitoring positions are full time or part time should be dependent on the size and monitoring requirements of a Project;
- First Nations monitors should be retained until all reclamation requirements have been fulfilled; and
- First Nations should make use of programs such as the National First Nations Environmental Contaminants Program[25] (initiated by the Assembly of First Nations and the Environmental Research Division of the First Nation and Inuit Health Branch, Health Canada) to assist in monitoring specific Project effects.

A2.6.9 *Mitigation of Unanticipated Adverse Impacts*

In the interviews, participants expressed concern about the potential for future environmental impacts when the Proponent is no longer in place to mitigate these

[25] http://www.afn.ca/cmslib/general/fund.pdf

impacts. In addition to the bonding mechanism currently in place to deal with future mine-related environmental issues, some interviewees suggested that:

- a more general Remediation Fund be established and held in trust to mitigate future adverse impacts from Projects. During the EA process, and before an EA Certificate was granted, the Parties, including First Nations, would negotiate the amount to be contributed to the Remediation Fund based on the nature and size of the Project and the likelihood of it resulting in serious environmental effects after closure or decommissioning.

A2.6.10 *Financial Capacity for Participation In EA*

Meaningful participation of a First Nation through all stages of a typical BC EAO environmental assessment is costly, and most First Nations in BC are not regularly funded to participate in Consultation processes about land and resource matters. In the interviews, several observations were made about funding for First Nations to allow their meaningful engagement in EA reviews:

- a fee for service system could be established by First Nations, in which labour costs plus expenses would be billed to BCEAO. BCEAO could then recover these costs from the Proponent and/or CEAA;
- an EA funding agreement could be negotiated between the First Nation and BCEAO that would define the terms of the First Nation's participation in the EA;
- policy is needed to formalize the principle in which the Proponent is responsible for the of cost of First Nation participation in the EA process;
- the contribution of the Proponent for First Nation participation should reflect the size, potential impact and complexity of the proposed project;
- First Nations EA participation funds for a Project could be paid by each proponent into a trust fund that is under the control of an independent organization or the BC EAO. This organization would have the responsibility of flowing funding to First Nations, establishing an arm's length relationship between a proponent and the First Nation;
- funding for First Nation participation in an EA should never be thought to imply approval of the Project; a First Nation will make its decision on the acceptability of the Project based on results of the EA and other considerations;
- funding that allowed for meaningful contribution of First Nations to complex EA processes in the past was in the order of $300,000-$600,000;
- EA participation agreements should not be combined with economic agreements;
- to lower costs for First Nations under the current low funding approach taken by the BC EAO, most project meetings should be held in one of the communities of the participating First Nations; and
- the provision of adequate funding for First Nation participation in an EA review will result in a more efficient and timely review process.

A2.6.11 Capacity Building

During the interviews, the following comments and suggestions were advanced in respect of capacity building:

- need to develop EA capacity in all First Nations or establish and adequately fund a technical advisory group (such as FNEATWG) trusted by First Nations that can help First Nations communities with little EA capacity to control the process in their territory;
- capacity development is a long-term goal. Post secondary education is one way to build EA capacity, another and often more realistic approach may be the involvement of community members in the EA process, initially under the guidance of an internal or external EA practitioner and later independently. Experience is just as valuable as secondary education and can often be gained without leaving home and family in a culturally comfortable environment;
- a good first step to capacity building is the involvement of the community in the land use planning process in advance of EA participation;
- in the meantime, the BC EAO needs to properly fund First Nations to participate in EA reviews so that they can hire the professional expertise they require on their own terms;
- First Nations should make it a requirement for consultants to share their knowledge of the EA process in face to face meetings and workshops to build practical knowledge;
- Northern Lights College, Northwest Community College and University of Northern BC have in the past provided good preparatory courses about mining and other industrial sectors; it is hoped they will continue to do so in the future;
- First Nations are likely to be supportive of Projects that: 1) are environmentally sustainable; and 2) can provide employment for their membership. A well-trained and educated membership that is locally available for hire is attractive to Proponents, and can serve to attract other economic development;
- basic science and math skills are necessary for effective review of EAs, and should be given more emphasis in schools with high percentages of aboriginal students;
- specific courses should be offered to prepare First Nations' members to engage in the EA process. Examples would be courses on GIS and other data bases, and the drafting of agreements; and
- high school students should be introduced to First Nations' Natural Resource departments through summer student programs. Once talented and motivated students have been identified they should receive scholarships to encourage them to pursue post secondary education.

A3. SUMMARY OF INTERVIEWS ON NON-EA ISSUES

During the interviews, participants often made comments or suggestions on issues that are not directly related to EA, but that none the less have a bearing on the way EA is practiced or the way in which First Nations are involved in EA in British Columbia. These comments and suggestions are summarized under several topic headings in the following sections.

A3.1 Aboriginal Rights and Title

A "strength of claim" analysis is often used by governments to determine the degree of Consultation with First Nations that is required in respect of land and resource matters, including proposed development projects. In respect of this, two suggestions were advanced during the interviews that are not specifically EA related:

- prove strong title to all claimed land to provide a stronger voice in future EA processes; and
- invite neighbouring First Nations to also affirm their title to their lands and negotiate and resolve overlap issues.

A3.2 Suggested Changes in Legislation other than the EA Act

Section 5 (1) of the Metal Mining Effluent Regulation (MMER)[26] under the *Fisheries Act* states:

> *"Despite Section 4, the owner or operator of a mine may deposit or permit the deposit of waste rock or an effluent that contains any concentration of a deleterious substance and that is of any pH into a tailings impoundment area that is either*
>
> *(a) a water or place set out in Schedule 2; or*
>
> *(b) a disposal area that is confined by anthropogenic or natural structures or by both, other than a disposal area that is, or is part of, a natural water body that is frequented by fish."*

It was clear from this section of the regulation that the intent of MMER is to discourage and limit the deposition of mine waste in natural fish-bearing waters, as indicated by the fairly onerous procedure to permit such use, *i.e*. revising the Regulation to list the proposed water body under Schedule 2 of MMER.

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[26] Metal Mining Effluent Regulations, SOR/2002-222, Canada Gazette Part II, Vol. 136, No. 13 as amended by Regulations Amending the Metal Mining Effluent Regulations, SOR/2006-239, Canada Gazette Part II, Vol. 140, No. 21.

Some interview participants felt that:

- the MMER of the *Fisheries Act* should be amended to remove the ability to designate a natural water body as a tailings impoundment by listing it in Schedule 2 of the MMER.

A3.3 Development Types Presently Excluded from EA

Several participants in the interviews expressed concerns about development types that are presently excluded from the EA process, specifically timber harvesting and oil and gas development. Both of these development types result in massive impacts on the landscape and natural ecosystems, and to the ability of First Nations to practice traditional use activities within their territories.

Several interviewees felt that the Forest and Range Practices Act[27], under which forestry is currently regulated, gives priority to timber supply over environmental protection and does not properly consider the cumulative effects of timber harvesting activities. Interviewees made the following specific comments in relation to forestry development:

- BC should certify the logging industry through an EA or a similar process that involves meaningful Consultation with First Nations;
- cumulative impact assessments over the whole range of ecosystems that may be connected to a large number of cut blocks should be conducted;
- as in the EA process, past and future logging in an area should be considered to assess the cumulative impacts;
- if ecosystems cannot be restored to their original state, mitigation and compensation measures should be the subject of meaningful negotiations with First Nations; and
- the whole variety of species and ecosystems disturbed through logging should be considered in reforestation and other restoration activities. Currently traditional medicinal or food plants are not considered in silvicultural plans.

Similarly, some interviewees felt that the cumulative effects of oil and gas development were not being properly accounted for in the current Oil and Gas Commission regulatory regime.

A3.4 Impacts of Pre-EA Projects

Concern was expressed by the interviewees in relation to the effects of many development projects, particularly mining projects that were either initiated or completed before the 1995 enactment of the BC EA Act. Some interviewees felt that:

- the environmental impacts of these projects should be remediated before new projects in the same area are considered; and

[27] http://www.for.gov.bc.ca/tasb/legsregs/frpa/frparegs/forplanprac/fppr.htm#section47

- in many cases environmental impact monitoring of these pre-EA process projects needs to be funded to determine appropriate remedial actions.

These actions would help to build trust with First Nations, particularly in their consideration of new development projects.

A3.5 Land Use Planning

Although not part of the EA process, land use planning can provide targets and objectives against which the significance of Project impacts can be assessed. Most First Nations EA practitioners felt that the provincial Land and Resource Management Planning (LRMP) process did not consider First Nations rights and title adequately, and that the resulting plans are therefore not suitable for use in EA evaluations. The following suggestions and comments were advanced by interviewees with respect to land use planning:

- a First Nations led land use planning process is needed to properly address and incorporate characteristics of aboriginal rights and title as defined by current case law (see Krehbiel[28] 2008);
- this land use planning should be funded by the provincial and federal governments (and possibly recovered from industry through revenue taxation);
- First Nations Land Use Plans will help to: 1) create the certainty that attracts investment; 2) avoid litigation, and 3) achieve efficiencies in the EA process;
- in the First Nations Land Use Plans, territory specific areas of land to maintain natural processes and traditional activities of cultural value should be identified for all First Nations' territories in BC;
- the development of a First Nation Land Use Plan should utilize both traditional knowledge and western science based information, and should be based on clearly defined priorities;
- base line studies would be carried out to geo-reference highly valued cultural activity and other important areas;
- GIS technology should be used to archive, analyse, and map information gathered in the baseline studies; access to GIS information needs to be restricted to prevent release of sensitive information and its possible misuse;
- The Land Use Planning process needs to first identify all title holders (e.g., hereditary House Chiefs) and the cultural interests within their territories (often House territories). Examples of cultural interests are diverse but often include fishing, trapping, hunting and gathering. The locations of these past or present activities can form the "bones" of a First Nations Land Use Plan;
- protection plans for culturally important areas should be developed as part of the overall Land Use Plan;

[28] Krehbiel, Richard (2008. The Changing Legal Landscape for Aboriginal Land Use Planning in Canada. Plan Canada Summer 2008 on-line supplement: http://www.cip-icu.ca/web/la/en/fi/8f77899f36324883af9833224dfbfcf0/get_file.asp

- protection plans will also identify valued wildlife species habitat, fish bearing and fishing streams and gathering areas; these areas could provide direction for baseline studies as part of future EA processes;
- The Land Use Plan will also identify corridors to connect highly valued areas of and prescribe which kind of land uses will be allowed in these corridors;
- as part of the protection plans, areas of high priority for protection will be set aside as special management areas; some of these areas may be designated as being off-limit from any kind of industrial development;
- Water Management Areas should also be addressed in First Nation Land Use Plans to protect water quality and uses from the cumulative effects of various types of development;
- a First Nations Land Use Plan should also identify areas where past development has resulted in unacceptable environmental impacts; and
- at least until treaties are negotiated, First Nations Land Use Plans need to be recognized as higher level planning tools by the provincial and federal governments.

A3.6 Interim Access Agreements

Some interview participants suggested the use of an "interim access" agreement to lay out understandings between a Proponent and a First Nation when the Proponent first contemplates a Project within the First Nations's territory. Such an agreement can help to provide clarity and establish trust between a First Nation and a Proponent and thus set a tone of mutual respect as a good base for subsequent collaborations. In general, an interim access agreement can set out the terms and conditions for the Proponent's activities in the First Nation's territory.

In the case of a mining project, the agreement should ideally be made before staking or any exploratory activity has taken place. The agreement would then set out the terms for mineral staking, exploration, and what happens in the subsequent stages of developing a property. The agreement should also state the Proponent's commitments, should the Project advance from the exploration to the Project development stage, to: 1) provide funding for the First Nation to participate in the EA process; 2) implement environmental protection measures; and 3) provide economic benefits to the First Nation.

The following list is provided as an example of the elements or understandings that could be formalized in an interim access agreement for mineral exploration on a First Nation's territory:

- the Proponent is a guest on the territory;
- a First Nation has the right to refuse entry to any or parts of its territory; it is very important that a Proponent respect this and behave accordingly;
- assurances that a First Nation will be properly informed about all relevant aspects of the project;

- a mechanism that provides for top level communication between the Parties as necessary, along with a mechanism to resolve any disputes;
- commitments that the Proponent will respect the interests of the First Nation while conducting the work;
- commitment that the Proponent will pay for First Nation's engagement in the negotiation of the Agreement and, if requested by the First Nation, will advance a sizeable payment towards these costs;
- commitment that the First Nation will lay out its approach to working with the Proponent, and will account for all funds received from the Proponent and expended in relation to the Project;
- a 'without prejudice' clause that makes it clear that the signing of the access agreement does not prejudice the First Nation's ability to ultimately say "No" to Project development after due consideration of environmental effects and other matters;
- a commitment from the Proponent to satisfy any specific environmental protection or monitoring conditions desired or negotiated by a First Nation;
- a commitment by the Proponent to adhere to Best Practices of the industry with respect to environmental protection, to comply with existing environmental laws and regulations, and to properly execute the terms of the agreement;
- a commitment by the Proponent to provide resources required by the FN to fulfill any obligation set out in the agreement, and to conduct the work necessary to review and understand the environmental and community implications of the proposed activity;
- a commitment by the Proponent to allocate the funds necessary to effectively implement its obligations under the agreement; and
- a commitment by the Proponent, and a mechanism, to negotiate longer-term and more comprehensive agreements in the event that advanced development work and/or commercial production becomes a reality at the end of the initial exploration period.

A3.7 Online Mineral Claim Staking and Oil and Gas Land Sales

All First Nations' EA practitioners interviewed felt strongly that the BC online mineral staking system called "Mineral Titles Online[29]" unfairly creates third party rights on First Nation territories without any Consultation with affected First Nations, and should be replaced by a system that requires consent from an affected First Nation. Many interview partners also felt the need to test the existing system in the courts for its infringement of First Nations' rights and title without Consultation. The same is true for the mining and oil and gas industries' land sale processes in which third party rights are created without adequate Consultation with First Nations.

[29] http://www.mtonline.gov.bc.ca/

The following recommendations were made by interviewees:

- before mineral staking is done, First Nations must be consulted;
- First Nations rights and title should be respected, including the right to reject staking or exploratory activity on their territories;
- staking with the consent of a First Nation will be the start to a respectful professional relationship between a Proponent and a First Nation; and
- seeking the consent of affected First Nation's to staking or exploratory activity will allow a Proponent to judge the level of First Nation support for the proposed Project.

Many interviewees voiced the concern that exploration has become a big industry that in many cases is detached from the actual mining of a resource. The exploratory activity exposes resources that are then offered to the highest bidder. While the mining industry must undergo a full EA the exploration industry does not. The exploration and mining industries should be regulated by the same EA process and be regulated to be equally responsive to First Nations' concerns.

A3.8 Referrals and Permitting

Once a Project receives its Environmental Assessment Certificate, it must then apply for the appropriate permits from the regulatory agencies. While some amount of funding is now generally available for participation of First Nations in EA processes, such funding is not commonly available to meaningfully participate in the permitting process.

During the interviews, it was suggested that:

- funding to First Nations needs to be provided for the permitting, monitoring and remediation phases of each project. As with all other funding arrangements, details of this type of participation funding should be formalized in written agreements.

A3.9 Benefit Sharing Agreements

While various types of economic or benefit sharing agreements might be negotiated between a Proponent and a First Nation while an EA in respect of the Proponent's Project is in progress, these types of agreements are not part of the EA process. The BC EAO Fairness and Service Code states:

> "*The EAO encourages proponents to explore benefit-sharing agreements with First Nations where the parties consider that to be in their mutual interest. The EAO will consider any information it receives regarding such agreements when assessing the impacts of a proposed project. However, such agreements are not considered preconditions to the completion of the review process or to a decision by ministers*."

Participants in the interview process made the following observations;

- a First Nation economic development entity should have the responsibility for negotiating economic arrangements with a Proponent;
- in such negotiations, the First Nation economic development entity should be guided by a strict set of rules set out by First Nation leadership or its Board of Directors if applicable;
- if not already done as part of general policy development, a First Nation may wish to consult community members about how revenue from an economic agreement in respect of a specific Project will be administered and used;
- a First Nation community and leadership may wish to consider using some of the revenue from economic agreements to build other economic ventures, for instance the purchase of machinery in a construction company;
- appropriate expertise should be used to draft legally sound economic agreements to the contracts to negotiate from a legally sound basis;
- economic agreements need to drafted to survive changes in Proponent over the life time of a project, as well as changes in the First Nation's government;
- joint venture agreements, in which the First Nation has an equity stake in the Project, should be considered as one type of economic arrangement between a Proponent and a First Nation. This type of arrangement may permit more involvement of First Nation personnel in the day to day activities and decision making of the joint venture, and may help to build capacity and confidence in respect of business enterprises;
- when applicable, economic agreements should give the First Nation the right of first refusal to bid on contracts in respect of a Project, where the First Nation has demonstrated it has the ability to satisfy the requirements of the contract; and
- successful engagement in such economic ventures, and appropriate utilization of revenue gained from the economic ventures, can assist a First Nation in diversifying its economy, helping to avoid "boom and bust" cycles.

APPENDIX B

CASE STUDIES

by

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B1. NAMGIS FIRST NATION AND POLARIS MINERALS: ORCA SAND & GRAVEL; SETTING A STANDARD FOR A MEANINGFUL EA COLLABORATION

B1.1 Background Facts

- Na̲mgis Membership and Location: The Na̲mgis First Nation consists of approximately 750 Na̲mgis citizens on reserve and 500 off reserve. The Na̲mgis reserves and the traditional and claimed territories are located in the vicinity of Alert Bay on Cormorant Island across from Port McNeil on the northeast coast of Vancouver Island (see following Map).

Map of location of Alert Bay (red arrow) on Cormorant Island and the Orca Quarry 3.8km west of Port McNeill (Source: Super Natural BC website)

-Na̲mgis Internal EA Capacity: 6 Na̲mgis staff members part-time; 2 administrative persons, 1 financial person, 1 professional forester, 1 fisheries coordinator, 1 treaty negotiator: Contact Person for this specific EA Process: Garry Ullstrom
-External EA Capacity, hired for the specific EA Process: 1 lawyer, 1 EA process consultant paid for by the proponent
-Proponent Size and Headquarter Location: Polaris Minerals Corporation, Vancouver, BC, Contact Person for this specific EA Process: Marco Romero CEO, Mike Westerlund
-What makes this EA Process special? The open-mindedness of the Na̲mgis First Nation was met with the personal interest of the CEO of the proponent company to patiently listen, learn, consult, mitigate and compensate. The Na̲mgis First Nation became a 12% partner in the Orca Sand and Gravel Enterprise.

B1.2 Recent History of the Namgis First Nation

Many details about this case study were reported in a 2008 Centre for Indigenous Environmental Resources (CIER) report, which beat the authors of this report to showcase the Orca Sand and Gravel EA as standard-setting. The authors of this report confirmed with two Namgis EA Team members that the CIER (2008) report adequately represented the Orca Sand and Gravel EA process and it was recommended to use the information unchanged for this report.

Orca Quarry located 3.8km west of Port McNeill on the Northwest Coast of Vancouver Island.

The Namgis' territory is comprised of Cormorant Island, several other small islands and extends onto Vancouver Island including the mouth of the Nimpkish River. The Namgis have been successful in developing the social infrastructure of their community over the past 20 years. The small community of Alert Bay has its own school, a health centre, a dental centre and many cultural gathering points. As part of the BC treaty process, Namgis First Nation is developing a bioregional atlas and a land use plan for its territory.

B1.3 Project Details

The ORCA sand and gravel project consists of a gravel mine, processing plant, and marine ship-loading terminal (see figure above). The processing plant and stockpiles are connected via a 1.7km conveyor belt system with the ship loader facility. The quarry can produce up to 6.6 Million tones of sand and gravel per year mainly for the California market. The quarry is located in the vicinity of the salmon bearing Cluxewe River and Abalone rearing sites in the ocean.

B1.4 EA Process Overview

The environmental assessment of the project officially commenced on Aug. 10, 2004 with the comprehensive study accepted on Nov. 10, 2005. The EA process was harmonized between the BC EAO and the federal Ministries of Transport, Department of Fisheries and Oceans and Indian and Northern Affairs Canada.

B1.5 First Nation and Proponent Involvement in EA Process

Pre-BC EAO-CEAA Process

As part of the B.C. treaty process the Namgis First Nation established an eleven member natural resource and economic development and planning team before they were approached by Polaris Minerals. As a result, the Namgis First Nation was in the process of land use planning that produced a mapping scheme to define important cultural areas and those deemed suitable for economic development before an EA process. In addition, EcoTrust Canada assisted in marine monitoring and mapping on the Namgis territory. Therefore, Namgis First Nation felt that they were well prepared to become a contributor to the EA process that resulted in the Orca Sand and Gravel project.

B1.6 Approach by the Proponent: Drafting an Exploration Agreement and Negotiating a Veto Right

Before the project design stage and approximately 3 years before the start of the official EA process, Polaris Minerals, the proponent, asked the Namgis First Nation for permission to explore on their territories and manifested their intentions in the drafting of an exploration and access agreement. This process involved the identification and protection of values such as traditional use areas.

The Na̲mgis First Nation was also ensured that they were respected as the original owners of the land and accordingly, veto power over the project was given to the Na̲mgis First Nation up to the conceptual stage. This relationship building process also built a considerable amount of trust, which allowed for an open and respectful environmental assessment process (CIER 2008).

B1.7 BC EAO- CEAA Process Stage

Communication

Community involvement was a major component of this environmental assessment process. The discussion of the Na̲mgis First Nation's vision of sustainability for the region was discussed in public meetings where the membership was able to express their concerns (e.g. fish and fish habitat health, impacts to river and groundwater). Polaris Minerals responded by presenting possible mitigation measures and study results in response at subsequent meetings in the Na̲mgis long house. Communication was clear, transparent, and available. Plain language presentations were given, and translations were made into the local language (CIER 2008).

Terms or Reference

The Na̲mgis First Nation was involved in drafting the Terms of Reference for the EA process and report. In addition, the Na̲mgis First Nation had a say in the choice EA consultants and proposed its own mitigation measures for the project (CIER 2008).

Capacity Building

Na̲mgis developed an internal EA team supplemented with specialists who provided critical expertise the Na̲mgis did not possess. The close collaboration between internal and hired capacity kept the control of the EA process within the Namgis territory and ensured the constant incorporation of indigenous values. The Na̲mgis First Nation also received funding from the proponent to undertake a traditional use study specific to the proposed "Orca Sand and Gravel" area. The hired EA process consultant oversaw the hiring of sub consultants and specialists for peer review of all EA processes and documents (CIER 2008).

B1.8 Impact Benefit Agreement

As part of the Impact Benefit Agreement, 50% of all positions in the quarry were offered to First Nations employees following a comprehensive training program that covered between three to five years. The training was co-funded by Polaris Minerals and the Na̲mgis First Nation. A joint Personnel Committee was established to oversee all hiring (CIER 2008).

B1.9 Post BC EAO-CEAA Stage

Monitoring

The Namgis First Nation received funding for an ongoing monitoring program to assess potential changes in salmon spawning and abalone habitat in project adjacent creeks and reefs. Namgis negotiated the option of slowing or stopping production during critical ecosystem periods, such as the salmon spawning run, if effects were detected. All concerns about perceived and project related changes in the monitored ecosystems are brought to the attention of the "Orca Sand and Gravel" board of directors, which includes Namgis First Nation member George Speck.

The project also participates in the Global Reporting Initiative[30] that sets international standards for the transparency of reporting on the economic, environmental, and social performance of the project (CIER 2008).

Decommissioning and Reclamation

Site reclamation was thoroughly planned by the Namgis First Nation and Polaris Minerals. It was made the Chairman of the Board's responsibility to ensure reclamation is completed to the satisfaction of all parties involved. The chairman of the board is a hereditary Namgis chief. Examples for special reclamation provisions are the storage and re-use of the original soils found in the area and progressive reclamation throughout the lifetime of the quarry.

B1.10 Assessment of Involvement of Namgis First Nation

The "ORCA Sand and Gravel" Project sets a standard for meaningful participation of a First Nation in an environmental assessment process. It also shows that meaningful participation is desirable not only for a First Nation but also the proponent and the regulatory agencies. The EA process was preceded by a three year relationship building exercise between the Namgis First Nation and Polaris Minerals. This process was not guided by any regulatory agency. The completion of the EA process was swift and mutually supported.

B1.11 Examples of Best EA Practices in the "Orca Sand and Gravel " Case Study

The following Best Practices for the involvement of First Nations into the EA process can be derived from this case study:

- Aabalone , harlequin duck and salmon are examples of species that were identified as culturally significant to the Namgis First Nation;
- to protect theses species, extensive studies funded by Polaris Minerals and carried out by the Namgis First Nation were undertaken;
- Marco Romero, the CEO of Polaris Minerals developed a personal interest in the studies to preserve the species of cultural significance;

[30] http://www.globalreporting.org/AboutGRI/WhatWeDo/

- Namgis First Nation EA participants pointed out that the direct collaboration between Polaris Minerals and Namgis kept the involvement of regulatory agencies minimal. Thus frustrations born out the lack of funding coming from regulatory agencies or the pushing of the process into pre-determined shape did not play a role in this EA. Flexibility in the approach to problem solving and the setting of standards that superseded the standards set by regulatory agencies made this EA process site and people specific and led to a perception of procedural fairness and respect;
- the involvement of the Namgis and their chosen consultants into the drafting of the Terms of Reference for the EA process automatically made the EA process culturally appropriate by including local community values;
- the Namgis First Nation chose the scope and method of their participation throughout the EA process;
- the negotiations outside of the EA process directly led the negotiation of a 12% Namgis ownership, a revenue sharing agreement and the training and employment of many Namgis citizens; and
- indirectly, the funds that become available to the Namgis through these arrangements will also lead to economic diversification of the community and overall economic empowerment.

B2 KEMESS NORTH: A MINING EA WITH NEGATIVE OUTCOME

B2.1 First Nation involved

The project review involved four aboriginal groups who asserted rights in the project area: Tsey Keh Dene, Takla Lake, Kwadacha, and the Gitxsan House of Nii Kyap. In April of 2006 the first three groups separated and were thereafter collectively referred to as the Tse Keh Nay. They became the focus of aboriginal participation and opposition to the project and received strong support from the First Nations Summit, the Carrier Sekani Tribal Council and other First Nations in the region. Further opposition came from the non-aboriginal environmental community, including MiningWatch Canada and the David Suzuki Foundation. The First Nations were also supported by various research efforts from students at the University of Northern British Columbia.

B2.2 Project Proponent and Project Description

Northgate Minerals Corporation operates an existing gold and copper mine which is projected to close in late 2008. The mine is located 250 km northeast of Smithers and 450 km northwest of Prince George. Northgate proposed to construct, operate and decommission a second mine, known as Kemess North approximately six km north of the existing mine. The project included development of a new open pit, modification of the existing mill, and related infrastructure. It would result in milling capacity at the operating

Kemess mine being increased from the current 55,000 tonnes per day to up to 120,000 tonnes per day.

B2.3 EA History

Fisheries and Oceans Canada announced on June 1, 2004 that a harmonized comprehensive study would be initiated. The project was referred to a joint federal-provincial review panel on March 14, 2005 at the Minister's request, supported by the Ministers of Transport and Natural Resources Canada. The joint panel was appointed on May 19, 2005 and submitted its final report to the federal and provincial environment ministers on September 17, 2007 recommending that the project not proceed.

B2.4 Description of approach by and to First Nations

Due to disagreements with the federal and provincial governments about accommodation and consultation, decision making, the development of an appropriate parallel forum for consultation and accommodation on potential infringements of Aboriginal rights and title, and participant funding, the Tse Keh Nay participated only intermittently and under protest in the environmental assessment process.

Aboriginal opposition to the project came to focus primarily on Amazay (also known as Duncan) Lake, which would have been used for acid rock and tailings storage if the project had proceeded. The valued ecosystem components attributed to the lake and surrounding area included fisheries and wildlife values, water quality, risk of dam failure, and effects on archaeological and traditional use sites. Although the weight attached to each varied between the members of Tse Keh Nay, a strong cultural and spiritual connection that was common to all ran throughout these ecosystem components.

Although there were initial impact benefit negotiations, relations with the proponent were publicly very strained, and continued to deteriorate after the assessment was complete.

B2.5 Outcome

In its Final Joint Review Panel Report: Kemess North Copper-Gold Mine Project[31] the Joint Panel made 33 recommendations, number 31 of which was that the project not proceed as proposed. In the Panel's view, "the economic and social benefits provided by the Project, on balance, are outweighed by the risks of significant adverse environmental, social and cultural effects, some of which may not emerge until many years after mining operations cease." Canada and British Columbia accepted the recommendation on March 7, 2008 by which time the proponent had also renounced the project.

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[31] (http://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_3394/24441E.pdf)

The remaining Panel recommendations would have applied had the project been approved. Of these the following four are directed at aboriginal follow-up and the process itself and may thus be cast as "Best Practices".

- **Recommendation #14:** The Panel recommends that, if the Project is approved, Aboriginal groups be consulted in the final design of the fisheries compensation program.

- **Recommendation #30:** The Panel believes that there is a possibility of locating more archaeological evidence through further survey, including possibly human burial sites. If the Project is approved, the Panel recommends that additional archaeological survey work be implemented prior to Project construction.

- **Recommendation #32:** If the Project does proceed, substantive efforts should be made to foster a working relationship between the Proponent, government and potentially affected Aboriginal groups. The Panel believes that this approach would increase opportunities for the Project to provide considerably more benefits to Aboriginal people than they are likely to realize without such a working relationship.

- **Recommendation #33:** The Panel believes that, should the Project be approved, a detailed and integrated long-term monitoring plan, with built-in adaptive management measures, would best meet the long-term post-closure management needs of the Project site. … The Panel envisages an integrated long term monitoring and maintenance initiative which addresses: 1) water quality; 2) hydrology and hydrogeology, including seepage under the dam; 3) dam and pit slope stability; 4) fisheries compensation, including fish transplants; 5), the new post-closure Impoundment ecosystem; and 6) terrestrial wildlife monitoring.

One of the University of Northern British Columbia studies[32] undertaken involved a masters' candidate examination of perceptions of risk on the part of two of the aboriginal participants with respect to the proposed project. Numerous individual interviews with Tsey Keh Dene and Takla Lake members examined the proposition that their perceptions of risk in the project were based on cultural characteristics. Flowing from this fundamentally important characterization of a basic task in environmental assessment, the suggested Best Practice is that:

- Risk assessment and risk management decisions in environmental assessment must take into account the culture-based perceptions of those potentially affected by the risks.

[32] Place, Jessica (2007). Expanding the Mine, Killing a Lake: A Case Study of First Nations Environmental Values, Perceptions of Risk and Health: University of Northern British Columbia, Geography Department, 2007

B3 MCKENZIE VALLEY PIPELINE

B3.1 Project Description

The Mackenzie Gas Project (MGP) would involve the construction and operation of three natural gas fields in the Mackenzie delta including associated collection and processing facilities. The McKenzie Valley Pipeline project is a proposed 1220-kilometre natural gas pipeline system along the Mackenzie Valley that would distribute the gas to North American markets through a terminus in northern Alberta. The start date for production is most recently estimated to be 2014.

The entire project is expected to cost approximately $16.2 billion, with the pipeline itself representing slightly less than half of that investment.

B3.2 First Nation Involved

[Note that the term “First Nation” is not generally used or accepted by aboriginal peoples in northern Canada]

The project involved aboriginal groups that live along the Mackenzie Valley and in adjacent regions affected by the proposed pipeline. These include the Deh Cho, Sahtu, Gwich’in, Inuvialuit, Akaitcho, Dogrib, Salt River, North Slave Metis Alliance, South Slave Metis Alliance and Dene Tha First Nation. These participated variously as proponents, governments and opponents as detailed below.

B3.3 Project Proponent

Four major Canadian oil and gas companies and a group representing the aboriginal peoples of Canada’s Northwest Territories are partners in the proposed Mackenzie Gas Project. The oil and gas companies are Imperial Oil, Shell Canada, ConocoPhilips and ExxonMobil.

The Aboriginal Pipeline Group (APG) was created as a business in 2000 with a formal resolution that expressed the goals to maximize the ownership and benefits in the Mackenzie Valley natural gas pipeline and to support greater independence and self-reliance among Aboriginal people. Two related organizations were formed to implement the agreement.

The first was a Limited Partnership structured to hold the APG’s financial interest in the Mackenzie Valley Pipeline. The partnership is owned primarily by organizations under the direction of the Deh Cho, Sahtu, Gwich’in and Inuvialuit with other settlement areas eligible to participate at the discretion of these primary owners.

The second organization was an incorporation of the individual aboriginal partners as the general partner in the limited partnership. This Mackenzie Valley Aboriginal Pipeline Corporation entered into a Memorandum of Understanding with the four producing companies in October 2001, and in June 2003, became a full participant in the Project following funding and participation agreements between the four producers, the APG and TransCanada PipeLines Limited.

B3.4 Description of Approach by and to First Nations

The approach to participation and environmental assessment paralleled the approach to the business opportunity and depended heavily on aboriginal jurisdiction under treaties and land claims agreements.

The Aboriginal Pipeline Group would own thirty-four percent (34 %) of the Pipeline. Gas producers would pay to use the pipeline and any profits remaining after repaying financing and operating costs would be paid as dividends to be used as decided by the people who comprise each aboriginal group. An eight percent share in the ownership of the pipe-line has been set aside for other aboriginal groups living in the Northwest Territories. The financial plan for the Mackenzie Gas Project forms part of the National Energy Board approval process.

The authorities involved in the environmental assessment and regulation of the proposed project include Indian and Northern Affairs Canada, the Canadian Environmental Assessment Agency, the National Energy Board, the Mackenzie Valley Environmental Impact Review Board, the Mackenzie Valley Land and Water Board, the Gwich'in Land and Water Board, the Sahtu Land and Water Board, the Inuvialuit Land Administration Office and the Inuvialuit Game Council. The Deh Cho First Nation and the Governments of the Yukon and Northwest Territories had observer status.

These authorities entered into a Cooperation Plan in 2002 and a Regulators Agreement in 2004 to coordinate the environmental and regulatory processes. The environmental assessment was conducted by a Joint Review Panel appointed by the Minister of Environment Canada, the Gwich'in, Sahtu, DehCho and Inuvialuit. The panel began hearings in February 2006 and expects to conclude in 2009.

In the spring of 2007, the Deh Cho called on the government of Canada to approve the band's land use plan which proposed to set aside 60 % of its lands as conservation areas and open the rest for development. Canada declined, but did agree to vary the process, which continues.

In 2006 the Dene Tha First Nation received a judgment in the Federal Court of Canada challenging the federal government's consultation process regarding impacts on Dene Tha territories in northern Alberta and the Northwest Territories. In response Mr. Tim

Christian was appointed as Chief Consultation Officer to addresses the Dene Tha' concerns[33].

The Government of Canada also established a $500 million Mackenzie Gas Project (MGP) trust fund in 2005. The fund would provide resources over a ten-year period to manage and mitigate socio-economic impacts anticipated to result from the (MGP),

B3.5 Best Practices

The project is currently "stalled" by economic and industrial relations considerations outside the control of the aboriginal participants. The Joint Review Panel expects to complete its environmental assessment in 2009 and the National Energy Board will thereafter make major regulatory approval decisions. Until the project ultimately proceeds or fails, it is difficult to confirm Best Practices. However, as this is the first time that Aboriginal groups in Canada are in a position to participate as an owner in a major, multi-billion dollar industrial project, it is clearly possible to suggest that First Nations acting in concert through formalized business alliances can achieve the potential for meaningful sustainable economic development in their territories.

Looking to the past, it is also interesting to reflect on the fact that a previous version of this project was the subject of a public inquiry by Mr. Justice Thomas Berger in 1977[34]. Aboriginal people throughout the study area at that time took the firm position, which Mr. Justice Berger reflected in the report, that development should not occur until land claims had been settled. This was essentially completed in the period before the current project was advanced. Secondly, the Berger process is largely credited with forming the impetus for development of a federal environmental assessment process in Canada.

Looking to the future, it is important to note that Enbridge Inc. is suggesting the same model may be available to the approximately 51 First Nations with territories on the route of their proposed 1,150 km pipeline from the oil fields near Edmonton Alberta to Kitimat British Columbia.

B4 INTERNATIONAL BEST PRACTICES GUIDE LINES FOR THE INVOLVEMENT OF ABORIGINAL PEOPLES INTO THE EA PROCESS

Environmental Assessment has become an internationally-accepted policy instrument that is necessary for sustainable development. The Canadian and British Columbia processes are highly respected internationally, but that is not to say that we cannot learn

[33] ([2007] 1 C.N.L.R. 1 (F.C.T.D.))
[34] Berger, Thomas R. (1977)Northern Frontier, Northern Homeland - The Report of the MacKenzie Valley Pipeline Inquiry

from, or be reinforced by, the work and experience of other nations and international bodies. Following are select references from the vast international resources available.

B4.1 ISO 14000

A generally applicable and flexible environmental assessment program was developed by the International Standards Organization. The ISO 14000 series of international management system standards provides guidance on how to manage the environmental impacts of activities, products and services. However, as the standards are applicable only in those particular circumstances, they can best be considered on that basis when applicable.

B4.2 International Association for Impact Assessment (IAIA)

IAIA is the premier international organization in the field of environmental assessment. Its global guidelines project lead to identification of the following sets of basic and operating principles of environmental assessment Best Practices[35].

B4.2.1 IAIA Principles of Environmental Assessment Best Practices

Basic Principles

Environmental Impact Assessment should be:
Purposive - the process should inform decision making and result in appropriate levels of environmental protection and community well-being.
Rigorous - the process should apply “best practicable” science, employing methodologies and techniques appropriate to address the problems being investigated.
Practical - the process should result in information and outputs which assist with problem solving and are acceptable to and able to be implemented by proponents.
Relevant - the process should provide sufficient, reliable and usable information for development planning and decision making.
Cost-Effective - the process should achieve the objectives of EIA within the limits of available information, time, resources and methodology.
Efficient - the process should impose the minimum cost burdens in terms of time and finance on proponents and participants consistent with meeting accepted requirements and objectives of EIA.
Focused - the process should concentrate on significant environmental effects and key issues; i.e., the matters that need to be taken into account in making decisions.

[35] Senécal P et al. *Principles of environmental impact assessment best practice.* Fargo, North Dakota, International Association for Impact Assessment and Institute of Environmental Assessment, 1999. http://www.iaia.org/Members/Publications/Guidelines_Principles/Principles%20of%20IA.PDF

Adaptive - the process should be adjusted to the realities, issues and circumstances of the proposals under review without compromising the integrity of the process, and be iterative, incorporating lessons learned throughout the proposal's life cycle.
Participative - the process should provide appropriate opportunities to inform and involve the interested and affected publics, and their inputs and concerns should be addressed explicitly in the documentation and decision making.
Interdisciplinary - the process should ensure that the appropriate techniques and experts in the relevant bio-physical and socio-economic disciplines are employed, including use of traditional knowledge as relevant.
Credible - the process should be carried out with professionalism, rigor, fairness, objectivity, impartiality and balance, and be subject to independent checks and verification.
Integrated - the process should address the interrelationships of social, economic and biophysical aspects.
Transparent - the process should have clear, easily understood requirements for EIA content; ensure public access to information; identify the factors that are to be taken into account in decision making; and acknowledge limitations and difficulties.
Systematic - the process should result in full consideration of all relevant information on the affected environment, of proposed alternatives and their impacts, and of the measures necessary to monitor and investigate residual effects.

Operating Principles

Specifically the EIA process should provide for:
Screening - to determine whether or not a proposal should be subject to EIA and, if so, at what level of detail
Scoping - to identify the issues and impacts that are likely to be important and to establish terms of reference for EIA
Examination of alternatives - to establish the preferred or most environmentally sound and benign option for achieving proposal objectives
Impact analysis - to identify and predict the likely environmental, social and other related effects of the proposal
Mitigation and impact management - to establish the measures that are necessary to avoid, minimize or offset predicted adverse impacts and, where appropriate, to incorporate these into an environmental management plan or system.
Evaluation of significance - to determine the relative importance and acceptability of residual impacts (i.e. impacts that cannot be mitigated)
Preparation of environmental impact statement (EIS) or report - to document clearly and impartially impacts of the proposal, the proposed measures for mitigation, the significance of effects, and the concerns of the interested public and the communities affected by the proposal.
Review of the EIS - to determine whether the report meets its terms of reference, provides a satisfactory assessment of the proposal(s) and contains the information required for decision making.

Decision making - to approve or reject the proposal and to establish the terms and conditions for its implementation.
Follow up - to ensure that the terms and condition of approval are met; to monitor the impacts of development and the effectiveness of mitigation measures; to strengthen future EIA applications and mitigation measures; and, where required, to undertake environmental audit and process evaluation to optimize environmental management. It is desirable, whenever possible, if monitoring, evaluation and management plan indicators are designed so they also contribute to local, national and global monitoring of the state of the environment and sustainable development.

B4.2.2 IAIA Best Practice Principles for Public Participation in EAs

IAIA has also established a comprehensive set of international Best Practices principles for public participation which can effectively be applied to aboriginal communities. As a general goal, every question from a member of the community should receive an answer. Beyond that, the IAIA Best Practices operate at three levels: basic principles, operating principles and developing guidelines. Each is reproduced below:

Basic Principles

Contemporary public participation practice in IA should be:
Adapted to the context – Understanding and appreciating the social institutions, values, and culture of the communities in the project area; and respecting the historical, cultural, environmental, political and social backgrounds of the communities which are affected by a proposal.
Informative and proactive – Recognizing that the public has a right to be informed early and in a meaningful way in proposals which may affect their lives or livelihoods. Increased interest and motivation to participate occur by diffusing simple and understandable information to the affected and interested public.
Adaptive and communicative – Recognizing that the public is heterogeneous according to their demographics, knowledge, power, values and interests. The rules of effective communication among people, in the respect of all individuals and parties, should be followed.
Inclusive and equitable – Ensuring that all interests, including those non-represented or underrepresented are respected regarding the distribution of impacts, compensation and benefits. The participation or defence of the interests of less represented groups including indigenous peoples, women, children, elderly and poor people should be encouraged. Equity between present and future generations in a perspective of sustainability should be promoted.
Educative – Contributing to a mutual respect and understanding of all IA stakeholders with respect to their values, interests, rights and obligations.
Cooperative – Promoting cooperation, convergence and consensus-building rather than confrontation. Engaging conflicting perspectives and values as well as trying to reach a

general acceptance of the proposal toward a decision that promotes and supports sustainable development should be pursued.
Imputable – Improving the proposal under study, taking into account the results of the public participation process; including reporting and feedback to stakeholders about the results of the public participation process, especially how their inputs have contributed to decision-making.

Operating Principles

With respect to the Basic Principles previously identified, public participation should be:
Initiated early and sustained – The public should be involved early (before major decisions are made) and regularly in the IA process. This builds trust among participants, gives more time for PP, improves community analysis, improves screening and scoping of the IA, increases opportunities to modify the proposal in regards to the comments and opinions gathered during the public participation process, reduces the risk of rumors, and improves the public image of the proponent. It can also give the regulator more confidence in the approval decision they must make.
Well planned and focused on negotiable issues – All IA stakeholders should know the aims, rules, organization, procedure and expected outcomes of the public participation process undertaken. This will improve the credibility of the process for all involved. Because consensus is not always feasible, public participation should emphasize understanding and respect for the values and interests of participants, and focus on negotiable issues relevant to decision making.
Supportive to participants – The public should be supported in their will to participate through an adequate diffusion of information on the proposal and on the public participation process, and a just and equitable access to funding or financial assistance. Capacity-building, facilitation and assistance should also be provided particularly for groups who don't have the capacity to participate and in regions where there is no culture of public participation, or where local culture may inhibit public participation.
Tiered and optimized – A public participation program should occur at the most appropriate level of decision-making (e.g., at the policy, plan, program or project level) for a proposal. The public should be invited to participate regularly, with emphasis on appropriate time for involvement. Because public participation is resource consuming (human, financial, time) for all the IA stakeholders, public participation optimization in time and space will ensure more willing participation.
Open and transparent – People who are affected by a proposal and are interested in participating, whatever their ethnic origin, gender and income, should have access to all relevant information. This information should be accessible to laypersons required for the evaluation of a proposal (e.g., terms of reference, report and summary). Laypersons should be able to participate in relevant workshops, meetings and hearings related to the IA process. Information and facilitation for such participation should be provided.
Context-oriented – Because many communities have their own formal and informal rules for public access to resources, conflict resolution and governance, public participation should be adapted to the social organization of the impacted communities, including the

cultural, social, economic and political dimensions. This shows respect for the affected community and may improve public confidence of the process and its outcomes.
Credible and rigorous – Public participation should adhere to established ethics, professional behavior and moral obligations. Facilitation of public participation by a neutral facilitator in its formal or traditional sense improves impartiality of the process as well as justice and equity in the right to information. It also increases the confidence of the public to express their opinions and also to reduce tensions, the risk of conflicts among participants, and opportunities for corruption. In a formal context, the adoption of a code of ethics is encouraged.

Developing Guidelines

For improving the outcomes of public participation, all actors should actively promote:
• Access to useful and relevant information for the public. Even if information is actually generally available, it might need some improvement to be useful to laypersons, or more focused and relevant to the decision-making process.
• High-level involvement and participation in decision making;
• Creative ways to involve people.
• Access to justice and equity.

APPENDIX C

ENVIRONMENTAL ASSESSMENT IN THE COMMON LAW

by

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C1 ENVIRONMENTAL ASSESSMENT IN THE COMMON LAW

C1.1 Meaning of "Common Law"

"Common law' refers to the part of our legal system that originates in the judgments of the various courts in Canada. The other component is the "statute law" which refers to the laws enacted by elected government representatives. In environmental assessment, as in other areas of regulated conduct, there is an ongoing interaction between the two.

C1.2 Common Law in Environmental Assessment

Environmental assessment is a relatively new feature in Canadian statute law but it has already founded a substantial body of common law. For example, the Supreme Court of Canada decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)* ([1992] 1 S.C.R. 3), which involved several aboriginal organizations as interveners, is widely credited with leading directly to the formalization of federal environmental assessment responsibilities in the *Canadian Environmental Assessment Act.*

The primary significance of the common law to aboriginal people in the context of environmental assessment is in its evolving relationship with the duty of the Crown under statute and common law to consult, and if necessary accommodate, aboriginal peoples for the impacts of government decision making on aboriginal and treaty rights. In the words of Chief Justice McLachlin "in the age-old tradition of the common law, the courts will fill in the details of the duty".

Both the federal and provincial environmental assessment statutes have received substantial judicial consideration. A good deal of this consideration has addressed fact specific situations such as adequacy of consultation in particular circumstances and remedies of breach of the duty to consult. As such, the decisions should never be read too broadly. However, this chapter attempts to limit itself to consideration of the common law insofar as it sets the context for application of Best Practices in environmental assessment.

C1.3 Consultation and Accommodation Regarding Aboriginal and Treaty Rights

This discussion focuses on consultation within the context of environmental assessment, so will not include consideration of the legion of cases that have given definition to consultation generally. Nevertheless the current framework for analyzing these issues is found in the 2004 Supreme Court of Canada decision in *Haida Nation v. British Columbia (Minister of Forests)* (2004 SCC 73). The core principles, with subsequent refinements, may be summarized as follows:

- The government's duty to consult with aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be

understood generously. This duty may in some circumstances flow from a fiduciary obligation requiring the crown to act in the best interests of a First Nation, but in circumstances of unproven rights and title, the honour of the Crown also requires balancing of other interests.

- 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.
- The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.
- The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith.
- The content of the duty varies with the circumstances and each case must be approached individually and flexibly.
- Where accommodation is required in making decisions that may adversely affect as yet unproven aboriginal rights and title claims, the Crown must balance aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests. The information obtained through meaningful consultation may require the Crown to make changes to its proposed action.
- The duty to consult and accommodate applies to the provincial government as well as the federal government.
- There is no obligation on third parties to consult or accommodate but the Crown may delegate procedural aspects of consultation to industry proponents as is not infrequently done in environmental assessments.

With respect to the procedural aspects of meaningful consultation, the Federal Court of Canada in *Leighton v. Canada (Minister of Transport)* (2006 FC 1129), which concerned consultation about expansion of the port of Prince Rupert, distilled the results of the Haida decision in the following terms:

> "The process set out in *Haida, supra*, in essence, involves four steps:
>
> 1. Full disclosure by the aboriginal claimants setting out their claims including the scope and nature of the rights asserted and the alleged infringement of these rights;
>
> 2. A preliminary assessment of the strength of the case and the seriousness of the potentially adverse effect upon the claimed right or title be conducted by the Crown;
>
> 3. Meaningful consultation between the parties; and
>
> 4. Accommodation, if necessary."

While not all environmental assessment decisions have survived judicial challenge, which usually comes in the form of judicial review, the courts have definitively defended the provincial and federal environmental assessment process themselves as vehicles for meaningful consultation. Select judicial direction in respect of each is discussed below.

C1.4 Provincial Environmental Assessment in the Common Law

There is as yet relatively little litigation under the current 2002 BC *Environmental Assessment Act.* However the fundamentals remain relatively constant from the original 1995 act, under which the following cases were decided.

In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, (2004 SCC 74), which was released at the same time as the *Haida* decision the Supreme Court of Canada held that the process engaged in by the province in respect of the environmental assessment of a mining project contemplated in the territory of the Taku River Tlingit First Nation fulfilled the requirements of the province's duty to consult and accommodate. The assessment process included traditional land use studies in the context of specific impact of a proposed mining road with meetings, committees, hearings, preparation of written reports and extensions of time within the process provided by the *Environmental Assessment Act*.

In the earliest significant provincial decision, *Cheslatta Carrier Nation vs. British Columbia* ([1998] 3 C.N.L.R. 1) (the "Huckleberry case") the BC Supreme Court accepted the legitimacy of the environmental assessment process as a "unique form of consultation" and made several decisions which have survived in practice and the common law. Specifically:

- Any First Nation as defined in the statute may participate in the process. (But for an interesting discussion on the effect of overlapping claims, standing to participate and conflict of interests, see *Komoyue Heritage Society v. British Columbia (AG)* 2006 BCSC 1517 which was decided in the context of the Orca Sand and Gravel development. And for a circumstance where remoteness from a proposed development disentitled participation, see *Calliou v. BC*, Vancouver Supreme Court Registry A982279 October 23, 1998).
- It is a legitimate expectation of First Nations under the statute to be consulted, to make representations and to have their representations taken seriously.
- The common law duty of consultation is always present. The additional obligation in the environmental assessment statute in no way lessens this common law duty but rather focuses it on the issues of project approval.
- In order to achieve the purposes of environmental assessment the Executive Director and the Ministers must have sufficient information about the impact of the project upon First Nations, and First Nations must have sufficient information to make a reasonable assessment of the project's impact on their people and to advise the

process as to the impact on their lives and their land. However requests for information must not be unreasonable.

- Consultation is a two-way street. Affected First Nations cannot complain if they refuse to be consulted in an effective forum created in good faith and may not remain silent during consultation, in hopes of complaining about unaddressed concerns at a later stage of the proceedings.

C1.5 Federal Environmental Assessment in the Common Law

Usually, consideration of the *Canadian Environmental Assessment Act* has taken place in the Federal Court of Canada and the Supreme Court of Canada. As in the provincial context, there have been various successful challenges to particular decisions or procedures, but the integrity of the process itself has been constant.

Thus, in *Leighton v. Canada* (2007 FC 553) the Federal Court Trial Division found that: "the consultations about Aboriginal interests in the *CEAA* process are an integral part of the Crown's obligations to consult with respect to the overall (project) and should not be severed from that process."

Aboriginal confidence in the federal process was evident in at least one instance, *Reece v. Canada* (2007 FC 550) where two First Nations petitioned the Federal Court to enforce Crown compliance with the *Canadian Environmental Assessment Act* against the Minister of Western Economic Diversification in connection with Port of Prince Rupert expansion.

In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005 SCC 69) the Supreme Court of Canada concluded with respect to a proposed national park winter road:

- Where the content of the Crown's duty to consult case lies at the lower end of the spectrum of obligations due to minimal impacts the Crown is required to provide notice to the First Nation and to engage directly with them. This engagement should include the provision of information about the project, addressing what the Crown knows to be the aboriginal interests and the anticipated potential adverse impact on those interests.
- The 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. Any consultation must be undertaken with genuine intention to address aboriginal concerns.
- There is a reciprocal onus on the First Nation to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution.

- Where necessary, the Crown is required to engage directly with the aboriginal group, which may not be satisfied by participation in a general public consultation process. A public forum or public comment process is not a substitute for formal consultation.
- Although the duty to consult is triggered at a low threshold, adverse impact is a matter of degree, as is the extent of the Crown's duty.

Regarding the nature of information provided by an aboriginal group that was attempting to persuade a court to order environmental assessment based on identifying a regulatory duty under the *Navigable Waters Protection Act*, vague statements which were more in the nature of statements of principle and conclusions of law than of precise and useful narratives of fact were not accepted as statements of material facts in *Humber Environmental Action Group v. Canada (Minister of Fisheries and Oceans Coast Guard)* (2002 FCT 421).

C1.6 Common Law Limits on Environmental Assessment as a Consultation Mechanism

While conduct of an environmental assessment may in some circumstances also discharge mutual consultation obligations, it must be recognized that this will not always be the case. As one academic has noted "the jurisprudence of Aboriginal consultation coexists uneasily with the statutory law of environmental assessment and regulatory decision-making." (Lambrecht, Kirk: Environmental Assessment and Aboriginal Consultation: One Sovereignty or Two Solitudes? *Environmental Law, The Year in Review 2007*. Canada Law Book 2008, Aurora at 73)

The reason for this uneasiness is that there is a fundamental difference between the goals of consultation and the goals of environmental assessment. Consultation was first put forward in the "Sparrow test" as nothing more than one of the ways the Crown might justify infringement of an aboriginal right. Future judicial direction has cast this within the purpose of reconciling the pre-existing interests of the aboriginal peoples of Canada with the present and future sovereignty of the Crown, but the fundamental imbalance remains.

One the other hand, the purpose of environmental assessment is to predict and assess the environmental effects of a proposed project or activity before the proposal is carried out and to incorporate environmental factors into decision making. In that respect, the "playing field" in environmental assessment is potentially considerably more "level" than in the common law of consultation.

Responsibility for assessing the effect of consultation efforts was broadened in February 2009 when the BC Court of Appeal concluded in *Kwikwetlem First Nation v. British Columbia Utilities Commission* (2009 BCCA 68) and *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* (2009 BCCA 67) that the Utilities Commission must consider the adequacy of aboriginal consultation and accommodation when it decides whether to approve energy projects within its mandate. The Utilities Commission had

previously taken the position that the BC environmental assessment process provided the only process for ensuring that the Crown had satisfied its obligation to consult, and if necessary, accommodate First Nations before the project could proceed.

The same issue was raised in Dene Tha litigation against the McKenzie Valley Pipeline, where the Joint Review Panel ruled that it "does not have the jurisdiction or mandate to determine the adequacy of consultation between the Crown and First Nations in relation to First Nations rights" (see chapter 14.14).

Another difference under the federal process is that under the *Canadian Environmental Assessment Act*, it is not necessary that the "current use of lands and resources for traditional purposes by aboriginal persons" as provided in the act's definition of "environmental effect" be constitutionally protected aboriginal rights in order for those uses to be assessed under the Act (*Innu Nation v. Canada*, Federal Court (Trial Division) April 16, 1997, File T-393-97.) The implication is that the environmental assessment process is not a forum for determining the existence of aboriginal or treaty rights.

Consideration of impact on existing aboriginal land and resource uses is a matter of fairness under the Crown's fiduciary (and arguably honourable) obligation to aboriginal people. Where the right is a section 35 right Sparrow analysis must be applied (*Union of Nova Scotia Indians v. Canada (Attorney General* Federal Court (T.D.) ([1997] 1 F.C. 325).

Conclusion

Common law decisions handed down by judges at all levels of Canadian courts provide clarity to how statutory processes such as environmental assessment are conducted in practice. In the relatively short period during which federal and provincial environmental assessment statutes have coexisted with common law aboriginal consultation and accommodation obligations, courts have been very actively providing support and direction. Overwhelmingly, the fundamental integrity of assessment processes has been recognized while specific procedural details have been refined in various ways. Any discussion of Best Practices will profit from an objective assessment and implementation of these judicial directions.

APPENDIX D

USEFUL WEBSITES
AND OTHER SOURCES OF INFORMATION

D1 USEFUL WEBSITES AND OTHER SOURCES OF INFORMATION

1. First Nations Environmental Assessment Technical Working Group (FNEATWG), c/o Lisa Webster-Gibson, FNEATWG Coordinator, P.: 250-247-0117
   a. FNEATWG website:
      http://www.fneatwg.org/
   b. FNEATWG First Nations Environmental Assessment Toolkit:
      http://www.fneatwg.org/pdf/First_Nations_EA_Toolkit.pdf

2. Global Reporting Initiative:
      http://www.globalreporting.org/AboutGRI/WhatWeDo/

3. The Provincial British Columbia Environmental Assessment Process:
   a. The BC EA Act:
      http://www.qp.gov.bc.ca/statreg/stat/E/02043_01.htm
   b. BC EA Act, Reviewable Project Regulations:
      http://www.qp.gov.bc.ca/statreg/reg/E/EnvAssess/370_2002.htm

4. The Federal Canadian Environmental Assessment Process
   a. The Canadian EA Act:
      http://laws.justice.gc.ca/en/c-15.2/text.html
   b. Inclusion List Regulations:
      http://laws.justice.gc.ca/en/showdoc/cr/sor-94-637///en?page=1
   c. Cumulative Effects Assessment Practitioners Guide February 1999
      http://www.ceaa.gc.ca/013/0001/0004/index_e.htm

5. Canada-British Columbia Agreement on Environmental Assessment Cooperation:
      http://www.eao.gov.bc.ca/pub/can-bc_agreement/can-bc-agree_mar1104.pdf

6. Environmental Assessment Best Practice Guide for Wildlife at Risk in Canada, 1st edition, February 27, 2004, 68 pp.
      http://www.cws-scf.ec.gc.ca/publications/eval/guide/index_e.cfm

7. The Nisga'a Final Agreement:
   a. Environmental Assessment Section:
      http://www.gov.bc.ca/arr/firstnation/nisgaa/chapters/environmental.html
   b. Wildlife Section:
      http://www.gov.bc.ca/arr/firstnation/nisgaa/chapters/wildlife.html
   c. Fisheries Section:
      http://www.gov.bc.ca/arr/firstnation/nisgaa/chapters/fisheries.html

8. Critique of the current BC EA process authored by the Carrier Sekani Tribal Council:

http://www.cstc.bc.ca/downloads/EAO%20Critique.pdf

9. Forest and Range Practices Act:
   http://www.for.gov.bc.ca/tasb/legsregs/frpa/frpa/frpatoc.htm

10. Land Use Planning:
    a. Tobias, T.N. (2000). Chief Kerry's Moose, a guidebook to land use and occupancy mapping, research design and data collection http://www.ubcic.bc.ca/files/PDF/Tobias_whole.pdf

11. Court Cases:
    a. Delgamuukw versus Canada, 1997: http://csc.lexum.umontreal.ca/en/1997/1997rcs3-1010/1997rcs3-1010.html
    b. Haida Nation versus British Columbia (Minister of Forests), 2004: http://csc.lexum.umontreal.ca/en/2004/2004scc73/2004scc73.html
    c. Taku River Tlingit First Nation versus British Columbia, 2004 http://csc.lexum.umontreal.ca/en/2004/2004scc74/2004scc74.html
    d. Tsilhqot'in Nation versus British Columbia, 2007 http://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc1700/2007bcsc1700.html

12. The National First Nations Environmental Contaminants Program also called "The Healthy Land Healthy Future Program":
    http://www.afn.ca/cmslib/general/fund.pdf

13. Mineral Titles Online, BC's online staking system:
    http://www.mtonline.gov.bc.ca/

14. The New Relationship Trust:
    http://www.newrelationshiptrust.ca/