Laying the Groundwork for a Community Risk Assessment of the Ring of Fire and Related Infrastructure

by

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supervised by

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FOREWORD

My time in the JD/MES program has been a period of immense growth – personally, academically, and professionally. Upon entering the program, I knew I was committed to pursuing environmental and Aboriginal law as the core focus of my studies. I imagined a career spent advocating against major projects such as the Keystone XL pipeline, and the field of environmental assessment was on my radar at an early stage. During the very first month of my time at Osgoode Hall, I participated in the Anishinaabe Law Camp held at Neyaashiinigmiing, where an entire world opened to me. Listening to incredible scholars and lawyers including John Borrows, Lindsey Borrows, Hannah Askew, and Heidi Kiiwetinepinesiik Stark, I began to learn about Indigenous legal orders, and about different perspectives and worldviews regarding environmental governance. Following the camp, which I also attended in both my second and third years at Osgoode, I became immersed in working to understand concepts like treaty relationships and obligations, learning about Canada's colonial history, and trying to figure out what was meant by the term "reconciliation." Throughout all of this work, I kept returning to the concept of land and governance over land. While many disputes between Indigenous communities and the settler government revolve around land and natural resource development, I began to learn that the roots of this conflict have their origins in jurisdiction and sovereignty, and in competing views about governance authority over the land.

The area of concentration that I settled on for my MES was "environmental policy and Indigenous legal traditions." In exploring this topic, I worked to weave together three components: 1) Canadian environmental law and policy; 2) Indigenous peoples in Canada, and 3) environmental justice. In addition to both law and environmental studies courses, I was fortunate to spend my summers gaining practical experience understanding the operationalization of environmental, Aboriginal and Indigenous law in the field. At both the Ontario Ministry or Environment and Climate Change in Toronto, ON, and the Pacific Centre for Environmental Law and Litigation in Victoria, BC, I worked to learn about the strengths and weaknesses of our settler current environmental law regime. My placement with West Coast Environmental Law through Osgoode's Environmental Justice and Sustainability Clinical Program was foundational in cementing

the foundations for this Major Research Project, as I dove deeply into debates about approaches to environmental assessment, was directly involved in the ongoing federal environmental law reform, and completed a research paper examining how Indigenous inherent jurisdiction could be recognized in environmental assessment law.

The more I learned about environmental governance and Canada's settler history, the more I felt I had an obligation to act positively, and take advantage of my opportunity as a graduate student to engage in beneficial research work. I indicated an interest to engage in a research project in fulfillment of my MES, and my supervisor Professor Dayna Scott graciously assisted in connecting me with the Neskantaga First Nation, who was interested in exploring the possibility of engaging in an Indigenous-led assessment of the Ring of Fire region in Treaty 9 territory.

This MRP also works to fulfil a number of learning objectives I have set for myself in completion of the MES program. These include, but are not limited to:

- Gaining a thorough knowledge of the laws and policies governing environmental management and protection in Canada today, with particular emphasis on those governing natural resource developments;
- Evaluating the effectiveness of Canada's environmental law and policy regime, and understanding strengths, weaknesses, and areas for improvement;
- Gaining an understanding of Indigenous legal traditions, including how the principles drawn from these legal traditions guide environmental management and protection; and
- Understanding how environmental policy decisions impact Aboriginal rights, and how Indigenous communities defend their rights and inherent jurisdiction when governments fail to uphold and implement them.

In environmental law, we often speak about the shortcomings or the failures of the law in adequately protecting our environment, which often stem from inadequate political will to enact laws. For many, the field can often feel hopeless and overwhelming, with victories few and far between. What I adore about the intersection of environmental and Indigenous law is the endless opportunity to craft creative solutions by engaging aspects of each legal tradition. This field is rapidly changing and evolving, and through this MRP, I hope to move beyond the theoretical towards the practical by working to imagine ways that the strategic intersection of Anishininuwug law and conventional environmental assessment models can result in a consent-based approach to natural resource development for the Ring of Fire.

ACKNOWLEDGEMENTS

Throughout the past four years at Osgoode Hall Law School and the Faculty of Environmental Studies, I have been fortunate to cross paths with so many wonderful individuals who have each played a commanding role in shaping my path through the JD/MES program.

I would like to first thank my supervisor Professor Dayna Scott. Without your support and guidance, this research project would not have been possible. Thank you for trusting in me, for constantly challenging my perspectives, and for your mentorship, both academically and professionally, over the past several years. I admire your dedication and critical approach to your work, and I hope I can replicate a fraction of this as I transition out of the JD/MES program into professional practice.

To my advisor, Professor Mark Winfield, thank you for your guidance throughout the JD/MES program. Since day one, you've helped to me to shape and tailor my research, always offering advice and encouragement. I admire your enthusiasm for your work, and your enduring commitment to student success.

I would also like to acknowledge the community of Neskantaga First Nation. It has been a privilege to learn from you during your time spent in Toronto, and I admire your commitment and resilience in working to defend your land. I wish you continued strength on the long road that lies ahead.

I would also like to acknowledge several other individuals who have had an immeasurable impact on this research project. To David Peerla, thank you for all of your advice, suggestions, numerous conversations, and your time spent reviewing drafts of this project. To Professor McGregor, your courses at FES and Osgoode Hall have been transformational in helping me understand my role both as a treaty partner and as a researcher. Thank you for your guidance and patience as I worked to locate myself in this field. To Anna Johnston, I've learned so much from you over the past couple of

years, and I appreciate your continued support and willingness to help me understand the complicated field of environmental assessment.

Additionally, I would like to thank the participants in my research – Ugo Lapointe and Joan Kuyek. Thank you for sharing your wealth of knowledge and experience, and for helping shape the direction of this Major Research Project.

Finally, thank you to the unwavering support of my family, friends and colleagues for their constant support and reassurance over these past four years. In particular, to my partner Trevor, for all of the sacrifices you've made, and the miles driven down the 401 as we both worked to finish our degrees in different cities. Thank you for constantly lifting me up, and letting me know how proud you are.

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LIST OF ABBREVIATIONS

CBLUP	Community Based Land Use Plan
CEAA	*Canadian Environmental Assessment Act*
CEAA, 2012	*Canadian Environmental Assessment Act, 2012*
CEM	Cumulative Effects Management
CNSC	Canadian Nuclear Safety Commission
DTCA	Duty to Consult and Accommodate
EA	Environmental Assessment
EIS	Environmental Impact Statement
ERT	Environmental Review Tribunal
FPIC	Free, Prior and Informed Consent
IA	Impact Assessment
IAA	Impact Assessment Agency
JRP	Joint Review Panel
KI	Kitchenuhmaykoosib Inninuwug First Nation
LNG	Liquefied Natural Gas
MNRF	Ministry of Natural Resources and Forestry (Ontario)
NEB	National Energy Board
NWT	Northwest Territories
OCC	Ontario Chamber of Commerce
SCC	Supreme Court of Canada
SON	Saugeen Ojibway Nation
SSN	Stk'emlúpsemc Te Secwépemc Nation
TOR	Terms of Reference
TWN	Tsleil-Waututh Nation
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

EXECUTIVE SUMMARY

Development of the Ring of Fire region in northern Ontario presents one of the most complex environmental challenges in recent years within the province. Situated in Treaty 9 territory, the Ring of Fire lies within a vastly undisturbed, critically important ecological landscape that has been home to numerous Indigenous communities since time immemorial. Development of the minerals that lie beneath the surface stands to permanently change the face of northern Ontario, and the province has just one chance to ensure that it is done properly.

This report unpacks the history of the Ring of Fire region, situating the development's current status within political, historical, and ecological realities. **Part 1** of this report sets out the scope and purpose of this research project, including the methodology used, and the theoretical framework of legal pluralism that is applied throughout. Legal pluralism recognizes the equal legitimacy and authority of both settler law and Indigenous legal traditions in exercising governance over the land within the Ring of Fire region.

Part 2 of this report provides a high-level overview of the history of development in northern Ontario, and also emphasizes the importance of the land from an ecological and Indigenous perspective. As this section will explore, mineral development in the Ring of Fire has been at a standstill for more than ten years, and numerous years of political negotiations have left countless issues unresolved.

Part 3 of this report begins to explore and delineate the deficiencies of the current settler legislative model governing development of the region, addressing provincial, federal, constitutional and international legal obligations that influence the approach currently being taken.

Part 4 of this report provides a comprehensive overview of competing approaches to land-based decision-making models, namely Indigenous-led approaches to impact assessment. Three unique categories of Indigenous-led impact assessments are explored: 1) those conducted for particular projects; 2) those conducted in partnership with the Crown or a project proponent, and 3) non-project-specific approaches to impact assessment. The strengths and limitations of each case study are explored, as well as

opportunities for these models to intersect with the settler approach to environmental assessment.

Finally, **Part 5** of this report provides a discussion and analysis of considerations for the Neskantaga First Nation when making a decision on how to effectively advocate through the assessment process for the Ring of Fire. General preliminary considerations are canvassed, as well as considerations specific to conducting an independent assessment versus strategically engaging in the settler environmental assessment process.

This report is not intended to be prescriptive, although it is intended to have practical application. By engaging in a comprehensive case study approach exploring numerous approaches to Indigenous-led impact assessment, this report seeks to emphasize successful and effective strategies that may be advanced, taking into account the unique circumstances and challenges at play in the Ring of Fire, so that Neskantaga First Nation can make an informed decision about how best to allocate resources and advocate in relation to the Ring of Fire.

1 INTRODUCTION

1.1 INTRODUCTION

Over the past decade, the future of Ontario's Far North has garnered significant attention from politicians, Indigenous communities, environmentalists, and scientists, among others. Defined within the *Far North Act, 2010*,[1] this globally, nationally, and locally significant region covers 452,000 square kilometres.[2] To put that into perspective, the Far North makes up 42% of the total area of Ontario, amounting to an area approximately as large as France.[3] While this remote region seems far and distant for the majority of the Ontario's population that resides in the southern reaches of the province, the Far North is significant for several reasons.

Situated within the heart of the Far North is a contentious, crescent-shaped region of mineral deposits known as the Ring of Fire. Located approximately 500 kilometres north of Thunder Bay, the deposits discovered to date lie concentrated along a 20-kilometre-long strip.[4] This region has been home to intense mining exploration since 2008, when the first commercial quantities of chromite in North America were discovered in the area.[5] It has been dubbed by some as "Ontario's oil sands" due to the potential value of the minerals, which include chromite, copper, nickel, gold, zinc, titanium, vanadium, platinum, and palladium.[6] The region has been described as a "multi-generational economic opportunity" with the potential to create long-term job growth in the region, with known mineral deposits valued at over $60-billion.[7] Despite these economic benefits, several obvious challenges emerge in determining whether and how to develop this remote region of northern Ontario.

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[1] SO 2010, c 18 [*Far North Act*].
[2] *Ibid,* s 2.
[3] Gord Miller, "Serving the Public: Annual Report 2012/2013" (2013) at 63, online (pdf): *Environmental Commissioner of Ontario* <docs.assets.eco.on.ca/reports/environmental-protection/2012-2013/2012-13-AR.pdf>.
[4] Jed Chong, "Background Paper: Resource Development in Canada: A Case Study on the Ring of Fire" (2014) at 1, online (pdf): *Library of Parliament* <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2014-17-e.pdf>.
[5] *Ibid*.
[6] Miller, *supra* note 3 at 65; Chong, *supra* note 4 at 3.
[7] Chong, *supra* note 4.

First, the Far North "is the current and ancestral homeland for Indigenous peoples of the Nishnawbe Aski Nation," formerly the Grand Council Treaty No. 9.[8] Indigenous peoples have had a relationship with these lands since time immemorial, and have hunted, fished, and trapped in the region for generations according to seasonal and annual patterns and cycles. They "have prior rights to the custody of [the] land, which precede and supercede all of [the Crown's] claims."[9] Their own legal traditions guide their relationship with the land, wildlife, and food systems. Contact with European settlers in northern Ontario occurred between 1500 and 1600 AD, bringing significant social changes and devastation to Indigenous communities through assimilative government policies and actions that took their land, outlawed religious beliefs and practices, destroyed plant and animal life, restricted movement, and prohibited the use of their own language.[10] These actions have been described as cultural genocide.[11]

Treaty No. 9 was signed in 1905, with adhesions signed in 1929-1930.[12] These agreements were viewed by the government as land surrenders, while Indigenous signatories "understood and expected Treaty No. 9 to be a confirmation of the fur trade model of coexistence, a *modest* sharing of the land *and* its benefits."[13] The impacts of colonization continue to be felt today, and communities face significant challenges accessing basic services such as clean drinking water, education and healthcare. However, the Indigenous peoples have a sacred respect for the land, and many people continue to "depend on the environment to meet livelihood needs, including hunting, trapping, fishing and gathering" in ways that are protected as Aboriginal and treaty rights under s.35 of the *Constitution Act, 1982*.[14] Today, approximately 24,000 Ojibway, Cree,

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[8] Cheryl Chetkiewicz & Anastasia M. Lintner, "Getting it Right in Ontario's Far North: The Need for a Regional Strategic Environmental Assessment in the Ring of Fire [*Wawangajing*]" (2014) at 16, online (pdf): *Wildlife Conservation Society Canada* <www.wcscanada.org/Portals/96/Documents/RSEA_Report_WCSCanada_Ecojustice_FINAL.pdf>.
[9] Nishnawbe Aski Nation, "A Declaration of Nishnawbe-Aski (The People of the Land)" (1977), online: <www.nan.on.ca/article/a-declaration-of-nishnawbeaski-431.asp>.
[10] *Ibid*.
[11] *Ibid*.
[12] Government of Canada, *The James Bay Treaty: Treaty No. 9 (made in 1905 and 1906) and adhesions made in 1920 and 1920* (Ottawa: R. Duhamel, Queen's Printer and Controller of Stationery, 1964).
[13] John S Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal: McGill-Queen's University Press, 2010) at 353.
[14] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*]; Chetkiewicz & Lintner, *supra* note 8 at 20.

and Oji-Cree First Nations people live within 34 remote communities in the Far North. Many of these communities are accessible only by air or winter roads, although development in Ontario's Far North stands to impact this accessibility to varying degrees.

Second, the Far North is "an area of international ecological significance and a stronghold for biodiversity."[15] Consisting of two major ecological regions – the Hudson Bay Lowlands and the Boreal Shield[16] - the region supports numerous species of mammals, birds, fish, and plants, "including such at-risk mammals as caribou, wolverine and polar bear."[17] The Far North is home to the largest continuous area of boreal forest free from large-scale human and industrial disturbance in the world.[18] This boreal forest, along with the region's peatlands, constitute the world's single largest storehouse of carbon.[19] As such, the region plays an important role in regulating the global climate, and protection of this key ecological region is necessary for the fight against climate change.[20]

The Ring of Fire poses a complex challenge from an environmental assessment ("EA") perspective.[21] As any potential development stands to change the entire landscape of northern Ontario, with far-reaching ecological, socio-economic and cultural impacts, many have called for a strategic, regional-level EA prior to development of any individual mines.[22] To date, no such commitment has been made by either the Ontario provincial

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[15] Miller, *supra* note 3 at 63-64.
[16] Chetkiewicz & Lintner, *supra* note 8 at 10.
[17] Miller, *supra* note 3 at 64.
[18] *Ibid*.
[19] Chetkiewicz & Lintner, *supra* note 8 at 11.
[20] *Ibid*.
[21] Both within Canada and throughout the world, multiple terms are used to describe "environmental assessment," including "impact assessment," "environmental impact assessment," and "risk assessment." Throughout this report, the terms "environmental assessment" and "impact assessment" are used synonymously, although for intentionally different reasons. "Environmental assessment" is used when describing the current provincial and federal environmental regimes, as well as when referring to any assessment processes that have been commenced or completed under these pieces of legislation. Presently, the term "environmental assessment" is favoured among domestic jurisdictions. The term "impact assessment" is used to refer to and signal the movement towards a broader assessment approach with sustainability at its core, as advanced in Bill C-69 and Canada's proposed new *Impact Assessment Act*. The term "impact assessment" is also used throughout the part of the report discussing Indigenous-led assessment models, as these assessments generally take a broader approach, assessing the impacts of a particular project on a wide range of values important to each individual community, typically going beyond the factors taken into consideration under the current conventional environmental assessment legislation.
[22] See Cole Atlin & Robert Gibson, "Lasting Regional Gains from Non-Renewable Resource Extraction: The Role of Sustainability-Based Cumulative Effects Assessment and Regional Planning for Mining Development in Canada" (2017) 4 Extractive Industries & Soc'y 36; Chetkiewicz & Lintner, *supra* note 8;

government or the federal government. Voluntary project-level EAs led by mining companies have been started and suspended, and currently there are only a couple of individual project-level assessments moving ahead. In May 2018, the Government of Ontario entered into voluntary agreements with two individual First Nation communities to conduct EAs for two single road projects. Webequie First Nation will be the proponent for an assessment of an all-season supply road from their community to the proposed Ring of Fire development area,[23] and Marten Falls First Nation will be the proponent for all-weather multi use community access road leading from the northern end of the Painter Lake forestry road to the community of Marten Falls.[24] Phase 2 of the Marten Falls road would branch off of this initial segment, providing an all-season community access road north of the Albany River to connect the community with the Ring of Fire mineral deposits.[25] Additionally, as the Ring of Fire lies within the Far North of Ontario, community-based land use plans have been developed by Indigenous communities under the *Far North Act*. These land use plans outline which lands are to be protected, and which are open to development, although there is "no mechanism to coordinate the plans coming out of various communities or to plan for regional-scale impacts."[26]

Indigenous peoples in the Far North stand to face tremendous impacts from development of the Ring of Fire. In addressing the Ontario government in 1977 through a document titled "A Declaration of Nishnawbe Aski (The People of the Land)," the Nishnawbe Aski Nation highlighted the importance of the land: "You [the Ontario government] have alienated life and land, by the exploitation of the natural resources. As a result of your greed there is a real possibility that our environment will be destroyed. If it is, we will also be destroyed because we are part of nature."[27] As Ontario only has one

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Robert Gibson, "Turning Mines into Bridges: Gaining Positive Legacies from Non-renewable Resource Projects" (2014) 15 Journal Aboriginal Mgmt 4.

[23] Ministry of Environment, Conservation and Parks, "Webequie Supply Road Project" (2018), online: *Government of Ontario* <www.ontario.ca/page/webequie-supply-road-project> [MECP, "Webequie Supply Road"].

[24] Ministry of Environment, Conservation and Parks, "Marten Falls Community Access Road Project" (2018), online: *Government of Ontario* <www.ontario.ca/page/marten-falls-community-access-road-project> [MECP, "Marten Falls Community Access Road"].

[25] Marten Falls First Nation, "Marten Falls First Nation Environmental Assessment on Community Access Road" (3 December 2018), online: <www.martenfalls.ca/2018/12/03/marten-falls-first-nation-environmental-assessment-on-community-access-road/>.

[26] Chetkiewicz & Lintner, *supra* note 8 at ii.

[27] Nishnawbe Aski Nation, *supra* note 9.

chance to “get it right” in the Far North, it is critically important that Indigenous communities understand and take advantage of the available avenues for advocacy so that they can ensure their concerns are heard and taken into account throughout the EA process for the Ring of Fire, whenever decisions are made to move forward.

1.2 OVERVIEW OF THIS RESEARCH PROJECT

This research report will examine the role that Indigenous communities could fill in the EA process for the Ring of Fire region in Ontario’s Far North. The goal of this report is to outline the various forms of Indigenous-led impact assessments (“IA”) that have emerged across the country in different legal traditions, with a view to preparing the Neskantaga First Nation to take a decision about whether it wishes to conduct its own IA of the Ring of Fire development.

This report will take an in-depth look at the complicated landscape of the Ring of Fire from an EA perspective. After thoroughly examining the history and importance of the Ring of Fire region, this report will outline the legislative framework that currently governs the development, working to expose areas where this legislative regime falls short. Provincial, federal, and constitutional law all have a role to play in governing development in Ontario’s Far North, and international commitments such as the *United Nations Declaration on the Rights of Indigenous Peoples*[28] stipulate standards of conduct that governments must adhere to when engaging in development on Indigenous territories. In response to these shortcomings in settler law, this report will explore alternative approaches to the conventional government-led EA process through a case-study review of the trends, practices, and goals of Indigenous-led IAs. Indigenous-led IAs typically combine conventional EA processes with governance frameworks, legal principles, and ways of knowing specific to the territory. In this way, Indigenous-led reviews are intended to achieve an enhanced ability to highlight local realities, capacities, challenges, priorities, practices, and cultural values, so as to inform community decision-making moving forward.

[28] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st Sess, UN Doc A/RES/61/295 (2007) 1 [UNDRIP].

The final analysis portion of this report will provide strategic advice for the Neskantaga First Nation regarding conducting their own assessment of the Ring of Fire. The focus will be on Indigenous-led IAs on treaty territory, an overview of the work that needs to be done before engaging in an assessment, and the challenges and opportunities that may arise.

1.3 METHODOLOGY

The findings in this research report are based primarily on publicly-available documentary sources gathered using standard legal research methods. In reviewing the relevant legal context and varying approaches to EA, both conventional and Indigenous-led, much reliance was placed on a review of scholarly publications. Additionally, grey literature on Indigenous-led IA was consulted to gather information about trends and principles underlying the methodologies used by different communities.

Information throughout the report was supplemented with selected interviews with individuals working with organizations whose work overlaps with areas of focus within this research report. The analytical methods used in this report were informed by discussions with Neskantaga community members and advisors. Ethics approval was granted from the Human Participants Review Sub-Committee at York University for research involving human participants, and is attached to this report as **Appendix 1**.

1.4 THEORETICAL FRAMEWORK: LEGAL PLURALISM

A core thread that weaves through and guides the entirety of this report is the theoretical framework of legal pluralism. Legal pluralism as it exists within the Canadian context is aptly explained by Professor John Borrows in his book titled "Canada's Indigenous Constitution." Borrows defines the concept as "the simultaneous existence within a single legal order of different rules [or *legal traditions*] applying to identical situations."[29] Borrows defines "legal traditions" as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the ways

[29] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 8.

law is or should be made, applied, studied, perfected, and taught."[30] In Canada, the common law, the civil law, and Indigenous legal traditions overlap to play a role in dispute resolution and form the basis for Canada's legal order. While the common law and civil law may make up the dominant legal order within Canada, what I refer to as "settler law," Professor Borrows stresses that "the validity of each legal tradition does not rest solely on its historic acceptance or how it is received by other traditions."[31] Each legal tradition "has its own distinctive methods for development and application."[32]

Since the recognition and affirmation of Aboriginal and treaty rights in s.35 of the *Constitution Act, 1982*, "new political and legal space has been opened up for the recognition and exercise of Indigenous governance" particularly in the area of environmental management.[33] The Supreme Court of Canada ("SCC") has recognized the existence and exercise of Indigenous laws in cases including *R v Van der Peet*[34], *Tsilhqot'in Nation v British Columbia*[35], and *Delgamuukw v British Columbia*[36]*.* Lawyer Jessica Clogg of West Coast Environmental Law argues that "ensuring that Indigenous law takes its rightful place in environmental decision-making has the transformative potential to achieve more sustainable outcomes for all."[37] There is a dynamic and growing wave driving the revitalization of Indigenous laws within communities across the country, and these legal traditions are being articulated in ways that increasingly intersect with settler law in Canada as competing frameworks for responding to contemporary environmental problems.[38] EA is just one among many areas of the law where this legal pluralism is notably evident. In the Canadian context, project proposals for resource development projects are always situated within the traditional territories of Indigenous peoples. While the Canadian government has a comprehensive set of processes outlined

[30] *Ibid* at 7.
[31] *Ibid* at 8.
[32] *Ibid* at 8.
[33] Jessica Clogg et al, "Indigenous Legal Traditions and the Future of Environmental Governance in Canada" (2016) 29 J Envtl L & Prac 227.
[34] [1996] 2 SCR 507, 137 DLR (4th) 289.
[35] 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in Nation*]
[36] [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*].
[37] Jessica Clogg, "Reflections on Indigenous Jurisdiction and Impact Assessment" (17 August 2017), online (blog): *West Coast Environmental Law* <www.wcel.org/blog/reflections-indigenous-jurisdiction-and-impact-assessment>.
[38] Clogg et al, *supra* note 33.

in settler law regarding the procedures to be followed when assessing the environmental impacts of proposed projects, this process represents only one of a multitude of legal traditions that may be applicable to the governance of the land. Indigenous communities have their own equally valid legal traditions governing their decision-making in relation to the land.

Scholars of Indigenous law including Professors Val Napoleon and Hadley Friedland have called for scholarship that goes beyond the recognition and assertion of Indigenous laws in order to "build on the current momentum to revitalize and fully realize the potential application of Indigenous law in the world today."[39] This scholarship needs to translate "from the theoretical and the philosophical to the practical and the concrete – and then back again"[40] and should "support the practical application of specific Indigenous legal principles to the real issues that Indigenous peoples grapple with today, while recognizing how these principles form one part of a larger, coherent whole."[41]

While I am not in a position to draw out and apply specific principles of Anishininuwug law to the EA process for the Ring of Fire, I hope that this report may build on this call from Napoleon and Friedland by addressing some of the practical challenges of applying Indigenous legal traditions within the realm of EA by highlighting some of the issues and opportunities that communities may face in deciding how best to assert their rights within their traditional territories. Napoleon and Friedland rightly state that

> If Indigenous people cannot use Indigenous law, that is, if people cannot reason with it and apply it to the messy and mundane, then it will continue to be talked about only in an idealized way or as a rhetorical critique of Canadian law – arguably a backhanded twist of colonization that would render Indigenous law useless. As long as Indigenous laws are not accessible or usable, in a crunch, by default, both Indigenous and non-Indigenous people in Canada will turn to state law to resolve disputes. This inaccessibility perpetuates the colonial process of undermining and obscuring Indigenous legal traditions.[42]

By working to identify spaces where Indigenous legal traditions may integrate with and operate independently alongside the settler EA regime, I hope that this report may reveal

[39] Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:1 McGill LJ 725 at 733.
[40] *Ibid*.
[41] *Ibid*.
[42] *Ibid* at 741.

new possibilities for approaching EAs from a legal pluralist perspective. In addition to providing analysis that could lead to a competing Indigenous-led IA of the Ring of Fire, the report aims also to demonstrate how the incorporation of various Indigenous legal principles could improve, and render more rigorous, conventional EA processes as envisioned according to settler law.

2 OVERVIEW OF THE RING OF FIRE REGION

While the Ring of Fire has garnered much recent political attention, challenges with developing the region and opening it up to mining activities are not new. Conversations over how to access the minerals in the Ring of Fire have been ongoing for the past decade, and in 2019 it remains that there is no road or rail access to the region, let alone any operating mines. However, the recent change of government in Ontario from the Liberal government of Kathleen Wynne to the Conservative government of Doug Ford has already sparked new debates and discussions over accessing the valuable minerals of the Far North. The Ring of Fire has been identified as a priority for the new government, and Premier Ford has declared that he would "hop on [a] bulldozer [him]self" in order to build the roads necessary to access the mining region.[43] Although statements like this should be taken as hyperbole, this type of discourse reveals the ignorance of the Far North held by those unfamiliar with the region, and a lack of knowledge of the impacts that development could have on the region. For example, those who reside in the Far North have pointed out that Premier Ford will have little success with bulldozing through the Far North, as the landscape is comprised of muskeg, and a bulldozer would quickly sink.[44]

In order to understand the nuances and complexities impacting the governance and development of the Ring of Fire in Ontario's Far North and the Ring of Fire, it is essential to establish a timeline of the major events leading to the current state of affairs, including the major players involved, political goals, and legal developments. This timeline will shed light on why the Ring of Fire remains an inaccessible and undeveloped mass of minerals. In combination, it is also essential to understand the unique geographic and environmental features of the region which underscore the sensitivities associated with mining in the Far North and the challenges these features pose in terms of completing an EA. Finally, it is necessary to outline the importance of maintaining the social, cultural and

[43] Maija Kappler, "Doug Ford tells supporters he can 'take back' Ontario from Liberals", *The Globe and Mail* (19 March 2018), online: <www.theglobeandmail.com/canada/article-doug-ford-tells-supporters-he-can-take-back-ontario-from-liberals/>.
[44] Josh Dehaas, "How Ontario can get the Ring of Fire back on track," *TVO* (4 October 2018), online: <www.tvo.org/article/how-ontario-can-get-the-ring-of-fire-back-on-track>.

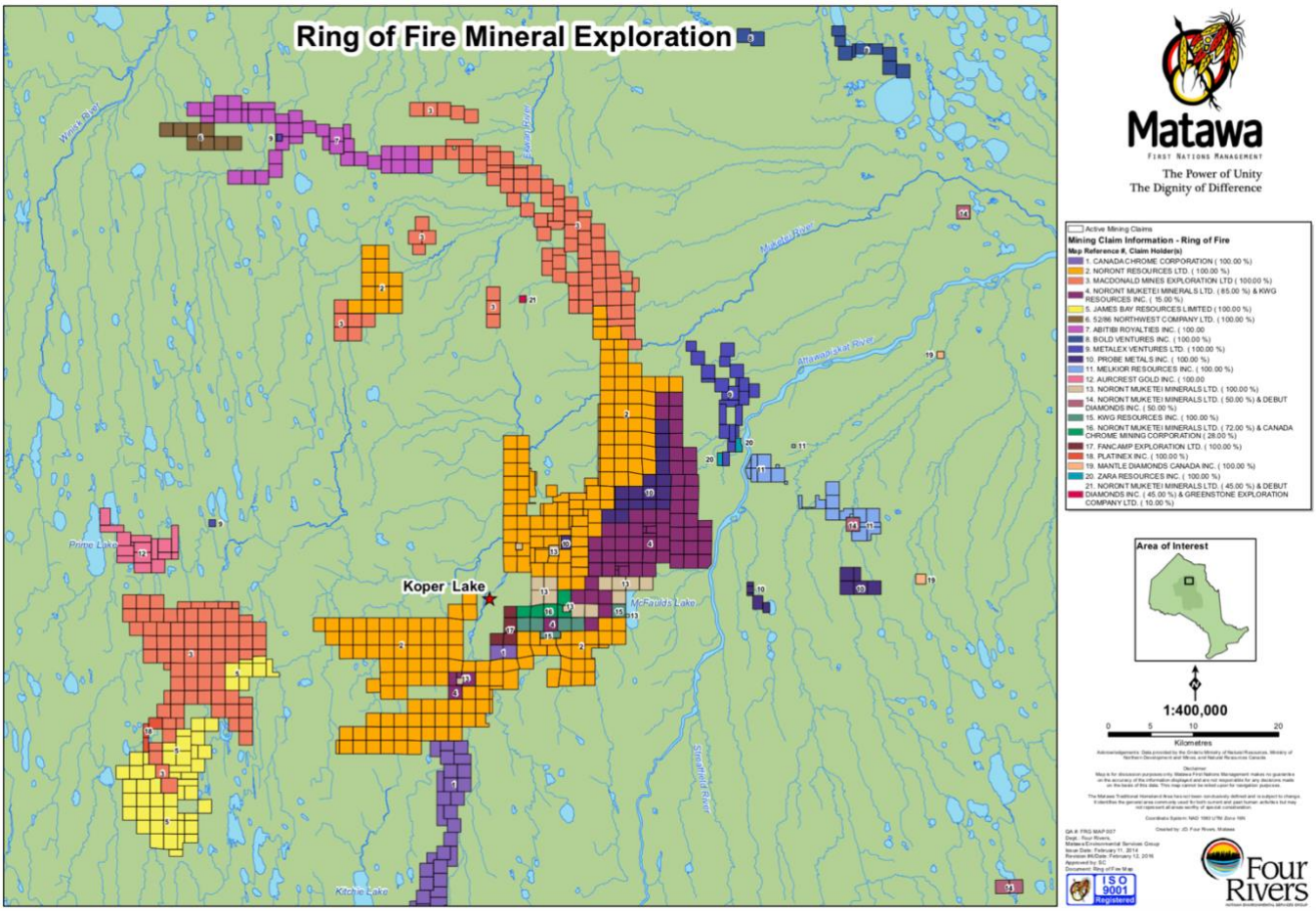
ecological integrity of the region to the Indigenous communities who live there, bringing to the forefront what this development places at stake.

2.1 HISTORY OF DEVELOPMENT IN THE RING OF FIRE

Minerals were first discovered in the region known as the Ring of Fire in Ontario's remote Far North in 2002, when miners in search of additional veins of diamonds from the De Beers Victor diamond mine discovered a rich source of nickel, copper, platinum and palladium.[45] However, the name didn't catch on until 2007, when Richard Nemis, the head of junior mining company Noront Resources, discovered a large deposit of minerals and named his exploration camp the "Ring of Fire" after the hit Johnny Cash song.[46] Since 2007, over 30,000 mining claims have been staked in the region.[47] The arc-shaped Ring of Fire covers an area of approximately 5,120 square kilometers, with the majority of minerals concentrated along a 20-kilometer-long strip as depicted in **Figure 1**, below.[48]

Figure 1: Map Depicting the Ring of Fire Mineral Deposits and Mining Claims[49]

[45] Peter Gorrie, "The Ring of Fire," *Ontario Nature* (31 August 2010), online: <onnaturemagazine.com/the-ring-of-fire.html>.
[46] *Ibid*.
[47] The Canadian Press, "Ring of Fire Blockades Lifted," *CBC News* (21 March 2010), online: <www.cbc.ca/news/canada/toronto/ring-of-fire-blockades-lifted-1.931898>.
[48] Josh Hjartarson et al, "Beneath the Surface: Uncovering the Economic Potential of Ontario's Ring of Fire" (2014) at 1, online (pdf): *Ontario Chamber of Commerce* <occ.ca/wp-content/uploads/Beneath_the_Surface_web-1.pdf>.
[49] Four Rivers, "Ring of Fire Mineral Exploration" (2016), online (pdf): <www.fourriversmatawa.ca/wp-content/uploads/2016/03/MAP007_2016_02_12_ROF_11x17_rev6.pdf>.



The "minerals lie close to the earth's surface, having been pushed upward as a result of millions of years of heat and pressure."[50] With the exception of the De Beers open-pit Victor diamond mine midway up the James Bay coast, Ontario's Far North has been closed to industry. "No part of the boreal forest is less touched by human activity" than the Far North – a "soggy land of black spruce, jack pine and white birch, with peat bogs along the James and Hudson Bay coasts."[51] This lack of development is due primarily to ecosystem sensitivity, and remoteness and lack of infrastructure.[52]

Despite these challenges, many are counting on the Ring of Fire to be the main driver of Ontario's economy over the next decade. The Ontario Chamber of Commerce OCC ("OCC") has described the Ring of Fire as "one of the province's greatest economic development opportunities in a generation" and "an unparalleled opportunity for the

[50] Gorrie, *supra* note 45.
[51] *Ibid*.
[52] Chong, *supra* note 4 at 5.

province to diversity its economy and solidify its place as a global leader in mining and mining technology."[53] In November 2013, Ontario's Minister of Northern Development and Mines indicated that the Ring of Fire had known mineral potential worth $60-billion.[54] A 2014 report from the OCC titled "Beneath the Surface: Uncovering the Economic Potential of Ontario's Ring of Fire" estimated that in the first 10 years of operation, the Ring of Fire will generate up to $9.4-billion in GDP, and over $25-billion over the first 32 years.[55]

The rush to develop the Ring of Fire really began in 2008 when North America's first commercially valuable source of chromite, a component of stainless steel, was found in high concentrations.[56] The discovery of these valuable minerals in the Far North prompted legislative action from the government of Ontario, as they worked to respond to a host of concerns that threatened development in the region.[57] In the summer of 2009, Dalton McGuinty's Liberal government introduced the *Far North Act* as well as amendments to Ontario's *Mining Act*.[58] While the impacts and issues raised by these new pieces of legislation will be explored later in this report, it is important to note at this juncture that the core purpose of these legislative moves was to ready the Far North for extraction, primarily by giving the government unilateral power to approve or reject community-based land use plans based on the "economic interest of all Ontarians".[59]

The two projects that have garnered the most attention in the Ring of Fire are the "Eagle's Nest" polymetal mine, and the "Black Thor" chromite mine, the claims for which are both owned by Noront Resources Canada. As part of the "Eagle's Nest" project,

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[53] Hjartarson et al, *supra* note 48 at i-1.
[54] Government of Ontario, "Protecting the Far North: McGuinty Government Provides New Leadership Role for First Nations" (2 June 2009), online: <news.ontario.ca/mndmf/en/2013/11/ministers-statement-on-ring-of-fire.html>.
[55] Hjartarson et al, *supra* note 48 at 8.
[56] Gorrie, *supra* note 45.
[57] Professor Dayna N Scott suggests that a confluence of developments led to Ontario's move to introduce new legislation: Ontario had moved from a "have" to a "have not" province; the Ring of Fire deposits had recently been discovered and quantified; environmentalists were pressuring the province to take steps to conserve the Boreal Forest leading up to the Copenhagen climate change conference; conflict with First Nations opposed to permitting under the *Mining Act* and the "free entry" system for exploration on their territories was escalating; Ontario Court of Appeal judgments resulting from those disputes mentioned the fact that the Crown's constitutional duty to consult with Aboriginal peoples was not fulfilled by this permitting system; and finally, the Environmental Commissioner was pressuring the Ontario government to establish a comprehensive land-use planning process for the Far North. A summary of some of the litigation related to mining conflict in Ontario's Far North has been attached as **Appendix 2.**
[58] RSO 1990, c M.14 [*Mining Act*].
[59] *Far North Act*, *supra* note 1, s 12(4).

Noront proposed the "construction, operation, decommissioning and abandonment of an underground nickel-copper-platinum multi-metal mine, an on-site metal mill, and a facility for the extraction of 358,000 cubic metres per annum of groundwater […] The proposed mine […] would have an ore production capacity of approximately 2,960 tonnes per day, with an anticipated life of approximately 11 years."[60] While individual mining projects do not require an individual EA in Ontario, Noront entered into a voluntary written agreement to subject the "Eagle's Nest" project to the provincial *Environmental Assessment Act*.[61] The project did, however, require a comprehensive study under the federal *Canadian Environmental Assessment Act*[62] due to potential harmful alteration, disruption or destruction of fish habitat, and interference with navigable waters.[63] As a result, a coordinated EA between the two levels of government was initiated for the "Eagle's Nest" project. The harmonized EA process was initiated in April 2011, but has since been suspended as of June 2015, pending resolution of issues around transportation, resource access, and Indigenous rights claims. Further details on the EA process are provided in the "Legislative Context" part of this report.

The Black Thor deposit was discovered in 2008 by Freewest Resources Canada Inc., and is the largest chromite deposit in the Ring of Fire. Cliffs Natural Resources Inc. acquired Freewest's interests in the Black Thor deposit in 2009 for $550-million,[64] and also opted to enter into a voluntary agreement with Ontario to subject the deposit to the provincial EA regime. Cliff's proposed to "develop and operate the Black Thor chromite deposit […] This undertaking [would] involve the establishment, construction and operation of an open pit/underground chromite mine and ore processing facility, including

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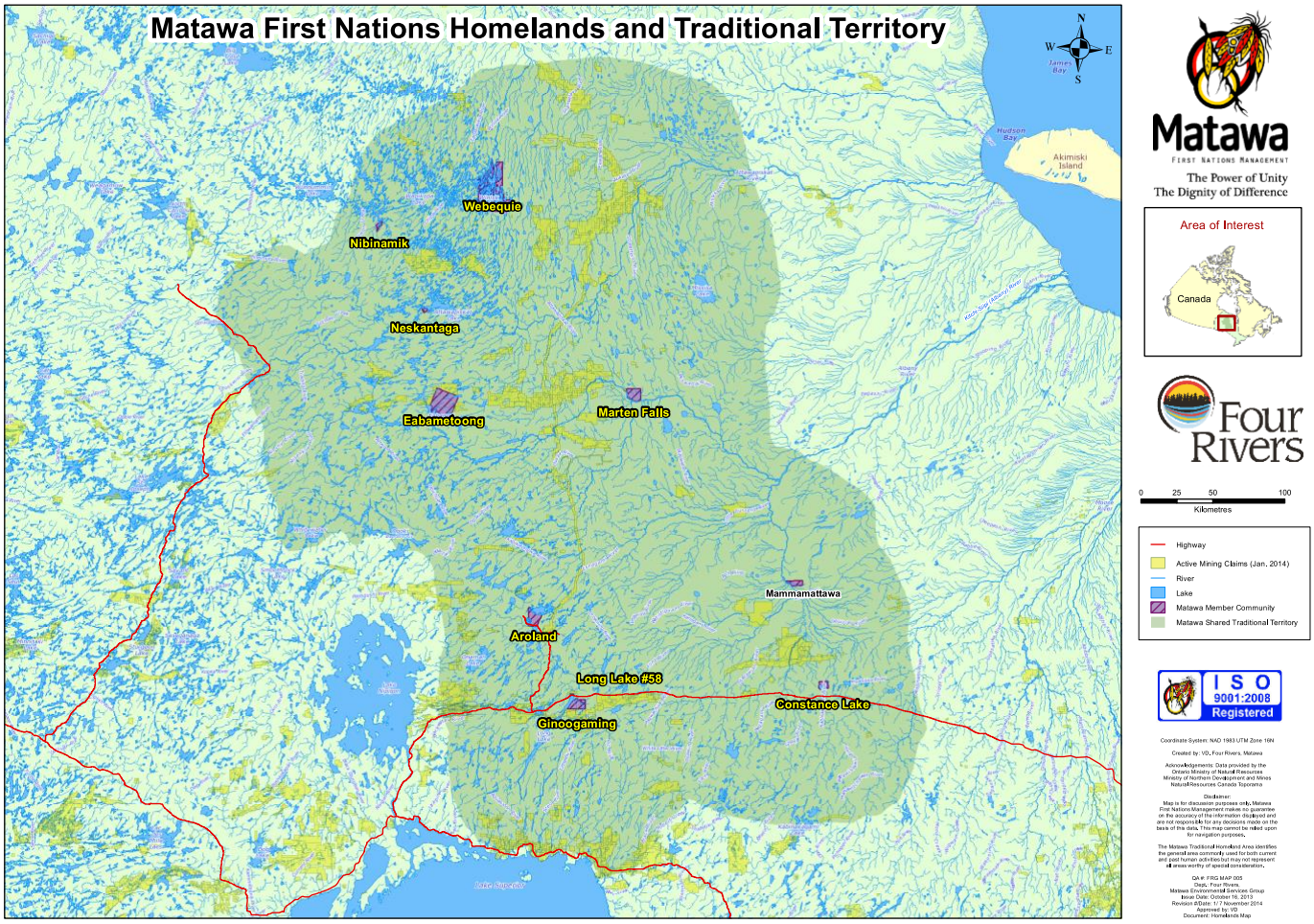
[60] Government of Canada, "Eagle's Nest Project" (2018), online: *Canadian Environmental Assessment Agency* <www.ceaa-acee.gc.ca/050/evaluations/proj/63925?culture=en-CA>.
[61] Government of Ontario, "Noront Eagle's Nest Multi-metal Mine" (2018), online: <www.ontario.ca/page/noront-eagles-nest-multi-metal-mine> [Government of Ontario, "Noront Eagle's Nest Multi-metal Mine"]; RSO 1990, c E.18.
[62] SC 1992, c 37 [*CEAA*].
[63] Knight Piésold Consulting, "Noront Eagle's Nest Project: A Federal/Provincial Environmental Impact Statement/Environmental Assessment Report – Draft Copy" (2013) at ES-4, online (pdf): *Noront Resources* <norontresources.com/wp-content/uploads/2014/10/pdf/Eagles%20Nest%20Project%20Draft%20EIS%20EA/Volume%201%20-%20Executive%20Summary.pdf>.
[64] Business Wire, "Cliffs Natural Resources Inc announces definitive agreement to acquire chromite deposits from Freewest Resources Canada, Inc," (23 November 2009), online: <www.businesswire.com/news/home/20091123005521/en/Cliffs-Natural-Resources-Announces-Definitive-Agreement-Acquire>.

associated transportation and electricity infrastructure, waste management and any ancillary activities."[65] However, in 2013, Cliff's announced that they were halting work on the project citing delays with government EAs, land surface rights issues, conflict with local Indigenous communities, and negotiations with the province,[66] and in 2015, Cliffs sold the Black Thor project along with the rest of its assets in the Ring of Fire to Noront at a loss for a mere $20-million, with strong objection from the Matawa Nations.[67] Noront has not moved forward with any development plans for the Black Thor project since acquiring it.

A major "roadblock" for the project proponents in developing these projects as planned is the fact that the mineral deposits lie in Treaty 9 territory, within the traditional territories of the nine Matawa First Nations, as depicted in **Figure 2**, below.[68]

[65] Government of Ontario, "Voluntary agreement for the Cliffs Chromite Project Environmental Assessment" (2016), online: <www.ontario.ca/page/voluntary-agreement-cliffs-chromite-project-environmental-assessment>.
[66] CBC News, "Cliffs stops work on chromite project in Ring of Fire," *CBC News* (12 June 2013), online: <www.cbc.ca/news/canada/sudbury/cliffs-stops-work-on-chromite-project-in-ring-of-fire-1.1319912>.
[67] Rachelle Younglia & Bertrand Marotte, "Cliffs Natural Resources completes costly exit from Ontario's Ring of Fire," *The Globe and Mail* (23 March 2015), online: <www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/cliffs-to-exit-ontarios-ring-of-fire-with-sale-of-chromite-assets/article23576822/>; Chiefs Council, Media Release, "Matawa Chiefs Oppose Noront's Purchase of Cliffs Assets and Lack of Engagement on Environmental Assessment" (25 March 2015), online (pdf): *Matawa First Nations Management* <www.matawa.on.ca/wp-content/uploads/2015/04/MEDIA-RELEASE-MATAWA-CHIEFS-OPPOSE-NORONTS-PURCHASE-OF-CLIFFS-ASSETS-AND-LACK-OF-ENGAGEMENT-ON-ENVIRONMENTAL-ASSESSMENT_13-25-15.pdf>.
[68] The nine Matawa First Nations include: Aroland, Eabametoong, Ginoogaming, Long Lake #58, Marten Falls, Neskantaga, Nibinamik, and Webequie.

Figure 2: Map Depicting the Matawa Nation's Homelands and Traditional Territory[69]



Constitutional principles such as the duty to consult and accommodate ("DTCA"), to be discussed subsequently in this report, and the recognition and the affirmation of Aboriginal and treaty rights under s.35 of the *Constitution Act, 1982* preclude mining companies from developing projects in the Ring of Fire without first consulting the Indigenous communities that live in the region whose treaty rights stand to be impacted by the development. In July 2011, the nine Matawa Nations signed a "Unity Declaration" which stated that "the nine First Nations take the position that our traditional territories are under our control, and approval to operate in our respective territories cannot be given by

[69] Matawa First Nations Management, "Matawa First Nations Homelands and Traditional Territory" (2014), online (pdf): <community.matawa.on.ca/wp-content/uploads/2013/12/FRGMAP005_b_2014_02_07_Matawa_First_Nations_Homelands_11x17.pdf>.

the Government or any other entities."[70] The Unity Declaration was a strong assertion of Aboriginal and Treaty rights to the land, water, and resources, and stipulated that written consent of the Matawa Nations was required before any development could proceed.[71]

As political pressure to develop the Far North continued with the introduction of the *Far North Act* and amendments to the *Mining Act*, the Matawa First Nations Tribal Council appointed formed NDP Premier of Ontario Bob Rae in June 2013 as the chief negotiator to represent them in talks with the Ontario government about the opening of their land to the Ring of Fire development. In this role, Rae hoped to achieve:

- real improvements in infrastructure (roads, hydro, broadband) for the whole region;
- an agreed effort to increase investment in health care, education, and training;
- a new economic relationship with the province, the federal government and the companies doing business in the region; and,
- assurances that any environmental process will involve community meetings and genuine ways of ensuring compliance with essential standards.[72]

The Matawa Nations developed a "Community Driven Regional Strategy" under which they aimed to negotiate an EA process with Ontario that would "include meaningful First Nation participation, consultation, decision making and would consider the accumulated impacts of more than one development."[73] Under this Regional Strategy, the Matawa Nations hoped to address three core pillars – land management, revenue sharing, and capacity building – in three stages. First, a Framework Agreement which would "contain all the topics to be discussed at the Negotiation Table and include a set of guiding

[70] Matawa Nation Chiefs Council, "Mamow-Wecheekapawetahteewiin: Unity Declaration" (13 July 2011), online (pdf): *Matawa First Nations Management* <www.matawa.on.ca/wp-content/uploads/2013/12/Mamow-Wecheekapawetahteewiin-Unity-Declaration-Signed-July-13-2011.pdf>.
[71] *Ibid*.
[72] Gloria Galloway, "Bob Rae jumps into Ring of Fire," *The Globe and Mail* (24 June 2013), online: <www.theglobeandmail.com/news/politics/bob-rae-jumps-into-ring-of-fire/article12768375/>.
[73] Matawa First Nations, "Community Driven Regional Strategy" (2013) at 2, online (pdf): *Matawa First Nations Management* <www.matawa.on.ca/wp-content/uploads/2013/12/Regional-Strategy-Brochuresmallpdf.com_.pdf>; The Matawa First Nations Chiefs had been pursuing litigation regarding the comprehensive EA process for the Eagle's Nest project, but dropped the litigation in favour of the regional negotiations that commenced. See: CBC News, "Matawa First Nations chiefs drop Ring of Fire legal challenge," *CBC News* (11 September 2013), online: <www.cbc.ca/news/canada/thunder-bay/matawa-first-nations-chiefs-drop-ring-of-fire-legal-challenge-1.1705871>.

principles, a funding regime, and goals and objectives"; second, the Negotiation Stage which would "work out the details of the topics from the Framework Agreement"; and, third, the Implementation Stage, where "the ratified agreements from the negotiations would be implemented by First Nations."[74] For these negotiations with the Matawa Nations, the province of Ontario appointed formed Supreme Court of Canada Justice Frank Iacobucci as their lead negotiator in July 2013. He was mandated to address several issues including environmental protection, regional infrastructure, resource revenue sharing, and social and economic supports.[75]

The parties signed the "Regional Framework Agreement" ("Framework Agreement") in March 2014 which set out a number of principles and objectives for participation in a "community-based process of negotiation related to mineral and other related developments" in the Ring of Fire.[76] These included the recognition of a government-to-government relationship between the parties, respect for existing legal and constitutional rights of all parties, and mutual respect, understanding, and participation.[77] The purpose of this Framework Agreement was to establish a basis for the negotiation of one or more agreements related to the three pillars identified in the Matawa Nation's "Community Driven Regional Strategy" – land management, revenue sharing, and capacity building. Importantly, the Framework Agreement recognized that mineral developments in the Ring of Fire "may have differential potential impacts on individual First Nation communities" requiring an "equitable approach that is proportionate to the degree of potential impact on a particular First Nation."[78] It and also recognized existing Memorandums of Understanding that had already been signed with two individual First Nations – Marten Falls and Webequie, both of whom are now proponents for individual project-level EAs of roads leading to the Ring of Fire.[79]

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[74] *Ibid* at 3.
[75] Government of Ontario, "Ontario Appoints Lead Negotiator for Ring of Fire" (2 July 2013), online: <news.ontario.ca/opo/en/2013/07/ontario-appoints-lead-negotiator-for-ring-of-fire-1.html>.
[76] Matawa First Nations & Her Majesty the Queen in Right of Ontario, "The Regional Framework Agreement," (26 March 2014) at 1, online (pdf): *Ontario Ministry of Energy, Northern Development and Mines* <www.mndm.gov.on.ca/sites/default/files/rof_regional_framework_agreement_2014.pdf>.
[77] *Ibid* at 3-4.
[78] *Ibid* at 1-2.
[79] *Ibid* at 2.

The Regional Framework Negotiation Process was not without its challenges, and a number of Matawa Nation chiefs spoke out against Ontario's negotiating stance, which they claimed was inconsistent with the Framework Agreement. One criticism was of Ontario's creation of a new Ring of Fire Infrastructure Development Corporation in August 2014, which included no First Nation representation on its interim board. The body was created to "bring First Nations and the public and private sectors together to create partnerships and facilitate investment decisions in strategic transportation infrastructure."[80] This included providing advice on how to best utilize the $1-billion-dollar commitment to Ring of Fire infrastructure pledged by the Ontario government to develop an all-season transportation corridor to the Ring of Fire in its April 2014 budget.[81] A second issue was that the province of Ontario was continuing to issue mining permits during the negotiations. In response, the Matawa Chiefs passed Resolution #01 in September 2014, which established a moratorium on permits.[82]

Debates over a transportation corridor continued to plague the Ring of Fire development throughout the Regional Framework Negotiation Process, as the provincial government made clear its intention to invest in this necessary infrastructure. Transportation proposals included one from the Mushkegowuk Council to develop a 410-kilometer railway to the James Bay coast creating an energy and infrastructure corridor,[83] a joint federal-provincial proposal for a transportation corridor that would connect the Ring of Fire to four remote First Nations (Webequie, Eabametoong, Neskantaga, and Nibinamik) to Pickle Lake, Ontario for which $785,000 was pledged to study (the "east-west" route),[84] and a 340-kilometre long north-south rail line connecting the Ring of Fire

[80] Government of Ontario, "Ontario Establishes Ring of Fire Infrastructure Development Corporation" (28 August 2014), online: <news.ontario.ca/mndmf/en/2014/08/ontario-establishes-rof-infrastructure-development-corporation.html>.
[81] *Ibid*; Maria Babbage, "Ontario pledges $1-billion for Ring of Fire," *The Globe and Mail* (28 April 2014), online: <www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/ontario-pledges-1-billion-for-ring-of-fire/article18316210/>.
[82] Northern Ontario Business Staff, "First Nation leaders call for halt on Ring of Fire Permits," *Northern Ontario Business* (23 September 2014), online: <www.northernontariobusiness.com/industry-news/aboriginal-businesses/first-nation-leaders-call-for-halt-on-ring-of-fire-permits-370729>.
[83] Ian Ross, "Mushkegowuk Ring of Fire plan attracts railroader interest," *Northern Ontario Business* (3 February 2015), online: <www.northernontariobusiness.com/industry-news/transportation/mushkegowuk-ring-of-fire-plan-attracts-railroader-interest-370995>.
[84] Government of Canada, "Harper and Wynne Governments Invest in First Nations and Economic Development in Ring of Fire Region" (1 March 2015), online:

to an existing CN Rail line near Nakina, Ontario, proposed by a team of Chinese engineers.[85] In August 2017, after years of negotiations and delays, the government of Ontario announced that it planned to move ahead with an all-season east-west access road to the Ring of Fire in partnership with the Webequie and Nibinamik First Nations, as well as an all-season north-south access road in partnership with Marten Falls First Nation, representing dissolution of the "Unity Declaration" signed by all nine Matawa Nations in 2011.[86] This announcement shocked sidelined communities, who claimed that Premier Kathleen Wynne's "'divisive approach' in negotiating agreements with individual communities of the Matawa Tribal Council [is] a strategy to run roads into the region without their approval" and runs contrary to the Framework Agreement.[87] These side deals with individual First Nations represent a shift from the government-to-government approach envisioned by the Framework Agreement to a "divide and conquer" approach which was used due to a failure to force through a wider agreement with all impacted communities. As of May 2018, EAs are underway with Marten Falls and Webequie for the construction of two portions of road leading from the respective communities to the Ring of Fire.[88]

The new Conservative government in Ontario has opted not to renew funding for the Framework Agreement negotiations, and the appointment of Frank Iacobucci was not renewed.[89] The future of the collective negotiation process now remains uncertain – Bob Rae suggests that the provincial government would likely abandon the main negotiating

<www.canada.ca/en/news/archive/2015/03/harper-wynne-governments-invest-first-nations-economic-development-ring-fire-region.html>.

[85] Bill Curry, "Chinese engineers endorse plans for $2-billion rail line to Ring of Fire," *The Globe and Mail* (19 April 2016), online: <www.theglobeandmail.com/news/politics/chinese-engineers-endorse-plans-for-2-billion-rail-line-to-ring-of-fire/article29684695/>.

[86] Government of Ontario, "Ontario and First Nations Moving Ahead with Road to Ring of Fire" (21 August 2017), online: <news.ontario.ca/opo/en/2017/8/lontario-et-les-premieres-nations-progressent-dans-le-projet-de-construction-dune-route-pour-le-cerc.html>.

[87] Northern Ontario Business Staff, "Sidelined First Nations vow to half Ring of Fire road construction plans," *Northern Ontario Business* (24 August 2017), online: <www.northernontariobusiness.com/regional-news/far-north-ring-of-fire/sidelined-first-nations-vow-to-halt-ring-of-fire-road-construction-plans-702797>.

[88] MECP, "Marten Falls Community Access Road," *supra* note 24; MECP, "Webequie Supply Road," *supra* note 23.

[89] Matt Prokopchuk, "Provincial money ends for Ring of Fire talks as Matawa chiefs await response, negotiator says," *CBC News* (9 November 2018), online: <www.cbc.ca/news/canada/thunder-bay/bob-rae-ring-of-fire-progress-1.4897152>.

table created by the Framework Agreement and will likely favour striking deals with individual member First Nations.[90]

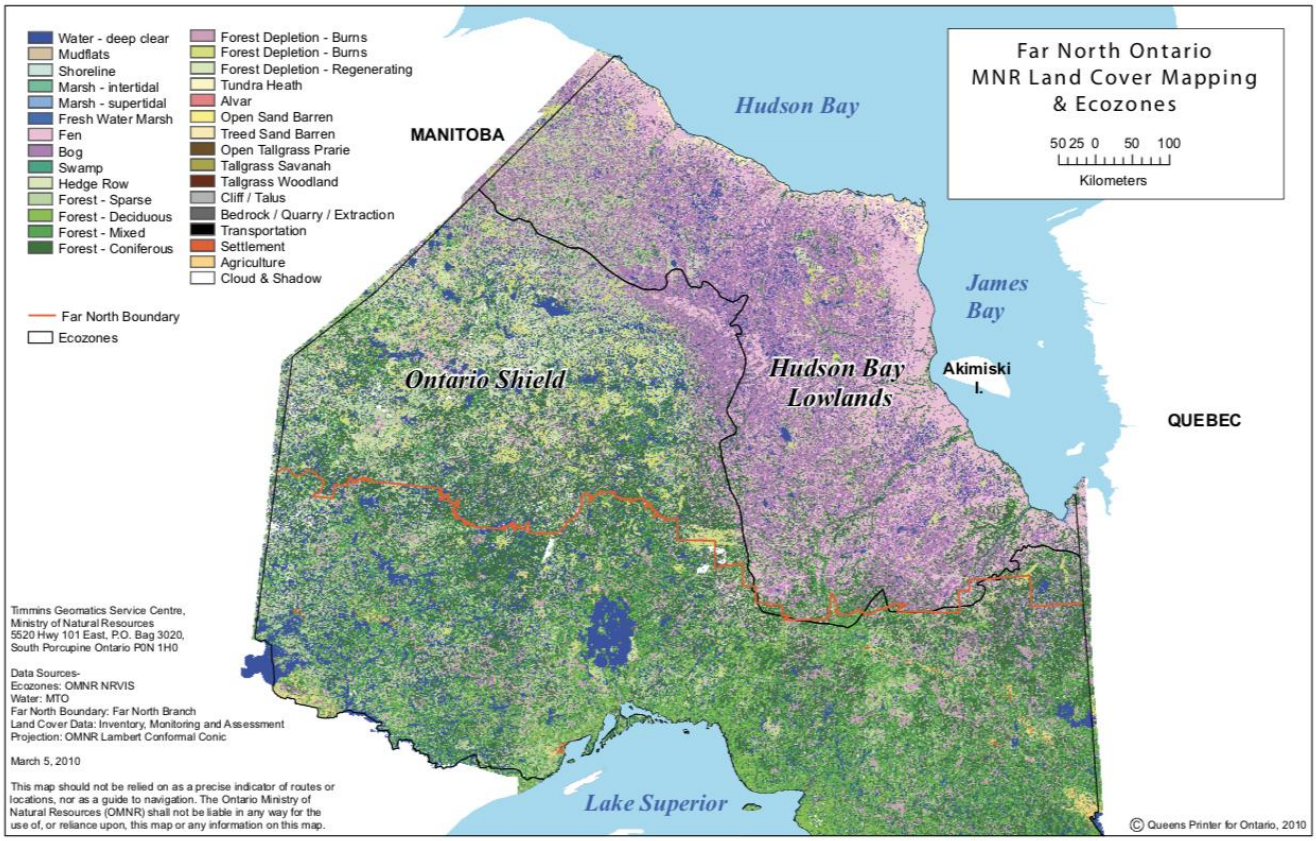
2.2 ECOLOGICAL IMPORTANCE OF ONTARIO'S FAR NORTH

This divisive approach to developing the Ring of Fire also calls into question how these individual, project-level assessments for small segments of road can possibly allow for proper assessment of the impacts that development may have on Ontario's ecologically sensitive and important Far North. As "one of the world's largest, most intact ecological systems, reflecting a high level of ecological integrity and providing ecosystem services far beyond its borders," the Far North has been the home of Indigenous peoples who have been sustaining themselves off of the land for generations.[91] Landscapes like the Far North are rare – most of the region's lakes and rivers are free from the impacts of human activity, the region is a stronghold for biodiversity, and the area contains "the largest single extant block of boreal forest free from large-scale anthropogenic disturbance anywhere in the world."[92] As the natural ecosystems in the Far North have been relatively undiminished by habitat loss and fragmentation, the region has provided stable ecological services over millennia.[93]

Roughly half of the region's land area is made up of the Boreal Shield, and the other half, Hudson Bay Lowland, as displayed in **Figure 3**, below.[94]

Figure 3: Map Depicting the Far North Land Cover and Ecozones[95]

[90] Jorge Barrera, "Ontario playing favourites with First Nations on Ring of Fire, says chiefs," *CBC News* (23 November 2018), online: <www.cbc.ca/news/indigenous/ontario-ring-of-fire-mining-matawa-first-nations-1.4917040>.
[91] The Far North Science Advisory Panel, "Science for a Changing North: The Report of the Far North Science Advisory Panel" (2010) at x, online (pdf): *Legislative Assembly of Ontario* <www.ontla.on.ca/library/repository/mon/24006/302262.pdf> [The Far North Science Advisory Panel, "Science for a Changing North"].
[92] *Ibid* at xi.
[93] *Ibid* at 8.
[94] *Ibid* at 8.
[95] *Ibid* at v.



Almost a tenth of the surface area of the Far North is covered by fresh water lakes and rivers, including three of Canada's largest rivers – the Albany, the Moose, and the Severn, and three other major rivers – the Winisk, the Attawapiskat, and the Ekwan. This water links the Far North's ecosystems and communities to each other and works to moderate temperature and climate in the region.[96] The Hudson Bay Lowland is the world's third largest wetland. Water moves very slowly from the lowlands and peatlands into the many rivers and lakes of the Far North, which ensures that these lowlands remain "sinks" of the carbon and heavy metals, like mercury, that are stored in them. Changes in these slow water flows, caused by either climate change or human activity, "will upset this equilibrium, and can tip these slow-moving systems into a new condition where they begin to release stored materials into downstream waters and the atmosphere."[97] As the peatlands store more carbon than all other natural ecosystems in Ontario combined, they provide a major cooling benefit. Moving southward and westward away from the coasts

[96] *Ibid* at 8
[97] *Ibid* at 9.

of the Hudson and James Bays, the Boreal Forest of the Far North also serves "critical ecosystem functions, providing habitat for its distinctive fish, wildlife and plants, including critical habitat for species and habitats of conservation concern," mediating ecosystem hydrology, and modifying local climate.[98] In combination with the region's peatlands, the forest plays a major role in moderating climate as a carbon sink. These important functions can be interrupted by human activity.

In addition to the natural features of the landscape, the Far North is rich in biodiversity. 53 mammal species call the region home, including the beaver, muskrat, gray wolf, red fox, black bear, wolverine, marten, mink, otter, lynx, and moose.[99] The Far North is also home to several iconic "special concern" and "threatened" species. Polar Bears, listed as "special concern" in 2011 under the *Species at Risk Act,*[100] rely on the ice of Hudson Bay and James Bay to access prey, and on the coastal lowlands for summer refuge and denning. Over the past few decades, the impact of climate change has already been observed in the region, as there has been a significant decline in the body condition of the bears.[101] The boreal caribou, listed as "threatened," are also present in the Far North. Forest disturbance is a core threat for the caribou. This increases the abundance of prey, such as wolves, who feed on young calves, resulting in high mortality rates and declining populations.[102] Many species of birds are also found in the Far North, particularly along the shores of James Bay and Hudson Bay. As the only tidal saltwater habitat between the Gulf of Mexico, the Atlantic, and the Gulf of the St. Lawrence, the shorelines provide one of North America's "primary breeding and nursery landscapes for waterfowl and shorebirds."[103] These birds, of which 190 species breed in the Far North, are of major cultural and economic importance to First Nations communities in the area.[104] The Far North is also a "biodiversity hotspot" for fish, which at least 50 species currently residing in the water systems. Species such as walleye, whitefish, sucker, northern pike, lake sturgeon, and trout provide subsistence for local communities. Climate change

[98] *Ibid* at 26.
[99] *Ibid* at 31.
[100] SC 2002, c 29.
[101] The Far North Science Advisory Panel, *supra* note 91 at 31.
[102] *Ibid* at 32.
[103] *Ibid*.
[104] *Ibid* at 33.

impacts to the region may result in more competition from non-native, warmer-water species and increased levels of mercury in fish tissue due to changes in waterflow from the lowlands.[105] Finally, there are at least 150 species of plants that occur only in Ontario's Far North, primarily in the Hudson Bay lowlands.[106]

The water, climate, geology, wildlife, and communities of the Far North are interdependent and interconnected, and thus decision-making in the region must be informed by these relationships.[107] While impacts from human activities are currently very modest, pressure to develop the mineral reserves in the Far North is growing, as is the desire to improve access among several of the 34 remote Indigenous communities in the Far North. The Far North Science Advisory Panel, established in 2008 by the Ontario Ministry of Natural Resources to provide scientific and technical advice on how to achieve the government's vision for the Far North, aptly summarizes the cascading impact that the Ring of Fire could have on the region, and calls on the need for a regional-scale EA for any proposed development:

> Planning for development must be approached with great caution. Individual development projects such as mines, wind energy farms, hydro-electric power and tourism operations have the potential to affect local ecosystem integrity, through habitat alteration, changes in water levels, increased erosion, and release of pollutants to air and water. More significantly, as human activity begins to alter this ecologically intact land surface through development, there is increasing potential to affect ecosystem structure and function at a broad scale. In part, this is because individual projects must be linked by regional infrastructure, such as roads, airstrips, and transmission corridors. Transportation and transmission infrastructure has the potential to cause significant regional environmental impacts, including the creation of physical barriers to animal movement, habitat fragmentation, including stream habitats that are critical for spawning and movement, alteration of soil properties and surface water flows, and increased access through otherwise inhospitable terrain for invasive species, as well as predators, and hunters and anglers. These changes in turn alter interspecies dynamics and affect the abundance and distribution of species. **Perhaps most important, however, the effects of roads are incremental and cascading. Once one road is built, to serve a single purpose or development project, it opens up the potential for further development, and creates pressure to build more road networks and power transmission lines**. Well-planned and well-managed

[105] *Ibid* at 35.
[106] *Ibid* at 36.
[107] *Ibid* at 8.

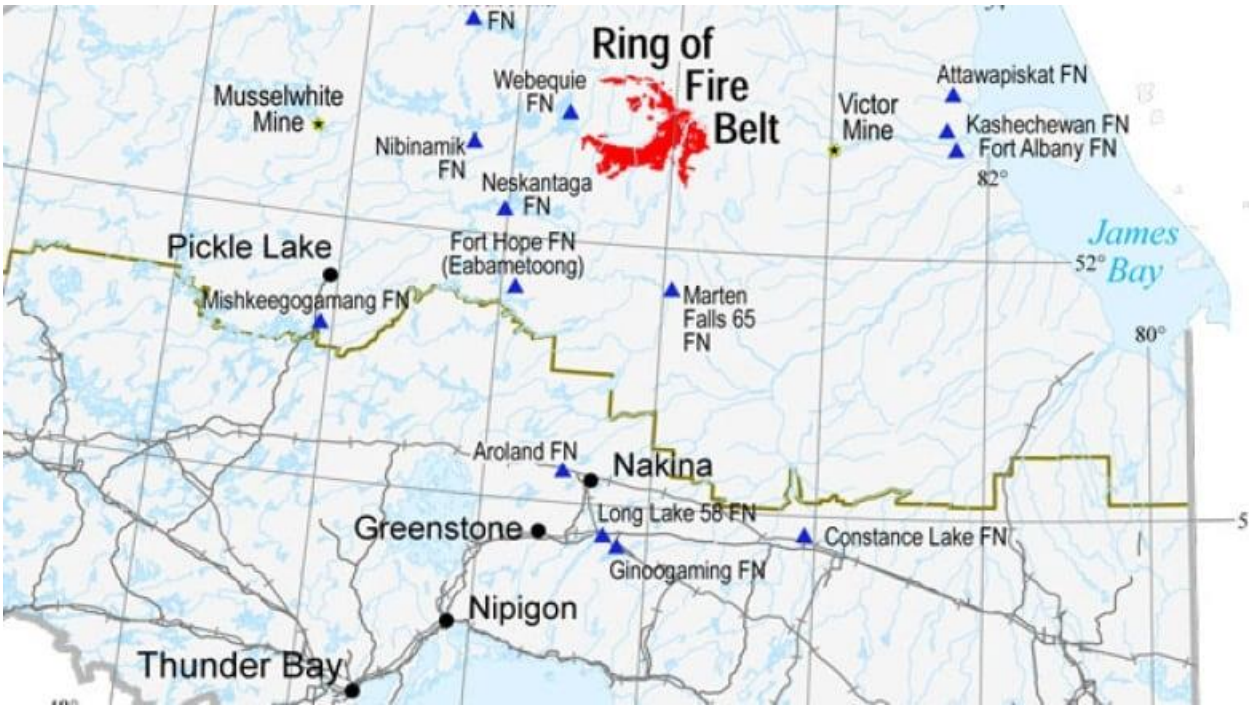
> infrastructure is therefore a critical component of land use planning for the Far North.[108]

As this excerpt demonstrates, while small, individual projects such as short segments of road may not appear on their face to have significant environmental impacts, cascading development into the Far North may have devastating impacts to the environment and for the Indigenous communities who rely on it. The following subsection highlights the major concerns for the Neskantaga First Nation.

2.3 IMPORTANCE OF TREATY 9 TERRITORY TO THE NESKANTAGA FIRST NATION

The importance of the land to the Neskantaga First Nation cannot be over-stated. The Neskantaga First Nation is a community of Oji-Cree people, whose reserve is located on the Attawapiskat Lake, approximately 180 km northeast of Pickle Lake and 560 km north of Thunder Bay, depicted in **Figure 4**, below.

Figure 4: Map Depicting the Location of Neskantaga First Nation[109]



[108] *Ibid* at xiii [emphasis added].
[109] CBC News, "Monday's Ring of Fire road announcement 'premature' says area First Nations," *CBC News* (25 August 2017), online: <www.cbc.ca/news/canada/thunder-bay/ring-of-fire-road-premature-1.4261877>.

They are a fly-in community, with a population of about 425 members, 300 of whom live on reserve.[110] Ice road access is available during the winter, with access times varying from 3 to 4 months during a cold winter, to a mere 5 to 7 weeks as of late.[111] The Neskantaga First Nation have an oral culture, with both the Oji-Cree and Ojibway languages spoken and very much alive in the community.[112] Community meetings discussing issues are held orally, in both traditional languages as well as English.[113]

In an affidavit sworn in an Application brought by the Matawa First Nations against the Attorney General of Canada and Cliffs Natural Resources at the Federal Court,[114] former Chief Peter Moonias provided an intimate account of the lived reality in his community, the importance of the land, and the impacts that the Ring of Fire development would bring. He states that "in our part of the world, the First Nations are the only ones living here. Our traditional and ancestral lands are all around us. They go in all directions from our reserve, to the north, south, east, and west."[115] People from the community use the land all throughout their traditional territory through activities like hunting, trapping, and gathering plants and medicines. Moonias states that "Our territory sustains us. Our people have lived in these homelands for generation after generation."[116]

The Neskantaga First Nation's reserve is located on the head waters of the Attawapiskat Lake and River, which is the "lifeline of [the] community."[117] The Attawapiskat Lake flows into the Attawapiskat River, which is hundreds of kilometers long, flowing all the way into James Bay. The community travels all along the river to hunt and fish in both summer and winter, and people harvest sturgeon, pickerel, white fish, pike, burbot, and geese.[118] While the river is used as a method of transportation, there are also many sacred ceremonial sites along the river system used by the community for generations as places of healing and to practice ceremony.[119]

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[110] *Matawa First Nations v Canada* (2012), Court File No T-1820-11 (FC) (Evidence, Affidavit of Chief Peter Moonias) at para 5.
[111] *Ibid* at paras 5-6.
[112] *Ibid* at para 3.
[113] *Ibid* at para 4.
[114] *Ibid*.
[115] *Ibid* at paras 7-8.
[116] *Ibid* at paras 13-14.
[117] *Ibid* at para 9.
[118] *Ibid* at paras 10, 12.
[119] *Ibid* at para 17.

The Neskantaga First Nation have constitutionally recognized Aboriginal and treaty rights that are protected by s.35 of the *Constitution Act, 1982*. In the affidavit sworn by former Chief Peter Moonias, he recounts the history of treaty-making in the territory and its impact on the people. He states:

> We are beneficiaries of Treaty 9 [the James Bay Treaty of 1905]. The people who came down to have us sign the Treaty didn't come to our community. We had to go to Fort Hope. At that time, no one from our community spoke English. And we only had a day and a half to sign the Treaty.
>
> Our understanding is that in Treaty 9, our people entered into a political and legal relationship with the Crown, based on the principles of friendship, mutual respect and shared arrangements. We promised to keep peaceful relations, and the Crown promised to protect our livelihood and jurisdiction as times changed. We understood that we would share the use of our lands and resources with the newcomers, so long as the right to hunt and fish and use our lands would continue and would be protected. We recognize our obligation to protect these lands as stewards while gaining sustenance from them.
>
> We know this because our elders tell us so. The rules and stories of how to care for the lands have evolved over millennia and continue to be practiced by our hunters and trappers.
>
> Our understanding is that we never ceded, sold or surrendered our homelands, and never gave up our inherent rights, including jurisdiction over our territories and peoples.[120]

These words from former Chief Peter Moonias depict the contentious relationship that the community has had with the Crown over the past 100+ years, as well as the fundamental obligations that the community holds in relation to their lands. For these reasons, the Ring of Fire development is of significant concern for the community.

The Neskantaga First Nation is concerned with the Ring of Fire development for two primary reasons. First, they are concerned with the impacts the development would have on the lands and the environment. The development would result in mines built to the northeast of the reserve, within the community's traditional territory. The development would be near a lake that is connected to the Attawapiskat River. As outlined above, Moonias describes this river as the "lifeline" of their people.[121] The construction of mines,

[120] *Ibid* at paras 19-22.
[121] *Ibid* at para 25.

bridges, and roads would create miles and miles of impacts, including on wildlife, on life on and in the river, and on air quality.[122] Development also has the potential to create new sources of pollution.[123]

Second, the Neskantaga First Nation is concerned that increased access to the territory through new road construction would "cause substantial and permanent harm to [their] culture and way of life."[124] New roads may bring in new hunters and fishers to the land, impacting the resources available to those who rely on them, and may result in changes to the availability of hunting and fishing grounds.[125] Things like hunting and fishing outfitters and camps may become established, bringing new people to live on the territory.[126] These new roads through the traditional territory may impact burial and sacred sites which the community has spiritual obligations to protect.[127] Additionally, increased access to the territory combined with the creation of new jobs and wealth in the area has the potential to negatively impact the community's struggle with drug and alcohol abuse.[128] Chief and Council have implemented several programs in the community which have assisted with this problem, but community elders are worried that money combined with easier access to the community may increase problems with drugs and alcohol, negatively impacting families.[129]

In addition to these specific community concerns, both the development of mines and the construction of new roads would seriously infringe the community's treaty rights. That being said, the community is not against or opposed to the development. However, they are "committed to making sure that any development is respectful of [their] Treaty and Aboriginal rights, respectful of [their] traditions, respectful of [their] lands and water. [They] need to make sure that any development will benefit the long-term health and well-being of [their] people, including future generations, rather than hurting [them]."[130]

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[122] *Ibid* at paras 31, 33-34, 39.
[123] *Ibid* at para 41.
[124] *Ibid* at para 25.
[125] *Ibid* at paras 35-36.
[126] *Ibid* at para 37.
[127] *Ibid* at para 30.
[128] *Ibid* at para 43.
[129] *Ibid* at paras 48-49.
[130] *Ibid* at para 29.

The Neskantaga First Nation have their own forms of governance, protocol, law, authority, and jurisdiction which require them to manage and protect their lands and resources.[131] They have a community-based decision-making model for issues affecting the land, as lands are held collectively by the community.[132] The legal framework put in place by both the federal and provincial governments does not adequately take these obligations into account, and is viewed as "deficient" by the community for several reasons.[133] However, before unpacking alternative approaches to EA for the Ring of Fire, it is necessary to understand the current legal framework, and identify why this framework does not adequately address some of the concerns of Indigenous communities in Ontario's Far North.

[131] *Ibid* at para 50.
[132] *Ibid* at para 50.
[133] *Ibid* at para 54.

3 OVERVIEW OF THE LEGAL ENVIRONMENT IN ONTARIO'S FAR NORTH

This portion of the report aims to outline the laws, policies and regulatory instruments in place within the settler law that impact resource development and land use in the Far North. The lands and resources in Ontario's Far North are subject to a complex and intertwined system of decision-making processes at both the provincial and federal level. Central pieces of provincial legislation to be explored in this section of the report include the *Far North Act,* the *Mining Act*, and the *Environmental Assessment Act*. At the federal level, the *Canadian Environmental Assessment Act, 2012*[134] plays a crucial role in the assessment of projects impacting areas of federal jurisdiction. Federal environmental assessment legislation is an area of law currently undergoing significant review and redrafting. The introduction of Bill C-69[135] in February 2018 set out the new proposed *Impact Assessment Act*, which would replace *CEAA, 2012*. The Bill is currently under review by the Standing Senate Committee on Energy, the Environment and Natural Resources, and would provide a broader assessment framework should it receive Royal Assent. As such, it is an important piece of federal legislation to examine. Finally, s.35 of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and treaty rights across the country. Significant jurisprudence has evolved following this entrenchment outlining key principles such as the duty to consult and accommodate, and the Honour of the Crown, which have emerged as central concepts impacting state action when engaging with Indigenous communities on resource development projects. These principles play a central role in Ontario's Far North, as the Ring of Fire sits within Treaty 9 territory.

Beyond domestic legislative tools, the Government of Canada must also uphold international commitments. In particular, the Government of Canada has committed to fully implementing UNDRIP through s.35 of the *Constitution Act, 1982*. UNDRIP sets an

[134] SC 2012, c 19, s 52 [*CEAA, 2012*].
[135] Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (as passed by the House of Commons 20 June 2018) [Bill C-69].

important backdrop for discussions of Indigenous-led environmental assessment, particularly the requirement for free, prior and informed consent ("FPIC").

Aside from outlining key features of each of these legislative and policy measures, this portion of the paper seeks to highlight the deficiencies in the current settler legal regime, further emphasizing the need for an approach that moves beyond the confines of this legal framework, and points out critical opportunities for advocacy within this settler regime that may be useful for Indigenous communities wishing to effectively advocate to protect their interests.

3.1 ONTARIO'S LEGISLATIVE FRAMEWORK

3.1.1 THE FAR NORTH ACT, 2010

3.1.1.1 History of the Far North Act, 2010

Governance of Ontario's Far North was initially cast by the provincial government as a key part of its plan to fight climate change. In July 2008, then Premier Dalton McGuinty and his Liberal government announced that they would protect at least 225,000 km^2 of boreal region within Ontario's Far North in accordance with its Far North Planning Initiative.[136] The stated objective of this initiative was "to develop community based land use plans that served to identify areas that could be used to promote environmentally sustainable economic opportunities, while ensuring that large amounts of land [were] protected in Ontario's Far North region."[137] The aim was to strike a balance between conservation and sustainable development, which was to be achieved by the government working alongside Indigenous communities to develop these so-called "community based land use plans" ("CBLUPs"). This collaborative mapping exercise would "permanently protect an interconnected network of conservation lands across the Far North" and allow communities to express what types of economic development they were interested in.[138]

[136] Office of the Premier, "Protecting Ontario's Northern Boreal Forest" (14 July 2008), online: *Government of Ontario* <news.ontario.ca/opo/en/2008/07/protecting-ontarios-northern-boreal-forest.html?>.
[137] Isabelle Côté & Matthew I Mitchell, "The Far North Act in Ontario, Canada: A Sons of the Soil Conflict in the Making?" (2018) 56:2 Commonwealth & Comp Pol 137 at 144.
[138] Office of the Premier, *supra* note 136; Côté & Mitchell, *ibid* at 144-145.

New commercial forestry opportunities would be made available, and any new mining projects were to be consistent with these CBLUPs.[139]

In order to elicit advice related to land use planning in the Far North, the government created two separate bodies to provide input on the formation of future legislation. One body was the Far North Advisory Council, composed of conservation groups and resource-based development industries. It completed a report on the Far North Planning Initiative for the Minister of Natural Resources in March 2009, stating that it had the potential to "transform the unique region in a number of positive ways that would make it a precedent-setting model for the world."[140] Second, the Far North Science Advisory Panel was established in December 2008 and was comprised of government and non-government officials with expertise on "terrestrial and aquatic ecosystems, biodiversity, mineral resources, carbon and climate change."[141] It was tasked with the mandate of "providing scientific advice around numerous issues related to land use planning in the Far North."[142] They released a report on the Far North Land Use Strategy in April 2010 which provided a series of recommendations to the government in achieving its broad vision for the Far North.[143]

Bill 191, *An Act with respect to land use planning and protection in the Far North*,[144] was introduced in the Ontario Legislature in June 2009. While the Bill was moving through the legislative process, the government moved its stance on the *Far North Act*. While initially touted as a key part of the government's plan to fight climate change, as outlined in its 2008-2009 Climate Change Action Plan, the government began to promote the *Far North Act* as part of its new five-year Open Ontario Plan to strengthen the economy. As a result, the government's "stressed the legislation's importance for future mineral development, especially in the Ring of Fire."[145]

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[139] Christopher J A Wilkinson & Tyler Schulz, "Planning the Far North in Ontario, Canada: An Examination of the 'Far North Act, 2010'" (2012) 32 Nat Areas J 310 at 310.
[140] The Far North Planning Advisory Council, "Consensus Advice to the Ontario Minister of Natural Resources" (March 2009) at 3, online (pdf): *Wildlands League* <wildlandsleague.org/attachments/274245.pdf>.
[141] Côté & Mitchell, *supra* note 137 at 145.
[142] *Ibid.*
[143] The Far North Science Advisory Panel, "Science for a Changing North," *supra* note 91.
[144] Bill 191, *An Act with respect to land use planning and protection in the Far North,* 2nd Sess, 39th Leg, Ontario, 2010 (assented to 25 October 2010, SO 2010, c 18) [Bill 191].
[145] Wilkinson & Schulz, *supra* note 139 at 311.

3.1.1.2 Legislative Framework of the Far North Act, 2010

The *Far North Act* received Royal Assent in October 2010, and was proclaimed into law in February 2011. The purpose of the legislation is to provide for community based land use planning in the Far North that:

> (a) sets out a joint planning process between the First Nations and Ontario;
>
> (b) supports the environmental, social and economic objectives for land use planning for the peoples of Ontario that are set out in section 5 ["Objectives for land use planning"]; and
>
> (c) is done in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult.[146]

Any First Nation with a reserve in the Far North, or with which the Minister of Natural Resources has agreed to work, may indicate an interest to the Minister to initiate discussions with respect to establishing a joint body to "advise on the development, implementation and co-ordination of land use planning in the Far North" and other agreed-upon advisory functions.[147] Once this interest has been indicated, "the Minister shall work with them to prepare terms of reference to guide the designation of an area in the Far North as a planning area and the preparation of a land use plan."[148] Once the terms of reference are approved by the Minister and the council of the First Nation community, the Minister may make an order designating the planning area, and the parties may then jointly develop a CBLUP.[149] These land use plans may specify prescribed categories of land use, land uses that are permitted or not permitted, land designated as protected areas, and how the plan addresses significant cultural and ecological features, among other matters.[150] In developing the plan, First Nations and the Minister of Natural Resources must take into account the objectives of the Act, and the Far North Land Use

[146] *Far North Act, supra* note 1, s 1.
[147] *Ibid*, s 7(1).
[148] *Ibid,* s 9(1).
[149] *Ibid,* s 9(4).
[150] *Ibid,* s 9(9).

Strategy.[151] Plans must be approved by both the Minister as well as the council of each First Nation community involved, and the Minister must consider the objectives of the legislation and the Far North Land use Strategy in doing so.[152]

Under the *Far North Act*, if there is no CBLUP for an area in the Far North, particular activities are prohibited, including: opening a mine, engaging in commercial timber harvest or oil and gas exploration, constructing or expanding an electrical generation facility, and constructing or expanding all weather transportation infrastructure.[153] This provision freezing development also prohibits First Nations from engaging in modern forms in economic development throughout their traditional territory, and this prohibition may only be lifted by engaging in the land use planning process.[154] Additionally, regardless of whether there is a CBLUP in place, it may be overruled by Cabinet approval if the development helps meet the objectives of the legislation, or is in the social and economic interests of Ontario, essentially giving Cabinet the final say over land use planning.[155]

3.1.1.3 Criticisms of the Far North Act, 2010

These types of provisions throughout the Act that give the Minister or Cabinet final decision-making power have been a source of strong opposition from First Nations communities as they are seen as statutorily undermining Indigenous jurisdiction over traditional territories, and a violation of the principle of FPIC that is recognized internationally in documents like UNDRIP.[156] Some argue that the *Far North Act*, and

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[151] *Ibid,* s 9(7); For the objectives of the *Far North Act,* 2010, see: *Far North Act, ibid*, s 5: "(5) The following are objectives for land use planning in the Far North: 1. A significant role for First nations in the planning; 2. The protection of areas of cultural value in the Far North and the protection of ecological systems in the Far North by including at least 225,000 square kilometres of the Fr North in an interconnected network of protected areas designated in community based land use plans; 3. The maintenance of biological diversity, ecological processes and ecological functions, including the storage and sequestration of carbon in the Far North; and, 4. Enabling sustainable economic development that benefits the First Nations."

[152] *Ibid,* ss 9(14), 9(16).

[153] *Ibid,* s 12(1).

[154] Nishnawbe Aski Nation, "Ontario's Far North Act" (2019), online: <www.nan.on.ca/article/ontarios-far-north-act-463.asp> [Nishnawbe Aski Nation, "Ontario's Far North Act"].

[155] *Far North Act, supra* note 1, s 12(4).

[156] Stan Beardy, "Elephant in the Room: A First Nations perspective on the Far North Act," *Republic of Mining* (3 December 2011), online: <republicofmining.com/2011/12/03/elephant-in-the-room-a-first-nations-perspective-on-the-far-north-act-stan-beardy-thunder-bay-chronicle-journal-december-3-2011/>.

amendments to Ontario's *Mining Act* (outlined below) emerged, at least, in part, from the conflict that arose between the community of Kitchenuhmaykoosib Inninuwug ("KI") First Nation and the exploration company, Platinex, in 2006. This conflict raised questions about jurisdiction and consent over development on Indigenous territories, as KI First Nation "refused to allow the exploration company to carry out a drilling program authorized under Ontario's *Mining Act* regime. KI First Nation challenged the authority of the province to send in an exploration company without community awareness and consent," acting in accordance with their own laws.[157] As a result, several injunctions and contempt of court charges culminated in the imprisonment of five elected leaders and one community member.[158] A similar situation unfolded in early 2007 involving the Ardoch Algonquin First Nation and a uranium exploration company, Frontenac Ventures.[159] Both of these communities "insisted they held the jurisdiction to decide what kinds of activities can be undertaken on their lands."[160] In the case of KI First Nation, the dispute arose "as a response to KI's assertion of its Aboriginal and treaty rights through *Kanawayandan D'aaki*," meaning "keeping my land" in *Anishiniimowin* (Oji-Cree), which is KI's sacred and legal duty to protect the land.[161]

While several First Nations communities in the Far North have engaged with the Ontario government in crafting CBLUPs,[162] many Indigenous communities have been opposed to the legal regime since its conception, labelling it a "new form of colonialism".[163]

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[157] Dayna Scott, "Confusion and concern over land-use planning across northern Ontario," *The Conversation* (11 March 2018), online: <theconversation.com/confusion-and-concern-over-land-use-planning-across-northern-ontario-92704>.
[158] *Platinex v Kitchenuhmaykoosib Inninuwug First Nation*, [2006] 4 CNLR 152 (ONSC), DLR (4th) 727; *Platinex v Kitchenuhmaykoosib Inninuwug First Nation*, [2008] 2 CNLR 301 (ONSC), 165 ACWS (3d) 656.
[159] See *Frontenac Ventures v Ardoch Algonquin First Nation,* [2007] OJ No 3360 (Sup Ct), 2007 CarswellOnt 7478 (WL Can); *Frontenac Ventures v Ardoch Algonquin First Nation*, 2008 ONCA 534, 91 OR (3d) 1.
[160] Scott, *supra* note 157.
[161] Rachel Arris & John Cutfeet, "Kitchenuhmaykoosib Inninuwug First Nation" Mining, Consultation, Reconciliation and Law" (2011) 10:1 Indigenous LJ 1 at 4, 8.
[162] See Government of Ontario, "Land use planning process in the Far North" (2018), online: <www.ontario.ca/page/land-use-planning-process-far-north#section-2>: To date, communities with approved CBLUPs include: Cat Lake-Slate Falls (2011), Pauingassi (2011), and Little Grand Rapids (2011) First Nations. Pikangikum First Nation's land use strategy for the Whitefeather Forest and adjacent areas, developed in 2006, was grandfathered in. Deer Lake First Nation has a draft CBLUP (2015). Several communities have terms of reference, including: Eabametoong & Mishkeegogamang (2013), Marten Falls (2013), Wawakapewin (2014), Constance Lake (2014), Webequie (2014), McDowell Lake (2016), Kashechewan (2017), Weenusk (2017), and North Spirit Lake (2018) First Nations.
[163] Nishnawbe Aski Nation, "Ontario's Far North Act", *supra* note 154.

The legislation has been interpreted as "a central plank in Ontario's attempt to remedy the uncertainties of jurisdiction that were exposed in the KI struggle."[164] The Nishnawbe Aski Nation released a statement in September 2010 following the passing of third reading of Bill 191 in the Ontario Legislature. Then Deputy Grand Chief Mike Metatawabin stated:

> The passing of Bill 191 today indeed shows how little regard the McGuinty Government gives to the concerns of First Nations and other Northern Ontarians when it comes to decision making […] As we have stated time and time again, NAN First Nations and Tribal Councils do not want and will not recognize this legislation on our homelands. We will continue to uphold our Aboriginal and Treaty rights and jurisdiction over our land.[165]

In fact, the legislation was drafted and passed without the Nishnawbe Aski Nation's input, as consultations were scheduled unilaterally and on short notice, and then cancelled by government representatives when Nishnawbe Aski Nation representatives were unable to attend.[166]

The question of jurisdiction features strongly in First Nations opposition to the *Far North Act*. Once a final CBLUP is approved by the First Nation and the Minister, all decisions to authorize land use activities must be consistent with the land use designations set out in the approved plan.[167] As Professor Dayna Scott points out, "it is the inherent jurisdiction over the lands and the authority to make decisions about contested land uses that is at stake."[168] In an article titled "Confusion and concern over land-use planning across northern Ontario" published in the Conversation, Professor Scott outlines the perspective of community members from Peawanuck, a Cree community in northern Ontario near the shores of Hudson Bay. Community elders highlight that the authority to make decisions about land use in their territory comes from the Creator, and is an authority they have always exercised.[169] First Nations communities

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[164] Scott, *supra* note 157.
[165] Nishnawbe Aski Nation, News Release, "NAN Releases Statement on the Passing of Third Reading of Bill 191 – The Far North Act" (23 September 2010), online (pdf): <www.nan.on.ca/upload/documents/com-2010-09-23-nan-statement-on-third-reading-of-bill-191.pdf>.
[166] Thomas Berger, Steven A Kennett & Hayden King, *Canada's North: What's the Plan? The 2010 CIBC Scholar-in-Residence Lecture* (Ottawa: The Conference Board of Canada, 2010) at 100.
[167] Scott, *supra* note 157.
[168] *Ibid*.
[169] *Ibid.*

"have complex and nuanced mechanisms for authorizing various activities on the land that rely on their own laws: Different family groups have authority over different party of the territory based on the locations of harvesting areas, traplines, hunting camps and cabins."[170] Through the community based land use planning process of the *Far North Act*, the Ministry of Natural Resources and Forestry would gain access to all of this knowledge about the land, and then bring the authority to make decisions about the land under the government's jurisdiction.

The disagreements over jurisdiction that emerge through discourse about the *Far North Act* stem directly from the interpretation of treaties on the land. While the Cree and Ojibwe "feel that they agreed to share their territories" under Treaty 9, "Ontario feels that there was explicit surrender and, thus, the Crown has jurisdiction. This is the unsteady footing from which planning proceeds in the [Far North]."[171] A review of northern planning strategies across all of Canada has led scholars to conclude that "Ontario represents the worst type of planning with Indigenous peoples – a seemingly complete disregard for the perspectives and opinions of the people who will be most directly affected by the land use plans."[172] As such, it can be concluded that the *Far North Act* provides an inadequate framework for the development of the Ring of Fire.

In February 2019, the Ontario Ministry of Natural Resources and Forestry introduced a proposal to repeal the *Far North Act*. The goal of this proposal is to reduce "red tape and restrictions on important economic development projects in the Far North including the Ring of Fire, all-season roads and electrical transmission projects for communities."[173] The proposal outlines that planning would continue for communities in the advanced states of developing a CBLUP, including the communities of Marten Falls, Webequie, Eabametoong, Mishkeegogamang, Constance Lake, Deer Lake and McDowell Lake First Nations. The deadline for these CBLUPs to be completed is December 31, 2020.[174] Any approved CBLUPs completed by this date would be retained

[170] *Ibid.*
[171] Berger, Kennett & King, *supra* note 166 at 98.
[172] *Ibid* at 102.
[173] Ministry of Natural Resources and Forestry, "Proposal in support of the province's review of the Far North Act" (2019), online: *Environmental Registry of Ontario* <ero.ontario.ca/notice/013-4734#>.
[174] *Ibid*.

under the *Public Lands Act*,[175] which would be the statute for any future land use planning in the Far North upon repeal of the *Far North Act*, and planning for communities that have not yet reached the advanced stages will be discontinued.[176] While First Nation communities have expressed opposition to the legislation since its first enactment and support its repeal, others are concerned about the government's stated rationale for repeal of the Act, and worry that protection over lands in the Far North may be lost if the Act is repealed.[177]

3.1.2 THE MINING ACT

Ontario's *Mining Act* is a second piece of legislation that fits into the bigger picture of development in the Far North. As the Crown claims ownership of almost all existing mineral rights in Canada, this legislation is central for proponents wishing to access these minerals.[178] Miners are required to "stake," or, "mark land for future mining activity, including exploration," subsurface mineral rights in accordance with applicable statutes, such as Ontario's *Mining Act*.[179] Over the past decade, this statute has undergone significant amendment and modernization, much of which stemmed from the same conflict that underlined the provincial government's interest in implementing the *Far North Act,* outlined above, including conflict arising on the traditional territories of Indigenous communities in northern Ontario.

3.1.2.1 Ontario's Free Entry Mining System

Much of this underlying conflict emerged predominantly because, historically, Ontario operated under what is known as the "free entry" or "open entry" system. A free entry system "allows miners to enter Crown lands for the purposes of locating and staking

[175] RSO 1990, c P.43.
[176] Ministry of Natural Resources and Forestry, *supra* note 173.
[177] Jamie-Lee McKenzie, "Ontario government reviewing, possibly repealing Far North Act," *CBC News* (27 February 2019), online: <www.cbc.ca/news/canada/sudbury/far-north-act-first-nations-repeal-1.5034526>.
[178] Dimitrios Panagos & J Andrew Grant, "Constitutional change, Aboriginal rights, and mining policy in Canada" (2013) 54:1 Commonwealth & Comp Pol 405 at 407.
[179] Colin Chambers & Mark Winfield, *Mining's Many Faces: Environmental Mining Law and Policy in Canada* (Toronto: The Canadian Institute for Environmental Law and Policy, 2000) at 19, online (pdf): <www.cielap.org/pdf/mining.pdf>.

mineral claims. It is these activities that guarantee the transfer of rights to discovered minerals from the Crown to the miner."[180] Under this system, "the miner who first makes a claim to a particular area is the individual who is legally entitled to the minerals located in that area."[181] The Crown retains no discretion as to whether to not to grant or deny rights to obtain the minerals.[182] Once a miner stakes a claim, the claim is recorded, giving the miner authority to engage in exploration activities on the land, as well as the right to exclude all others from staking a claim within the claim area.[183] Should the miner comply with technical requirements, they are entitled to a mining lease, which vests rights to obtain minerals in the claim holder.[184]

Central in this system, and one of the reasons why it generated such conflict, is the fact that miners "do not have to seek permission prior to engaging in mining-related activities on public lands."[185] Contrast this with other resource-based industries, such as forestry, where a proponent would need to obtain permission or a licence from the government in order to engage in related activities.[186] Under the *Mining Act*, a miner need only obtain a prospector's licence in order to stake a mining claim on any Crown land, or on non-Crown land where the Crown has reserved the mineral rights.[187] Authors Pardy and Stoehr have described the "free entry" system as a form of "private expropriation."[188] Under this system, the Crown was "unable to comply with its constitutional obligations pursuant to s.35 of the *Constitution Act, 1982*, most notably the duty to consult and accommodate."[189] As a result, amendments were made, beginning in 2009.

[180] Panagos & Grant, *supra* note 178 at 407.
[181] *Ibid.*
[182] Karen Drake, "The Trials and Tribulations of Ontario's *Mining Act*: The Duty to Consult and Anishinaabek Law" (2015) 11:2 JSDLP 183 at 190.
[183] *Ibid* at 170-171.
[184] *Mining Act*, *supra* note 58, s 81(1); Drake, *supra* note 182 at 191.
[185] Panagos & Grant, *supra* note 178 at 407.
[186] *Ibid* at 408.
[187] Drake, *supra* note 182 at 190.
[188] Bruce Pardy & Annette Stoehr, "The Failed Reform of Ontario's Mining Laws" (2011) 23 J Envtl L & Prac 1 at 2.
[189] Drake, *supra* note 182 at 191.

3.1.2.2 Amendments to the Mining Act

In 2009, Bill 173*, An Act to Amend the Mining Act*,[190] was passed into law. According to the Ontario Ministry of Energy, Northern Development and Mines, the modernization of the legislation "promoted mineral exploration and development in a manner that recognizes Aboriginal and treaty rights, introduced processes that are more respectful of private landowners, and minimized the impact of mineral exploration and development on the environment."[191] This is reflected in the purpose of the Act, amended in 2009, which now states that "the purpose of this Act is to encourage prospecting, registration of mining claims and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982,* including the duty to consult […]."[192] Under the new *Mining Act* regime, "prospectors can no longer acquire rights to engage in certain exploration activities by merely staking a claim and having it recorded."[193] Many of these new rules and standards were introduced through the regulation *Exploration Plans and Exploration Permits*,[194] which aimed to address some of the perceived reasons that conflict had arose on Indigenous territories. The new amendments stipulate that a proponent must submit an exploration plan to the Director of Exploration prior to engaging in prescribed exploration activities.[195] If the proponent's exploration activities go beyond those prescribed for exploration plans, the proponent must apply for and receive an exploration permit prior to engaging in the activities.[196]

The amendments introduced new procedural requirements for proponents engaging in activities that may impact Aboriginal communities.[197] When an exploration

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[190] Bill 173, *An Act to Amend the Mining Act*, 1st Sess, 39th Leg, Ontario, 2009 (assented to 28 October 2009, SO 2009, c 21).
[191] Ministry of Energy, Northern Development and Mines, "Mining Act" (2018), online: *Government of Ontario* <www.mndm.gov.on.ca/en/mines-and-minerals/mining-act>.
[192] *Mining Act*, *supra* note 58, s 2.
[193] Drake, *supra* note 182 at 193.
[194] O Reg 308/12 [*Exploration Plans and Permits*].
[195] See *Exploration Plans and Exploration Permits*, *ibid,* s 5(1): Prescribed activities which require an exploration plan are outlined in s 1 of O Reg 308/12 at Schedule 2. They include: 1. Any geophysical surveys that require the use of a generator to be carried out; 2. Mechanized drilling for the purpose of obtaining rock or mineral samples, if the assembled weight of the drill and its associated equipment, excluding drill rods, casings and bits, does not exceed 150 kilograms; 3. Line cutting, where the width of the lines does not exceed 1.5 metres; 4. Mechanized surface stripping; and 5. Pitting and trenching.
[196] *Ibid,* s 12(1).
[197] The term Aboriginal is used to reflect the statutory language of the *Mining Act*.

plan is submitted to the Director of Exploration, the Director must provide a copy of the plan to potentially affected Aboriginal communities.[198] Aboriginal communities who receive notification of an exploration plan have three weeks[199] to provide written comments to the Director "regarding any adverse effects the exploration plan activities proposed in the plan may have on their existing or asserted Aboriginal or treaty rights."[200] If the Director receives any comments from an Aboriginal community regarding the exploration plan, the Director may require the proponent to consult with the community as directed.[201] So long as the Director does not require the proponent to obtain an exploration permit, the proponent may commence the exploration plan activities 30 days after the plan has been circulated to any impacted Aboriginal communities.[202] The process is very similar when the Director contemplates issuing an exploration permit. One difference is that the Director may direct the proponent to consult with affected Aboriginal communities and require that they subsequently file a report regarding any consultation process that was conducted.[203] If the Director is "satisfied that appropriate Aboriginal consultation has been carried out," the Director may issue the exploration permit, attaching terms and conditions.[204]

3.1.2.3 Ongoing Challenges with the Mining Act

Despite the amendments made to the *Mining Act*, scholars still argue that the new legislation is unconstitutional, and that the effect of the amendments has been to "preserve flaws of the old regime and to create new difficulties" as the reforms perpetuate a "regime of political management in which discretion reigns, uncertainty persists and a politically-driven hierarchy of interests is pursued."[205] Some have pointed out that the amendments do not challenge the rights associated with the free entry system, as miners can still access Crown lands and may stake claims and obtain exclusive rights to

[198] *Ibid,* s 7(1).
[199] Ministry of Northern Development and Mines, "MNDM Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration" (2012) at 7, online (pdf): *Government of Ontario* <www.mndm.gov.on.ca/sites/default/files/aboriginal_exploration_consultation_policy.pdf>.
[200] *Exploration Plans and Exploration Permits*, *supra* note 194, s 7(2).
[201] *Ibid*, s 7(3).
[202] *Ibid*, s 9(1).
[203] *Ibid*, s 14.
[204] *Ibid*, s 15(1).
[205] Pardy & Stoehr, *supra* note 188 at 1.

discovered minerals.[206] Additionally, miners "may still undertake certain low-impact exploration activities after staking a claim without engaging in consultation," and "the Crown still has no discretion to decline to record a mining claim or require consultation as long as the claim complies with certain minimal technical requirements." [207]

Professor Karen Drake argues that "the [reformed] *Mining Act* is unconstitutional insofar as it allows proponents to adversely impact First Nations' treaty rights to implement their laws throughout their territories without requiring any consultation before this adverse impact occurs."[208] She states that the staking and recording of a claim should be enough to trigger the duty to consult. Using Treaty 9 territory as an example, Drake outlines that the first part of the three-part test triggering the duty to consult – that the Crown must have real or constructive knowledge of the asserted right – will be met, as the Crown will always have notice of the content of the treaty, as per *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*.[209] Drake points out that the second requirement – that there must be some Crown conduct or decision at issue – will also be met by the mere act of staking a claim. Citing the case of *Ross River Dena Council v Yukon*,[210] the lack of Crown discretion in recording mineral claims fulfills this stage of the test, as "the government cannot circumvent its constitutional duties by legislating away its discretion."[211] Lastly, Drake argues that even early exploratory actions will have a potential adverse impact on asserted treaty rights, as Treaty 9 First Nation signatories "assert that their treaty rights include the right to exercise governance and jurisdiction over their territories based on the oral promises of the treaty."[212] Low impact exploration activities have the potential to adversely affect treaty rights as the activities violate the laws of Treaty 9 signatories.[213]

On the other hand, the Government of Ontario may continue to interpret Treaty 9 in a way that limits treaty rights to the written text of the treaty, not taking into account oral promises that were made during the negotiation. Under this interpretation, Ontario argues

[206] Panagos & Grant, *supra* note 178 at 418.
[207] Drake, *supra* note 182 at 195-195.
[208] *Ibid* at 213.
[209] *Ibid* at 204; 2005 SCC 69 at para 34, [2005] 3 SCR 388.
[210] 2012 YKCA 14, 358 DLR (4th) 100.
[211] Drake, *supra* note 182 at 200.
[212] *Ibid* at 205.
[213] *Ibid.*

that “low impact exploration activities have no adverse impact on treaty rights, because these activities are unlikely to have any significant effect on the continued existence of animals and fish.”[214] As these activities do not impact hunting and fishing rights, the duty to consult would not be triggered at the third stage of the test.[215] However, this approach contradicts treaty interpretation litigation from the SCC. In *R v Badger*, the SCC stated that:

> When considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded, and committed to writing. The treaties, as written documents, recorded an agreement that had been reached orally and they did not always record the full extent of the oral agreement […] They must be interpreted in the sense they would naturally have been understood by the Indians at the time of the signing.[216]

The Government of Ontario’s interpretation of the modernized *Mining Act* and the obligations the legislation imposes regarding Aboriginal and treaty rights appear to continue to avoid the root cause of conflict over mining issues in Ontario – jurisdiction over lands and resources.

3.1.3 THE ENVIRONMENTAL ASSESSMENT ACT

A foundational component of the legislative scheme impacting development in the Ring of Fire is EA legislation, both provincially and federally. As a key decision-making tool in project planning and development, EA involves the process of identifying, evaluating and managing environmental factors of proposed projects.[217] The scope of the assessment, the factors to be considered in completing the assessment, and the types of projects for which an assessment is mandatory vary with the legislation, and is different at both the provincial and federal level. As this section of the report will outline, Ontario’s EA legislation, the *Environmental Assessment Act*, is particularly inept at dealing with the impacts arising from mining projects like the Ring of Fire.

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[214] *Ibid.*
[215] *Ibid.*
[216] *R v Badger*, [1996] 1 SCR 771 at para 52, 133 DLR (4th) 324 [*Badger*].
[217] Maria Valiante, “Evaluating Ontario’s Environmental Assessment Reforms” (1998) 8 J Envtl L & Prac 215 at 215.

3.1.3.1 History of the Environmental Assessment Act

Ontario was the first province in Canada to have a legislated EA process. This move towards a legislated EA regime began under the Progressive Conservative government of Premier Bill Davis with release of the Green Paper on Environmental Assessment in September 1973 by the Ontario Ministry of the Environment.[218] This paper recognized an existing legislative gap, as individual pieces of legislation that were in force at the time were incapable of "ensuring that all environmental factors [were] considered in a comprehensive and co-ordinated fashion, including public input, before major projects and technological developments proceed."[219] The government hoped to transition from an abatement approach, which dealt largely with after-the-fact pollution from existing sources, towards an approach emphasizing the restorative and preventative aspects of environmental management, and a need to "identify and resolve potential environmental problems as they emerge and before actual environmental damage occurs."[220] Their proposal within the Green Paper focused on three key elements:

1. ***Integrated Consideration****:* "a recognition that environmental concerns are interconnected, often causally, with concerns and decisions in the economic and social system."[221] An EA process would "ensure that potentially significant environmental effects are integrated with the other issues considered in review of major undertakings."[222] This element also recognized the importance of public participation in identifying potential impacts, their significance, advantages and disadvantages, and trade-offs.[223]

2. ***At an Early Stage****:* a recognition that the consideration should take place at an early stage, as it "ensures that environmental factors are considered at a time when alternative courses of action, including any measures to mitigate adverse effects, and the alternative of not proceeding, are still available and before actual environmental damage occurs."[224]

[218] Ministry of the Environment, "Green Paper on Environmental Assessment" (September 1973), online (pdf): *Government of Ontario* <agrienvarchive.ca/download/green_pap_env_assessment73.pdf>.
[219] *Ibid* at 1.
[220] *Ibid* at 3.
[221] *Ibid* at 6.
[222] *Ibid*.
[223] *Ibid* at 7.
[224] *Ibid*.

3. ***Of the Entire Complex of Environmental Effects which might be Generated by a Project****:* a recognition of the importance of "expand[ing] the range of effects evaluated beyond the direct impacts of the project on the air, land or water," such as "any potential effects on ecological processes or relationships, including the relationship of man to the environment."[225]

The Green Paper also set out options that had been considered by the government as to what should be included in the content of an EA, who should conduct the EA, who should review the EA, who should make decisions on the EA, and how the public should be involved.[226] Following a period for public comment on the Green Paper, the *Environmental Assessment Act, 1975*[227] was adopted, and came into force on October 20,1976.

The *Environmental Assessment Act, 1975* required that proposed undertakings undergo a comprehensive evaluation, which required both alternatives to the undertaking and alternative methods of carrying it out to be addressed. This evaluation was to be done by the proponent, and then submitted to the Ministry of the Environment[228] which would coordinate a review by provincial ministries and the public.[229] Decisions on the acceptability of the document submitted by the proponent would be made by the Minister of the Environment[230], or by the Environmental Assessment Board following a hearing.[231]

The Act broadly defined what constituted an "undertaking." An "undertaking" included a physical enterprise or activity as well as a proposal, plan or program.[232] Undertakings included public sector undertakings, or, those proposed by the province, a public body, or a municipality, and those proposed by the private sector.[233] Public sector undertakings were subject to the Act unless exempted, and private sector undertakings were not subject to the Act unless specifically designated by regulation.[234] Very few private sector undertakings were ever included.[235] This conception of an "undertaking"

[225] *Ibid*; *Ibid* at 8.
[226] *Ibid*.
[227] *Environmental Assessment Act, 1975,* SO 1975, c 69, as re-enacted by RSO 1990, c E.18.
[228] *Ibid,* s 5.
[229] *Ibid,* s 7(1).
[230] *Ibid,* s 5(1)(b).
[231] *Ibid,* s 13.
[232] *Ibid*, s 1(o).
[233] *Ibid*.
[234] *Ibid*, s 3.
[235] Valiante, *supra* note 217 at 219.

and the delineation between public and private undertakings pervades the current version of the Act. The "environment" was also defined broadly to include social, cultural and economic elements, as well as biophysical elements, such as air, land, or water, and plant and animal life.[236] This broad definition is also maintained in the current version of the Act.

A key issue with the original *Environmental Assessment Act, 1975* was that it "had no mechanism for determining which public undertakings subject to it would have potentially significant impacts, warranting more in-depth evaluation."[237] This meant that all public sector undertakings had to follow the comprehensive assessment approach, regardless of their impacts. As a result, the Minister issued hundreds of exemption orders for projects, "without following any criteria and without allowing for public input," leading to harsh criticism of the government's commitment to apply the Act broadly.[238]

In order to remedy this issue, one approach that was adopted in the early years of the legislation's existence to address projects with relatively insignificant impacts was the "Class EA." This type of assessment was not provided for in the Act, but was used "for small scale, recurring projects with potential impacts that were minor but significant enough to require some evaluation, but short of a full EA."[239]

The *Environmental Assessment Act, 1975*, now the *Environmental Assessment Act*, has undergone several rounds of amendment. A major source of legislative reform happened following the election of the Progressive Conservative government in 1995 under Premier Mike Harris. Harris was elected on the platform of the "Common Sense Revolution," and promptly introduced Bill 76, *Environmental Assessment and Consultation Improvement Act, 1996*,[240] in June 1996, which would overhaul and amend the existing EA legislation.[241] The Bill was received Royal Assent in November 1996 and came into force in January 1997.

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[236] *Environmental Assessment Act, 1975*, *supra* note 227, s 1(c).
[237] Valiante, *supra* note 217 at 219.
[238] *Ibid*.
[239] *Ibid* at 220.
[240] Bill 76, *Environmental Assessment and Consultation Improvement Act*, *1996*, 1st Sess, 32nd Leg, Ontario, 1996 (assented to 19 November 1996, SO 1996, c 27) [Bill 76].
[241] Alan D Levy, "A Review of Environmental Law and Practice in Ontario" (2001) 11 J Envtl L & Prac 173 at 204; See Alan D Levy, "A Review of Environmental Law and Practice in Ontario" (2001) 11 J Envtl L & Prac 173 for a full discussion of the consultation process that took place prior to the introduction of Bill 76 under the prior New Democratic government of Bob Rae.

Bill 76 introduced a new first step in the EA process: the preparation and approval of "Terms of Reference."[242] This requirement remains in place today. The Terms of Reference are prepared by the project proponent and given to the Minister of the Environment. They "set out in detail the requirements for the preparation of the environmental assessment."[243] This may involve one of three sets of requirements: "(a) those set out in the Act, (b) those set out in regulation for particular types of undertakings, or (c) those designed by the proponent."[244] The Minister is to "approve the terms of reference, with any amendments that he or she considers necessary, if he or she is satisfied that an EA prepared in accordance with the approved terms of reference will be consistent with the purpose of [the] Act and the public interest."[245]

Another important amendment made by Bill 76 was the introduction of harmonization provisions, which apply "if another jurisdiction imposes requirements with respect to an undertaking to which [the] Act applies" and "if the Minister considers the requirements imposed by the other jurisdiction to be equivalent to the requirements imposed under [the *Environmental Assessment Act*]."[246] These harmonization provisions give the Minister the power to issue an order varying or dispensing with requirements imposed under the Act in order to "facilitate the effective operation of the requirements of both jurisdictions." This includes issuing an order declaring that the Act does not apply to the undertaking.

Several other amendments to Ontario's EA regime introduced by Bill 76 include:

- The introduction of a legal requirement to consult with the public, including during the development of the terms of reference, during the preparation of an individual or class EA document, and once the final EA document is submitted to the Minister of the Environment;

- The codification of class EAs. The Minister of the Environment retains the authority to "bump up" an undertaking that would otherwise fall within a class assessment to require a full EA;

- The introduction of time limits throughout the EA process;

[242] Bill 76, *supra* note 240, cl 3, s 5(2).
[243] *Environmental Assessment Act*, *supra* note 61, s 6(2)(c).
[244] Valiante, *supra* note 217 at 224.
[245] *Environmental Assessment Act*, *supra* note 61, s 6(4).
[246] Bill 76, *supra* note 240, cl 2, s 3.1.

- Changes in the process for EA decision-making:
    - an EA document no longer needs to be explicitly accepted, although it may be rejected;
    - the only final approval decision to be made is on the approval of an undertaking;

- The introduction of a formal mediation process to resolve issues at two stages: before approval of the terms of reference or following government review and prior to a final decision on the application;

- The replacement of the use of exemption orders for undertakings otherwise subject to the Act with the power to "declare that this Act, the regulations or a matter provided for under the Act does not apply with respect to a proponent, a class of proponents, an undertaking or a class of undertakings."[247]

Ontario's EA legislation has remained largely the same since the amendments made by Bill 76 in 1996. The following section of the report sets out in detail the process to be followed for individual EAs under Ontario's current *Environmental Assessment Act*, and briefly outlines the general requirements under the streamlined class and screening assessment process.

3.1.3.2 Individual EAs

Individual EAs, which constitute a very small minority of assessments under the Act, are "prepared for large-scale, complex projects with the potential for significant environmental effects."[248] These types of projects require approval from the either the Minister of the Environment or the Environmental Review Tribunal ("ERT"), where the matter has been referred to the ERT for a public hearing under the Act.[249] Individual EAs, which are sometimes also referred to as comprehensive assessments in the literature, follow eight general steps, outlined below.[250] A graphic depicting the comprehensive EA process has been included as **Appendix 3.**

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[247] *Ibid,* cl 2; See Valiante, *supra* note 217 for a full review of the amendments made by Bill 76.
[248] Government of Ontario, "Preparing Environmental Assessments" (2019), online: <www.ontario.ca/page/preparing-environmental-assessments> [Government of Ontario, "Preparing EAs"].
[249] *Environmental Assessment Act*, *supra* note 61, s 5.
[250] These eight steps were taken from: Government of Ontario, "Preparing EAs," *supra* note 248.

1. ***Develop and Submit a Terms of Reference***: section 6
    - The proponent must submit a Notice of Commencement to the Director of the Environmental Assessment and Permissions Branch.
    - The proponent must give the Ministry of the Environment the proposed terms of reference governing the preparation of an EA for the undertaking.
    - The proponent is advised to consult with the public, Indigenous communities and government agencies while preparing the terms of reference. A consultation report must be included with submission of the proposed terms of reference.
    - The proponent must give public notice of the proposed terms of reference and allow members of the public to comment on the document, the deadline for which is to be included in the public notice.
    - The Minister of the Environment will consider any public comments received before the deadline, as well as the public interest, in deciding whether to approve the proposed terms of reference.

2. ***Prepare an Environmental Assessment***: s 6.1
    - The proponent must submit a Notice of Commencement to the Director, Environmental Assessment and Permissions Branch.
    - The EA must be prepared in accordance with the approved terms of reference.
    - There are no limits on how much time a proponent can take to prepare the EA document.

3. ***Submit an Environmental Assessment***: s 6.2
    - The EA document must be submitted to the Ministry of the Environment for review and decision.

4. ***Public and Government Review***: ss 6.3 and 6.4
    - The proponent must give public notice of the submission of the EA document.
    - The Ministry of the Environment coordinates public and government review of the document submitted.
    - The Ministry consults with: government experts, Indigenous communities, the public, and any other interested party.
    - The public has 7 weeks to comment.

5. ***Ministry of the Environment Review***: s 7
    - The Ministry of the Environment prepares a review of the EA, and takes into account any comments received from members of the public received within the deadline, as well as the proponent's response to the comments.
    - The Minister of the Environment will assess whether the proponent is in compliance with the approved terms of reference and the purpose of the

Environmental Assessment Act, and may direct the proponent to address and deficiencies.

- The Minister of the Environment may reject the EA if the deficiencies are not remedied within 7 days.

6. ***Public Consultation on the Ministry Review***: ss 7.1 and 7.2
   - The public, government agencies, Indigenous communities or any other interested party has 5 weeks to provide comments to the Ministry of the Environment on their review of the EA.
   - During this time, anyone may provide written comments identifying any outstanding issues with suggestions for how they might be resolved, or may request that the proponent's application, or a portion of it, be referred to the ERT for a hearing and decision.

7. ***Minister or Tribunal Decision***: ss 9, 9, 9.1, 9.2, 9.3, 10, 11, 11.1, 11.2, 11.3, 11.4
   - Once the public consultation is finished, the Minister has 13 weeks to make a decision.
   - The Minister may: (a) refer the project to mediation; (b) refer the application to the ERT for a hearing, or; (c) make a decision to approve, approve with conditions, or refuse the project.

8. ***Implement the Project and Monitor Compliance***:
   - Following approval, the proponent must gather other approvals as needed before construction can begin.
   - The proponent must report on how they have complied with commitments in the EA and the conditions of the approval.

Despite the intense flurry of mineral claim activity that has taken place in the Ring of Fire, very few individual EAs have been initiated under the *Environmental Assessment Act*. Noront initiated the EA process for their "Eagle's Nest" project in April 2011, one of the focal mining projects within the region. While the project was required to undergo a comprehensive EA under *CEAA*, Noront voluntarily subjected the project to the requirements of an individual EA Ontario's EA legislation. As part of this process, Noront provided a Project Description to both provincial and federal authorities in April 2011. Final federal guidelines for completing an Environmental Impact Statement under the *Canadian Environmental Assessment Act* were issued to Noront in January 2012, and Terms of Reference to satisfy the provincial EA requirements were submitted to Ontario

in October 2012.[251] Noront undertook baseline environmental studies to examine the mine site and access road corridor, and on December 20, 2013, Noront issued a Draft Environmental Impact Statement and Environmental Assessment Report for the "Eagle's Nest" project. This document was intended to satisfy both provincial and federal environmental assessment processes.[252] The most recent action taken with regards to this EA was the approval of the provincial Terms of Reference by Ontario's Ministry of Environment in June 2015. This approval set out outstanding issues and concerns raised during the review by government agencies, Aboriginal communities, and others, and detailed the requirements for the preparation of Noront's environmental assessment.[253] No licences, authorizations or approvals have been granted for the project, and the EA has since been suspended.

Most recently, Ontario has struck voluntary agreements with Marten Falls First Nation and Webequie First Nation who will be the proponents for the EAs of two road projects in the Ring of Fire region.

3.1.3.3 Streamlined Class and Screening EAs

Streamlined EAs constitute the overwhelming majority of assessments completed, and are frequently used "for routine projects that have predictable and manageable environmental effects."[254] These assessments differ from individual EAs as proponents follow a self-assessment and decision-making process, rather than approval being granted to each individual project.[255] The stream-lined self-assessment process includes class EAs,[256] as well as three categories of screening assessments provided for by regulation for electricity projects,[257] waste management projects,[258] and transit projects.[259]

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[251] Noront, "Eagle's Nest Ni-Cu-PGE Mine: Environmental Assessment" (2018), online: <norontresources.com/projects/eagles-nest-mine/reserves-resources/>.
[252] Knight Piésold Consulting, *supra* note 63 at ES-5.
[253] Government of Ontario, "Noront Eagle's Nest Multi-metal Mine", *supra* note 61.
[254] Government of Ontario, "Preparing EAs," *supra* note 248.
[255] *Ibid.*
[256] *Environmental Assessment Act*, *supra* note 61, Part II.1.
[257] *Electricity* Projects, O Reg 116/01.
[258] *Waste Management Projects*, O Reg 101/07.
[259] *Transit Projects and Metrolinx Undertakings*, O Reg 231/08.

Of most relevance to the Ring of Fire are class EAs, under Part II.1 of the *Environmental Assessment Act*. Ontario currently has 11 class EAs, which cover things including: "municipal road, sewage and water infrastructure, highway construction and maintenance, conservation authority works, transit projects, and other public sector activities such as forestry, resource management, and transmission lines."[260] Under these classes, EAs are effectively "pre-approved," meaning that "proponents may proceed directly with the project (without review or approval by the Minister or ERT), provided that the proponent has fully complied with the prescribed class EA requirements, and has otherwise obtained all other necessary instruments required by law."[261] A proponent must follow the planning, documentary and consultation requirements prescribed by the approved class EA, which are generally less extensive than what would be required by an individual EA.[262]

Should a class EA have significant outstanding environmental concerns that are not resolved through the prescribed class assessment process, anyone may request that the Minister of the Environment issue a Part II Order to require a project proponent to prepare an individual EA for the project.[263] A bump-up request may be submitted after the proponent has issued a public notice of completion for the assessment. Members of the public may review the EA report, and request that the Minister bump up a streamlined project to a comprehensive assessment within 30 days. A graphic depicting the streamlined EA process, including the bump-up request process, has been included as **Appendix 4.**

3.1.3.4 Ongoing Challenges with the Environmental Assessment Act

Critics of Ontario's EA regime have long pointed to the fact that the legislation has never lived up to its full promise. When first introduced in 1976, the Act had a very broad mandate, but the government hastily limited the application of the legislation by regularly exempting projects and streamlining approvals through the introduction of less-than-

[260] Government of Ontario, "Preparing EAs," *supra* note 248.
[261] Richard D Lindgren & Burgandy Dunn, "Environmental Assessment in Ontario: Rhetoric vs Reality" (2010) 21 J Envtl L & Prac 279 at 284.
[262] *Ibid* at 284.
[263] *Environmental Assessment Act*, *supra* note 61, s 16.

rigorous assessment processes.[264] Ontario's EA processes have repeatedly garnered the attention of public interest organizations, as well as provincial watchdogs. Both the Environmental Commissioner of Ontario and the Auditor General of Ontario have criticized the regime in their annual reports.

In the 2007/2008 Annual Report from the Environmental Commissioner of Ontario, then Commissioner Gord Miller wrote that "Ontario has long been burdened with an environmental assessment system where the hard questions are not being asked, and the most important decisions aren't being made […] The province has increasingly stepped away from some key environmental assessment decision-making responsibilities […]."[265] Miller urgently called for a new vision for EA, stating that "the *Environmental Assessment Act* has, over time, suffered so many truncations and add-ons that it no longer bears much resemblance to its original, idealistic self."[266] Specific points of critique in the Miller's report include the fact that "no" is rarely an option under the Act, as projects are almost never rejected, the lack of integration between EA and the land use planning process, and that the need for projects and undertakings is not often subject to scrutiny.[267]

More recently, the 2016 Annual Report of the Office of the Auditor General of Ontario found that "Ontario's environmental assessment process needs to be modernized and aligned with best practices in Canada and internationally. Because the Act is 40 years old – and is, in fact, the oldest environmental assessment legislation in Canada – it falls short of achieving its intended purpose."[268] Points of critique raised by the Auditor General included:

- Ontario is the only Canadian jurisdiction in which EAs are generally not required for private-sector projects;

- EAs are not completed for many significant government plans and programs;

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[264] Gord Miller, "Getting to K(no)w: Annual Report, 2007-2008" (2008) at 30, online (pdf): *Environmental Commissioner of Ontario* <docs.assets.eco.on.ca/reports/environmental-protection/2007-2008/2007-08-AR.pdf>.
[265] *Ibid* at 28.
[266] *Ibid* at 37.
[267] *Ibid* at 38.
[268] Bonnie Lysyk, "3.06: Environmental Assessments" in *2016 Annual Report Volume 1, Chapter 3: Reports on Value-for-Money Audits* (2016) at 338, online (pdf): *Office of the Auditor General of Ontario* <www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf>.

- The public is not informed about most projects;
- The type of assessment required for a particular project is often not based on the project's potential environmental impact;
- The cumulative effects of multiple projects are usually not assessed; and
- The Ministry does not have effective processes to ensure that projects are implemented as planned.[269]

One of the most glaring holes in the *Environmental Assessment Act*, which has vast implications for the Ring of Fire, is that the Act does not apply to mining projects. Despite the fact that Ontario is the largest mineral producer in Canada,[270] Ontario is the only jurisdiction in Canada that does not apply its EA regime to mining projects.[271] This is because "the *Environmental Assessment Act* does not apply to private companies unless designated by regulation or the company volunteers to be subject to the requirements of the Act."[272] Under the Act, an EA may be required for individual components of a mine site, such as the construction of a road leading to the mine, the mine's electricity generation facility, granting permits on Crown land, and the disposition of Crown resources, all of which are assessed in isolation, and generally through the class EA process.[273] A recent report from MiningWatch Canada compiled a list of 91 mining operations and projects in Ontario detailing whether the projects have undergone either federal or provincial EAs.[274] Of the 91 projects, only 8 have undergone a provincial EA, all of which were voluntary. Noront's "Eagle's Nest" project in the Ring of Fire was one of the 8 projects listed, the EA for which has been suspended for several years. Each of

[269] *Ibid* at 338-340.
[270] *Ibid* at 350.
[271] See MiningWatch Canada, "The Big Hole: Environmental Assessment and Mining in Ontario" (2014), online (pdf): *MiningWatch Canada* <miningwatch.ca/sites/default/files/the_big_hole_report.pdf>: While not all other jurisdictions always undertake rigorous and thoughtful analyses and consultation processes for mines, they at least provide a starting point for this to happen.
[272] Ministry of Energy, Northern Development and Mines, "Ring of Fire Secretariat: Environmental Assessment" (2018), online: *Government of Ontario* <www.mndm.gov.on.ca/en/ring-fire-secretariat/environmental-assessment>; See Lysyk, *supra* note 268 at 347: The only private-sector projects that must be assessed are: electricity, waste management, and large municipal infrastructure projects by private developers.
[273] Ministry of Energy, Northern Development and Mines, *ibid*.
[274] MiningWatch Canada, *supra* note 271 at 18-27.

these 8 assessments were also required to undertake a federal assessment. Of the remaining projects, neither federal nor provincial EA were conducted.[275] The impacts of mining are serious and well-known, and the *Environmental Assessment Act* provides an inadequate legislative regime for assessing and preventing these impacts.

An additional drawback of the *Environmental Assessment Act* is that it does not provide a strong basis for a regional-scale assessment. The Act defines an undertaking as including "an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity by or on behalf of Her Majesty in right of Ontario, by a public body or public bodies or by a municipality or municipalities."[276] Arguably, the provincial government could classify development of the Ring of Fire as a "proposal, plan or program," thus subjecting the entire region to an assessment under the Act. However, this designation would require strong political will.

Further, the *Environmental Assessment Act* does not require assessment of the cumulative impacts that numerous developments within the Ring of Fire may have. Cumulative effects are "changes to the environment that are caused by an action in combination with other past, present, and future human actions."[277] The phrase "cumulative effects" is not explicitly mentioned within the Act, although consideration of cumulative effects should be required under any EA law that mandates assessment of biophysical and socioeconomic effects. Chetkiewicz and Lintner point to the importance of the implications of climate change in Ontario's Far North, arguing that the potential for environmental changes in the subarctic climate is a compelling reason for consideration of cumulative effects in any EA of the Ring of Fire region.[278] Climate change will impact the planning and design of infrastructure for transportation and energy, and historical and baseline data used in the planning or mines and infrastructure may no longer be valid.[279] A cumulative effects assessment would also help to address issues of habitat fragmentation which often results from piece-meal, individual project assessments.

[275] *Ibid.*
[276] *Environmental Assessment Act, supra* note 61, s 1(1).
[277] Chetkiewicz & Lintner, *supra* note 8 at 46.
[278] *Ibid* at 58.
[279] *Ibid.*

Habitat fragmentation impacts wide-ranging species at risk that are present in the Far North, including caribou, through construction of roads, transmission lines, and dams.[280]

Some of these challenges existent in Ontario's EA regime may be supported through the possibility of a harmonized, coordinated, or joint EA process alongside the federal EA regime. Canada and Ontario have entered into an "Agreement on Environmental Assessment Cooperation" which provides for inter-jurisdictional cooperation and coordination in environmental assessment.[281] As evident through the "Eagle's Nest" EA, as well as the newly initiated road EA's for which Marten Falls and Webequie First Nations are proponents, projects within the Ring of Fire may be subject to both federal and provincial EA requirements, or a proponent may voluntarily agree to have their project assessed under the EA requirements of a jurisdiction where they are not statutorily required to do so. Provincially, the *Environmental Assessment Act* contains provisions for harmonization of the EA process, which allow the Minister to vary or dispense with the requirements of the Act where another jurisdiction (i.e. Canada) imposes EA requirements with respect to an undertaking.[282] Federally, where a project is subject to both provincial and federal requirements, the responsible authority of a designated project is obligated to consult and cooperate with particular jurisdictions where that other jurisdiction has powers, duties or functions in relation to an EA of the designated project.[283] Additionally, a federal joint review panel, conducted in cooperation with the province, allows for a more thorough consideration of the impacts of a project under both jurisdictions' EA legislation.[284] Federal EA legislation, including opportunities for collaboration under the proposed Bill C-69, will be explored more fully in the subsequent section of this report.

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[280] *Ibid* at 14.
[281] Canadian Environmental Assessment Agency, "Canada-Ontario Agreement on Environmental Assessment Cooperation" (2004), online: *Government of Canada* <www.canada.ca/en/environmental-assessment-agency/corporate/acts-regulations/legislation-regulations/canada-ontario-agreement-environmental-assessment-cooperation/canada-ontario-agreement-environmental-assessment-cooperation-2004.html>.
[282] *Environmental Assessment Act, supra* note 61, s 3.1.
[283] *CEAA, 2012, supra* note 134, s 18.
[284] *Ibid*, s 40.

3.2 CANADA'S LEGISLATIVE FRAMEWORK

3.2.1 THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT, 2012

As outlined in the preceding section of this report, Ontario's *Environmental Assessment Act* is fraught with gaps in relation to assessing the impacts of mining projects within the province, namely, that the legislation does not apply to private-sector projects, nor allow for a regional or cumulative effects assessment. Fortunately, as jurisdiction over the environment falls to both the provincial and federal government in Canada under the *Constitution Act, 1867* (UK),[285] projects that do not require an EA under provincial legislation may fall within the federal government's authority if the project impacts areas of federal jurisdiction.

Federal EA legislation has been the subject of much legislative amendment since 2012. Presently, the *CEAA, 2012* governs the federal EA process, although the future of this legislation remains uncertain. Bill C-69, introduced by Justin Trudeau's Liberal government in February 2018, would replace *CEAA, 2012* by enacting the *Impact Assessment Act*, should it receive royal assent. Bill C-69 is currently before the Standing Senate Committee on Energy, the Environment and Natural Resources. The following subsections of this report will outline the current EA process in place under *CEAA, 2012* and critique its application in relation to mining projects, briefly identify recent debates and political developments in the field which led to the introduction of Bill C-69, and unpack potential changes in Bill C-69 which may impact EA in the Ring of Fire.

3.2.1.1 The Canadian Environmental Assessment Act, 2012

Canada's current federal EA regime was first introduced by the Conservative government under then Prime Minister Stephen Harper's "Responsible Resource Development Plan" outlined in Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures.*[286] Bill C-38 entered Canada's policy sphere in the economic climate following the global recession of 2008.

[285] Ss 91, 92, 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.
[286] Bill C-38, *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 1st Sess, 41st Parl, 2011-2012 (assented to 29 June 2012, SC 2012, c 19) [Bill C-38].

Following this recession, the Conservative government identified the pursuit of economic growth and job creation as the single most important priority for the government and emphasized the importance of Canada having "the right conditions to attract global capital" to the country so that Canada could "compete with other resource-rich countries around the world for these job-creating investment dollars."[287] The primary goal of the Responsible Resource Development Plan was to streamline the EA process by implementing a "one project, one review" process, eliminating regulatory burdens, and making the assessment process more timely and predictable for proponents.[288] While the Conservative government claimed that *CEAA, 2012* would strengthen environmental protections and promote development of Canada's resources, making the country more attractive for foreign investment, the reality is that much of Canada's lands and waterways were suddenly left vulnerable to harm due to a lack of requisite EA for many proposed projects.

3.2.1.2 Projects Subject to an EA under CEAA, 2012

Perhaps the most significant amendment enacted through Bill C-38 were the changes to which projects were subject to the Act, thus requiring a federal EA. Under the original *CEAA,* which was repealed by Bill C-38, a "trigger approach" was used, based on a federal authority's involvement in a project.[289] Projects required an EA if a federal authority exercised one of several enumerated powers under s.5(1) of the Act, including where a federal authority "issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part" under any Act of Parliament.[290] This provision caught all projects requiring federal permits or approvals such as: a permit for the harmful alteration of fish habitat under s.35(1) of the *Fisheries Act*,[291] a permit for the deposit of a deleterious substance in water frequented by fish under s.36(3) of the *Fisheries Act*, and an approval for construction

[287] House of Commons, Standing Committee on Finance, Subcommittee on Bill C-38 (Part III), *Evidence,* 41-1, No 001 (17 May 2012) at 0905 (Hon Joe Oliver).
[288] *Ibid.*
[289] Ecojustice, "Legal Backgrounder: Canadian Environmental Assessment Act (2012) – Regulations" (2012) at 2, online (pdf): <www.ecojustice.ca/wp-content/uploads/2015/03/August-2012_FINAL_Ecojustice-CEAA-Regulations-Backgrounder.pdf>.
[290] *CEAA*, *supra* note 62, s 5(1)(d).
[291] RSC 1985, c F-14.

that would be “built or placed in, on, over, under, through or across any navigable water” under s.5(1) of the former *Navigable Waters Protection Act.*[292] The former *CEAA* strictly limited projects excluded from assessment to those enumerated on an exclusion list under the *Exclusion List Regulations,*[293] and select other instances identified in s.7 of the Act.[294]

In contrast, *CEAA, 2012* implemented a “project list” approach, where an EA is only contemplated for projects included on the list of “designated projects”. “Designated projects” are those that “have the greatest potential for significant adverse environmental effects in areas of federal jurisdiction.”[295] The discretion to designate projects has been given to the Minister of the Environment.[296] Designated projects that have been listed by the Minister are found in the *Regulation Designating Physical Activities*[297]. Select mining activities have been included on the Project List, although the requirement for an assessment is dictated by a threshold daily production capacity of the mine.[298] The Minister also retains the discretion to designate a physical activity that is not prescribed by regulations if “in the Minister’s opinion, either the carrying out of that physical activity may cause adverse environmental effects or public concerns related to those effects warrant the designation.”[299]

Despite the fact that a project is “designated” in the regulations, an EA is not necessarily required. Under sections 8 to 10 of *CEAA, 2012*, the Canadian Environmental Assessment Agency (the “Agency”) must decide if an EA of the designated project is required. This screening decision is made based on a number of factors, including: a review of the project description provided by the proponent, the possibility that carrying

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[292] RSC 1985, c N-22.
[293] SOR/2007-18.
[294] See *CEAA*, *supra* note 62, s 7: An assessment of a project is not required where the project is to be carried out in response to a national emergency for which special temporary measures are being taken under the *Emergency Act*, RSC 1985, c 22 (4th Supp), and where the project is to be carried out in response to an emergency and carrying out the project forthwith is in the interest of preventing damage to property or the environment or is in the interest of public health or safety.
[295] Government of Canada, “Screening Process under the Canadian Environmental Assessment Act, 2012” (2015), online: <www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/screening-process-under-canadian-environmental-assessment-act-2012.html>.
[296] *CEAA, 2012*, *supra* note 134, s 84(a).
[297] SOR/2012-147.
[298] *Ibid,* ss 16. 17.
[299] *CEAA, 2012*, *supra* note 134, s 14(2).

out the project may cause adverse environmental effects, comments received from the public within 20 days of posting the project description online, and any relevant studies conducted by a committee established by the Act.[300] This discretion is broad, and the Act "offers no clear direction on how this discretion is to be exercised."[301] The Agency has 45 days to make this screening decision for assessments completed both by the Agency as well as by a review panel.[302] However, EAs for designated projects under the authority of the National Energy Board ("NEB") and the Canadian Nuclear Safety Commission ("CNSC") are mandatory.[303]

3.2.1.3 Structure of the EA Process under CEAA, 2012

There are two types of EA under *CEAA, 2012*: an EA by a responsible authority, and an EA by a review panel. A graphic depicting the process for each type of EA has been attached to this report as **Appendix 5.** Both types of assessments may be conducted by the federal government alone, or in cooperation with another jurisdiction such as a province,[304] and both processes begin when a notice of the commencement of the EA process is posted on the Agency Registry internet site.[305]

An EA conducted by a responsible authority is conducted by either the Agency, the NEB, or the CNSC, all three of whom are designated as responsible authorities under the Act.[306] A responsible authority "ensures that an environmental assessment of a designated project is conducted in accordance with *CEAA, 2012,* including ensuring the public is provided with an opportunity to participate in the environmental assessment."[307] This type of EA must be completed within 365 days from when the notice of commencement is posted on the Registry, subject to Ministerial extension of up to three

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[300] *Ibid*, s 10(a).
[301] Meinhard Doelle, "CEAA 2012: The End of Federal EA As We Know It?" (2012) 24 J Envtl L & Prac 1 at 6.
[302] *CEAA, 2012*, *supra* note 134, s 10.
[303] Government of Canada, "Basics of Environmental Assessment" (2018), online <www.canada.ca/en/environmental-assessment-agency/services/environmental-assessments/basics-environmental-assessment.html> [Government of Canada, "Basics of EA"].
[304] *Ibid*.
[305] *CEAA, 2012*, *supra* note 134, s 17. The Registry internet site may be found at: <www.ceaa-acee.gc.ca/050/evaluations/exploration?culture=en-CA>.
[306] *Ibid*, s 15.
[307] Government of Canada, "Basics of EA", *supra* note 303.

months.[308] The time spent by the proponent to fulfill its obligations in the process does not count towards the 365 days. Assessments conducted by the NEB and CNSC look much different than those completed by the Agency.[309] This report will focus on the EA process completed by the Agency, as this process has the most relevance to the Ring of Fire.

An EA conducted by a review panel is conducted by a panel of independent experts appointed by the Minister of the Environment, or in cooperation with another jurisdiction in the case of a Joint Review Panel ("JRP").[310] A JRP may be established where "a proposed project requires an environmental assessment by both the federal government and a province or another jurisdiction."[311] The goal of the JRP process is to avoid duplication. An EA by a review panel or JRP must be completed within 24 months from when the proposed project is referred to a review panel, subject to Ministerial or Cabinet extension of up to three months.[312] Again, the time spend by the proponent to provide information requested by the panel does not count towards the time limit.[313]

An EA may be referred to a review panel by the Minister within 60 days of the notice of commencement of the assessment.[314] This decision is made based on several factors, including: "whether the designated project may cause significant adverse environmental effects; public concerns related to the significant adverse environmental effects that the designated project may cause; and opportunities for cooperation" with another jurisdiction.[315] Designated projects for which the NEB or the CNSC are the responsibly authority may not be referred to a review panel.[316]

The job of the review panel is to "assess whether the environmental impact statement prepared by the proponent is sufficient to proceed to public hearings."[317] Once

[308] *CEAA, 2012*, *supra* note 134, s 27(2).
[309] For example, the NEB holds its own hearing process to meet the requirements of CEAA, 2012. A description of the hearing process can be found at: <www.neb-one.gc.ca/prtcptn/hrng/hndbk/index-eng.html>.
[310] *CEAA, 2012*, *supra* note 134, s 42.
[311] Government of Canada, "Basics of EA," *supra* note 303.
[312] *CEAA, 2012*, *supra* note 134, s 38(3).
[313] *Ibid*, s 48.
[314] *Ibid*, s 38(1).
[315] *Ibid*, s 38(2).
[316] *Ibid*, s 38(6).
[317] Government of Canada, "Basics of EA," *supra* note 303.

the hearing begins, interested parties are allowed to "present evidence, concerns, and comments regarding the potential environmental impacts of the designated project."[318] A review panel has the authority to summon witnesses, and to order witnesses to present information or produce records related to the EA.[319] Again, an EA by a review panel for projects where the responsible authority is the NEB or CNSC is conducted differently than those under the authority of the Agency, and so the focus of this report will solely be on EAs conducted by a review panel where the Agency is the responsible authority.

CEAA, 2012 mandates the consideration of a specific list of factors when completing any type of EA for a designated project, which are enumerated in s.19(1) of the Act. These factors include: the environmental effects of the designated project and the significance of those effects, defined *only* in relation to effects on matters of federal justification[320], comments from the public, mitigation measures that are technically and economically feasible, the purpose of the designated project, and alternative means of carrying it out that are technically and economically feasible.[321]

The EA process for a review completed by the Agency and review by a Review Panel where the responsible authority is the Agency follows similar key stages, although there are unique requirements for each EA. The following table provides a side-by-side comparison of each type of EA, identifying where the stages of each overlap, and where they diverge.[322]

Key Stage	Environmental Assessment by the Agency (365 days)	Environmental Assessment by a Review Panel or JRP (24 months)
Project description submitted to the Agency and accepted	If a physical activity is described in the *Regulations Designating Physical Activities* and the Agency is the Responsible Authority, the proponent must provide the Agency with a description of the designated project.	
Screening decision by the Agency on the requirement for an EA	The Agency must decide within 45 days whether an EA is required for the project. If an EA is required, the Agency will post a notice of commencement on the Registry internet site.	

[318] *Ibid.*
[319] *CEAA, 2012*, *supra* note 134, s 45(1)
[320] See *ibid,* s 5(1) for a list of environmental effects that are to be taken into account. These include: impacts on components of the environment that were within the legislative authority of Parliament (fish and fish habitat, aquatic species, migratory birds), impacts to federal lands, projects with effects that would occur outside of Canada, and impacts to Aboriginal peoples.
[321] *Ibid*, s 19(1).
[322] These key stages are taken from: Government of Canada, "Basics of EA," *supra* note 303.

Development of Environmental Impact Statement ("EIS") Guidelines	If an EA is required, the Agency will prepare and post a draft of the EIS Guidelines on the Registry internet site for public comment on the proposed studies, methods and information required in the EIS. The Agency will consider the public comments, and then issue final EIS Guidelines to the proponent.	
Decision whether to refer the EA to a review panel	Within 60 days of the commencement of an EA, the Minister may decide to refer the EA to a review panel.	
Participant funding application period	Eligible individuals, incorporated not-for-profit organizations and Aboriginal groups may apply to the Participant Funding Program[323] for financial support to participate in the federal EA process.	
Comment period on draft review panel Terms of Reference ("TOR") and JRP Agreement	Not Applicable for EAs conducted by the Agency.	For a review panel, the Agency will prepare draft TOR[324] for the review panel and conduct a public comment period. For a JRP, the Agency will work with the other jurisdiction to draft a JRP Agreement, including TOR, and conduct a public comment period. After considering public comments, the Minister (along with the other jurisdiction for a JRP) will issue final TOR and post them on the Registry internet site.
Proponent completes environmental studies and submits EIS to the Agency	The proponent is required to prepare an EIS that identifies and assesses the environmental effects of the project and the measures proposed to mitigate those effects. This is prepared in accordance with the EIS Guidelines issued by the Agency, and is submitted to the Agency for review.	The proponent prepares its EIS according to the EIS guidelines provided by the Agency and submits it to the Agency (and in the case of a JRP, to the other jurisdiction) for review.
Determination on Completeness of the EIS:	The Agency will review the EIS for **completeness** to verify that it contains all the information required by the EIS Guidelines.	The Agency will review the EIS for **completeness** to verify that it contains all the information required by the EIS Guidelines.

[323] Information and the application package for the Participant Funding Program may be found at: <www.canada.ca/en/environmental-assessment-agency/services/public-participation/participant-funding-application-environmental-assessment.html>.
[324] Terms of Reference establish the mandate and authorities of the review panel, as well as the procedures and timelines for the review panel.

	The Agency may require the proponent to provide additional information prior to starting the sufficiency review.	The draft EIS is posted on the Registry internet site in the language in which it was produced. The Agency will solicit comments from the public on the draft EIS. The Agency may request additional information from the proponent based on the comments received. The Agency will then determine whether the EIS contains enough information to allow the review panel, once appointed, to begin its sufficiency review.
Review Panel Appointed	Not Applicable for EAs conducted by the Agency.	Before the end of the completeness review of the draft EIS, the Minister (along with the other jurisdiction in the case of a JRP) will appoint the review panel. They may be appointed from a roster of candidates established and maintained by the Agency. The Agency will identify and assess candidates for relevant knowledge, expertise and determine if any bias exists. Once membership is finalized by the Minister, appointments are made public on the Registry internet site.
Determination on Sufficiency of the EIS, including a Public Comment Period:	The Agency will review the draft EIS for **sufficiency** and accuracy. The Agency may require the proponent to provide clarification or additional information to understand the potential environmental effects and the proposed mitigation measures.	The proponent revises the draft EIS based on direction from the government following the completeness review. The final EIS is submitted to the review panel for a **sufficiency** review: the review panel will review the EIS to determine if the information provided is sufficient to proceed to public hearings. If it is not sufficient, it may require additional information from the proponent. The review panel will also hold a public comment period on the proponent's EIS to assist in determining the sufficiency of the EIS.

Agency Process: Comment Period on the EIS *Review Panel Process: Public Hearings Held*	A summary of the EIS and the EIS Report is posted on the Registry internet site in the language in which it was produced. The public can comment on the potential environmental effects of the project and the proposed measures to prevent or mitigate those effects The proponent revises the EIS based on public comment, and submits the revised EIS to the Agency for subsequent **sufficiency** review.	Once the review panel determines that it has sufficient information, it will provide notice prior to the start of public hearings. The review panel has a duty to hold public hearings in a manner that offers any interested parties an opportunity to participate. The hearing process will allow the review panel to obtain the information required to complete its assessment of the potential environmental effects of the proposed project.
Agency prepares draft EA report	The Agency drafts the EA report that includes the Agency's conclusions regarding the potential environmental effects of the project, the mitigation measures that were taken into account and the significance of remaining adverse environmental effects and follow-up program requirements.	Not Applicable for EAs conducted by a Review Panel.
Comment period on draft EA report	The public may comment on the draft EA report.	Not Applicable for EAs conducted by a Review Panel.
EA report submitted	The Agency finalizes the EA report and submits it to the Minister of the Environment to inform his or her EA decision.	The review panel prepares its report containing conclusions, rationale and recommendations, and submits the report to the Minister of the Environment. The report will contain a summary of the comments received from the public, recommended mitigation measures and follow-up program requirements. A JRP Report will also contain recommendations to the other jurisdiction. The Minister will use the review panel's report to determine whether adverse environmental effects are likely to be significant.

Determination of whether significant adverse environmental effects are justified	If the Minister's decision is that the project is likely to cause significant adverse environmental effects, the matter is referred to the Governor in Council (Cabinet) who will then decide if the likely significant adverse environmental effects are justified in the circumstances.
Minister issues the EA decision statement with enforceable conditions	The EA decision statement includes the determination of whether the project is likely to cause significant adverse environmental effects. Conditions with respect to mitigation measures and a follow-up program that the proponent must comply with for the proposed project to be carried out are set out in the decision statement by the Minister. ** For JRPs, the other jurisdiction will follow its own decision-making process upon receiving the review panel report. Each jurisdiction retains its independent decision-making responsibility. **
Regulatory decision making	If required, decisions on regulatory permits and approvals from federal departments and agencies that would permit the project to proceed can only be made after EA is complete.
Implement mitigation measures and follow-up program	Mitigation measures identified in the EA decision statement are incorporated in the EA decision statement and incorporated into the design plans and implemented with the project. A follow-up program is also implemented to verify that the EA was accurate and the mitigation measures were effective.

3.2.1.4 Collaboration with Other Jurisdictions under CEAA, 2012

CEAA, 2012 allows for collaboration with other jurisdictions throughout the EA process in limited ways. One option for collaboration is through the statutory requirement for consultation and cooperation with other jurisdictions. S.18 of the Act stipulates that "the responsibility authority with respect to a designated project – or the Minister if the environmental assessment of the designated project has been referred to a review panel under section 38 – must offer to consult and cooperate with respect to the environmental assessment of the designated project."[325] This requirement is limited to certain jurisdictions, including provincial governments, bodies established under a land claims agreement referred to in s.35 of the *Constitution Act, 1982*, governing bodies established under legislation that relate to the self-government of Indians, and foreign states.[326]

CEAA, 2012 also allows for substitution of the EA process "if the Minister is of the opinion that a process for assessing the environmental effects of designated projects that

[325] *CEAA, 2012, supra* note 134, s 18.
[326] *Ibid*, s 2(1).

is followed by the government of a province […] would be an appropriate substitute."[327] However, this substitution is precluded where the EA proceeds by way of a review panel, or where the responsible authority is the NEB or the CNSC.[328] As evident in the text of s.32(1), this option for substitution is only open to provinces, effectively enabling a province to take over the EA of a project that would otherwise require assessment federally. As will be evident in the subsequent discussion of Bill C-69, the range of possibilities for collaboration and completion of the EA process is one aspect of the EA process that has been subject to discussion and amendment, and a broader range of actors may have authority to conduct aspects of an EA should the new Bill receive Royal Assent.

3.2.2 FEDERAL ENVIRONMENTAL ASSESSMENT REFORM

3.2.2.1 Political Developments resulting in EA Reform

The past two years has brought yet another flurry of debate about the trajectory of federal EA within Canada. The reforms implemented through Bill C-38 under former Prime Minister Stephen Harper sparked fierce public outcry and concern over the state of environmental governance in Canada, and major project approvals such as the Northern Gateway Pipeline, the Site C Dam, and the Muskrat Falls Hydroelectric Project became hotly contested political issues, as the public perceived the EA process to have lost legitimacy. These issues brought on by Harper fed directly into the 2015 federal election, as Justin Trudeau and the Liberal Government ran on an election platform of delivering "Real Change" to Canadians – change that would reduce these political conflicts by making EAs "credible again."[329]

Following the Liberal Government's majority election in October, 2015, Minister of Environment and Climate Change Catherine McKenna was assigned the mandate of bringing this "real change" to Canada's EA laws with the goal of regaining public trust, getting resources to market, and restoring "robust oversight and thorough EAs of areas

[327] *Ibid,* s 32(1).
[328] *Ibid*, s 33.
[329] Liberal Party of Canada, "Real Change: A New Plan for a Strong Middle Class" (2015) at 42, online (pdf): <www.liberal.ca/wp-content/uploads/2015/10/A-new-plan-for-a-strong-middle-class.pdf>.

under federal jurisdiction."[330] In addition, the Government immediately introduced five principles to guide its decision-making on major natural resource projects, which included the Trans Mountain Pipeline and Energy East Pipeline projects at that time.[331] The interim principles were intended to ease the controversy over these major projects and govern project EA while the Government undertook the necessary work to reform the legislative scheme.[332]

Minister McKenna established a four-person Expert Panel in August 2016, tasked with conducting a review of federal EA processes and associated regulatory processes.[333] The Expert Panel travelled across the country, and heard from more than 1,000 participants in-person, received 520 written submissions, and 2,673 responses to an online survey to gain feedback from the public about the EA process that were left in place from Harper, and of what they hoped to see in a new package of legislation.[334] The findings of the Expert Panel, released in their Final Report in March, 2017, revealed that Canadians across the country felt that a new assessment process was needed, one which would move beyond consideration of just the bio-physical environment towards a full sustainability assessment, and would be "transparent, inclusive, informed, and meaningful."[335] The Expert Panel recommended moving from EA to a more broad IA, and

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[330] Justin Trudeau, "Minister of Environment and Climate Change Mandate Letter" (12 November 2015), online: *Prime Minister of Canada* <pm.gc.ca/eng/minister-environment-and-climate-change-mandate-letter>.

[331] See: Charles J Birchall & Giselle Davidian, "Federal Government Releases New Interim Principles for Natural Resource Development Projects Currently Under Regulatory Review" (28 January 2016), online (blog): *Willms & Shier LLP* <www.willmsshier.com/docs/default-source/articles/article---federal-government-releases-new-interim-principles-for-natural-resource-development-projects-currently-under-regulatory-review---cjb-gd---january-28-2016.pdf?sfvrsn=2>. The five "interim" principles were: "1) The views of the public and affected communities will be sought and considered; 2) Indigenous People will be consulted and their rights and interests accommodated; 3) Both direct and upstream greenhouse gas (GHG) emissions of projects under review will be assessed; 4) Decisions will be based on science, traditional Indigenous knowledge and other relevant evidence; and 5) No project proponent will be asked to return to the starting line – project review will continue within the current legislative framework [that left in place by Harper] and in accordance with treaty provisions, under the auspices of relevant responsible authorities and Northern regulatory boards."

[332] *Ibid*.

[333] Expert Panel Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa: Canadian Environmental Assessment Agency, 2017) at 9, online (pdf): *Government of Canada* <www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>.

[334] *Ibid* at 87.

[335] *Ibid* at 2.

envisioned a new governance model under a single authority to restore legitimacy and trust to the EA process, removing the roles of the NEB, the CNSC, and the Canadian Environmental Assessment Agency as responsible authorities.[336] The Expert Panel also captured the importance of land and water to Indigenous peoples across the country, which is "the source of all life and Aboriginal rights and title, but also the source and keeper of their history, their future and their laws."[337] The Expert Panel recommended that "Indigenous peoples be included in decision-making at all stages of EA, in accordance with their own laws and customs", in alignment with the principles of UNDIRP.[338]

Following the Expert Panel Review Process and Final Report, the Government released a Discussion Paper, which outlined the changes it was considering for Canada's new EA and regulatory processes.[339] The goals of the Government in implementing changes were to: "regain public trust; protect the environment; advance reconciliation with Indigenous peoples; ensure good projects go ahead, and resources get to market."[340] To much disappointment, the Discussion Paper, released in June, 2017, did not adopt the sweeping and necessary changes presented by the Expert Panel in their Final Report, but opted to maintain the existing EA regime, making several minor improvements. The overall governance structure was to remain the same, with the aims of: addressing cumulative effects assessment; increasing early engagement and planning; improving transparency and public participation; incorporating science, evidence, and Indigenous knowledge; partnering with Indigenous peoples; and, cooperating with jurisdictions.[341] While adopting the recommendation to transition to IA, the Discussion Paper was decidedly vague with regards to the specifics of what the assessment process would look like, leaving much up in the air while the drafting of new legislation took place.

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[336] *Ibid* at 52.
[337] *Ibid* at 26.
[338] *Ibid* at 30.
[339] Government of Canada, "Environmental and Regulatory Reviews: Discussion Paper" (2017), online (pdf): <www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/share-your-views/proposed-approach/discussion-paper-june-2017-eng.pdf>.
[340] *Ibid* at 3.
[341] *Ibid* at 8.

3.2.3 BILL C-69 AND THE PROPOSED *IMPACT ASSESSMENT ACT*

The Government released its new IA regime, contained in Part I of Bill C-69 on February 8, 2018, after more than 18 months of consultation. In many ways, Bill C-69 introduces a shift in Canada's approach to project assessment, although the Bill also hangs tightly to the existing framework within *CEAA, 2012.* Most notably, the Bill represents a shift from the concept of EA to IA, putting sustainability at the forefront of the assessment process. This is reflected in the Preamble and Purpose provisions of the proposed Act, as well as within the enumerated factors that must be taken into account when conducting an IA. Under the new regime, all IAs must now consider a broad list of environmental, social, health and economic factors, including cumulative effects, the impact of designated projects on Indigenous groups, the purpose and need for the designated project, impacts on Canada's international climate obligations, and the project's contribution to sustainability.[342]

3.2.3.1 Structure of the IA Process under Bill C-69

While Bill C-69 largely maintains the structure of IA as established in *CEAA, 2012*, the proposed *Impact Assessment Act* would introduce a new early planning phase to the assessment process which aims to facilitate multijurisdictional collaboration and early public engagement. An image depicting the proposed new IA process is attached to this report as **Appendix 6.** The early planning phase begins with the proponent of a designated project providing the new Impact Assessment Agency ("IAA") with an initial description of the project, which is also posted online for public access.[343] During this phase, which lasts up to 180 days, five deliverables are developed: 1) an IA Cooperation Plan; 2) an Indigenous Engagement and Partnership Plan; 3) a Public Participation Plan; 4) Tailored Impact Statement Guidelines; and 5) a Permitting Plan (if required).[344] This early planning and engagement has the goal of providing "early identification and engagement with potentially impacted Indigenous groups, regulators, departments,

[342] Bill C-69, *supra* note 135, cl 1, s 22(1).
[343] *Ibid,* cl 1, s 10.
[344] Government of Canada, "Better Rules for Major Project Review to Protect Canada's Environment and Grow the Economy: A Handbook" (5 September 2018) at 5, online (pdf): <www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/ia-handbook-e.pdf>

stakeholders, and the public," and would allow for project design to benefit from this early community input by adapting to issues that are raised early.[345] Funding would be available for Indigenous communities at this stage of the IA process.[346] At the end of the early planning phase, the IAA must decide whether an IA of the designated project is required.[347] This means that, despite the fact that a project may be designated and listed on the project list, an IA is not automatically required for all projects, and the government retains discretion. Should an IA be required, the IA process begins with a notice of commencement issued by the IAA. This must be issued within 180 days from the begging of the early planning phase.[348] The notice of commencement sets out the information or studies that the IAA considers necessary for it to conduct the IA, and also includes any of the five deliverables, identified above.[349]

Following this early planning phase, the IA process largely mirrors the current process under *CEAA, 2012.* If an IA is required for a project, the proponent then begins to prepare a draft Impact Statement in accordance with the Impact Statement Guidelines issued in the notice of commencement at the completion of the early planning phase. The proponent has three years to gather this information and complete necessary studies, subject to extension by the IAA. Once this information gathering stage is completed, the IA review begins. There are three options for conducting an IA:

1) ***IA led by the IAA***: The IAA assesses the Impact Statement and prepares a draft Impact Assessment Report, which is posted online for public comment.[350] The report must set out the effects that are likely to be caused by carrying out the designated project, including indication of adverse effects that are within federal jurisdiction.[351] In finalizing the report, the IAA must take into account any comments received from the public, as well as Indigenous knowledge provided with respect to the project, and must set out the IAA's conclusions, including any mitigation measures and follow-up programs.[352] This type of IA may take up to a

[345] *Ibid* at 7.
[346] *Ibid.*
[347] Bill C-69, *supra* note 135, cl 1, s 16; This decision is based on the following factors: the potential for adverse effects, impacts on Indigenous rights, public comments, and any relevant regional or strategic assessments that have been conducted, or studies or plans for the region.
[348] *Ibid*, cl 1, s 18.
[349] *Ibid.*
[350] *Ibid,* cl 1, s 28(1).
[351] *Ibid*, cl 1, s 28(3).
[352] *Ibid*, cl 1, ss 28(2), 28(3.1), 28(3.2).

maximum of 300 days.[353] In conducting the IA, the IAA may delegate to a jurisdiction defined within the Act any part of the IA of the project and the preparation of the report with respect to the IA.[354] The Minister may also approve a substitute IA process of a qualifying jurisdiction to meet the requirements under the Act is they are satisfied that particular conditions are met.[355] As will be discussed in Part 4 of this report, "jurisdiction" includes "Indigenous governing bodies," allowing for Indigenous-led assessment of the impacts of a project where the delegation or substitution powers have been engaged.

2) ***IA led by a Review Panel or JRP***: Within 45 days of the notice of commencement of an IA, the Minister may refer the IA to a review panel if it is in the public interest.[356] The Minister must establish the Panel's terms of reference and appoint one or more members "who are unbiased and free from any conflict of interest relative to the designated project and who have knowledge or expertise relevant to the designated project's anticipated effects or have knowledge of the interests and concerns of the Indigenous peoples of Canada that are relevant to the assessment."[357] If this option is pursued, the review panel must complete the IA an submit an IA report to the Minister within 600 days from the appointment of the panel, subject to Ministerial or Cabinet extension.[358] The Minister may also decide to establish a JRP with another jurisdiction, including an Indigenous governing body, except where the designated project includes physical activities that are regulated under the *Nuclear Safety and Control Act* or the *Canadian Energy Regulator Act*.[359]

3) ***IA led by an Integrated Review with Lifecycle Regulators***: The Minister is required to refer the IA of a designated project to a review panel if the project includes physical activities that are regulated under the *Nuclear Safety and Control Act* or the *Canadian Energy Regulator Act.*[360] These review panels are subject to unique appointment rules, with at least one of the persons appointed coming from a roster on the recommendation of the regulator.[361] Despite the time limit provisions for other review panels, IAs for activities falling within this category are subject to a stricter time limit of 300 days.[362] This time limit may be extended to a

[353] *Ibid*, cl 1, s 28(2)
[354] *Ibid*, cl 1, s 29.
[355] *Ibid*, cl 1, ss 31(1), 33(1).
[356] *Ibid*, cl 1, s 36(1).
[357] *Ibid*, cl 1, s 41(1).
[358] *Ibid*, cl 1, ss 37(1), 37(3), 37(4).
[359] *Ibid*, cl 1, s 39.
[360] *Ibid*, cl 1, s 43.
[361] *Ibid*, cl 1, ss 44, 47.
[362] *Ibid,* cl 1, s 37.1(1).

maximum of 600 days if the Minister issues an order, with reasons for the extension, prior to the notice of commencement of the IA.[363] Substitution is not allowed for this category of IA.[364]

For IAs conducted by a review panel within categories 2 and 3, the review panel has statutorily mandated duties. These include ensuring that the information that it uses when conducting the IA is made available to the public, and "holding hearings in a manner that offers the public an opportunity to participate meaningfully."[365] The review panel also has the power to summon any person to appear as a witness before it, and may order the witness to give evidence either orally or in writing, and to produce records necessary for conducting the IA.[366] The review panel may also require the proponent of the designated project to collect information and undertake studies that are necessary for the IA by the review panel.[367]

The fourth stage in the IA process is decision-making. Under Bill C-69, decision-making for an IA remains with the Minister and Cabinet. For IAs conducted by the IAA under category 1, including substituted processes approved under this stream, the Minister must take into account the IA report compiled at the completion of the IA process and determine if the effects within federal jurisdiction, including adverse direct or incidental effects, are in the public interest.[368] The Minister may also refer this determination to Cabinet.[369] The decision for projects subject to an IA by a review panel within categories 2 and 3, identified above, goes directly to Cabinet which must then make the same public interest determination, having taken into account the IA report as well as the effects of the project.[370] In making this public interest determination for all types of IAs, both the Minister and Cabinet must base their decision on the following factors:

- The extent to which the designated project contributes to sustainability;

[363] *Ibid*, cl 1, s 37.1(2).
[364] *Ibid,* cl 1, s 32.
[365] *Ibid*, cl 1, s 51(1).
[366] *Ibid,* cl 1, s 53(1).
[367] *Ibid*, cl 1, s 38.
[368] *Ibid*, cl 1, s 60(1)(a).
[369] *Ibid*, cl 1, s 60(1)(b).
[370] *Ibid*, cl 1, s 62.

- The extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the IA report in respect of the designated project are adverse;

- The implementation of the mitigation measures that the Minister or Cabinet, as the case may be, considers appropriate;

- The impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by s.35 of the *Constitution Act, 1982*; and

- The extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.[371]

Despite these enumerated factors guiding decision-making, Bill C-69 does not include any requirement preventing the Minister or Cabinet from approving a project that is inherently unsustainable, or that violates international commitments such as UNDRIP.[372] There is also no barrier to the decision-maker giving economic benefits more weight than environmental impacts, nor any requirement that the Minister or Cabinet justify how they reached the public interest determination or justified environmental trade-offs.[373] Once a decision is reached, the Minister must issue a decision statement to the proponent of the project that outlines: the determination reached by the Minister or Cabinet, including reasons for the determination, and conditions established that must be complied with, the time period within which the proponent must substantially begin to carry out the project, and a description of the project.[374] There is no right of appeal for this decision.

There is no option for joint decision-making within Bill C-69 with jurisdictions such as Indigenous governing bodies, despite the fact that delegation or substitution is an option within the proposed Act. Other jurisdictions are limited to assessing the impacts of

[371] *Ibid,* cl 1, s 63.
[372] Anna Johnston, "Questions and Answers about Canada's Proposed New *Impact Assessment Act*" (2019) at 4, online (pdf): *West Coast Environmental Law* <www.wcel.org/sites/default/files/publications/2019-02-wcel-revisedqanda-iaaact.pdf>.
[373] *Ibid* at 5, 8.
[374] Bill C-69, *supra* note 135, cl 1, s 65.

the project and providing a report outlining findings and recommendations to the IAA, but cannot exercise decision-making power over the project. This represents a derogation from the government's commitment to fully implement UNDRIP, and also contradicts the recommendations from the Expert Review Panel which called for recognition of Indigenous laws and inherent jurisdiction through a collaborative framework, including the requirement for FPIC.[375]

Finally, there is an increased possibility for Indigenous involvement through the implementation of follow-up programs following the completion of an IA. The IAA has the power to establish research and advisory bodies related to IA, and monitoring committees for the implementation of follow-up programs and adaptive management plans, "including with respect to the interests and concerns of Indigenous peoples or Canada."[376] Details surrounding these bodies have not been established.

3.2.3.2 Projects Subject to an IA under Bill C-69

Presently, there is a lack of clarity about which projects will be subject to assessment under Bill C-69, although the Bill largely maintains the *CEAA, 2012* approach to what receives an assessment. The Government has indicated its intentions to maintain the existing *Regulations Designating Physical Activities*, which contains the Project List that was gutted by Harper, and has asked the public to bring suggestions for amendment through a Consultation Paper.[377] As outlined in the description of the early planning phase, designated projects do not necessarily require an IA. Designated projects must undergo in initial screening, wherein the IAA must consider whether an IA is required, based on a list of factors enumerated in clause 1, s.16(2). Projects that are not included on the project list may be designated by the Minister if they determine that potential adverse effects or public concerns warrant an assessment.[378] Anyone may request that a project be designated, and the Minister has an obligation to respond to this request,

[375] Expert Panel Review of Environmental Assessment Processes, *supra* note 333 at 29.
[376] Bill C-69, *supra* note 135, cl 1, s 156(2).
[377] Government of Canada, "Consultation Paper on Approach to revising the Project List: A Proposed Impact Assessment System" (2018), online (pdf): <www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/consultation-paper-approach-revising-project-list.pdf>.
[378] Bill C-69, *supra* note 135, cl 1, ss 9(1), 9(2).

with reasons, within 90 days.[379] Ministerial designated projects remain subject to the IAA screening process.

3.2.3.3 Public Participation Under Bill C-69

A notable change within Bill C-69 is the elimination of restrictions on who may participate in an assessment. Under *CEAA, 2012*, standing for participation was limited to "interested parties" who were "directly affected" by the designated project.[380] This has been eliminated from Bill C-69. While Bill C-69 highlights "meaningful participation" as a goal of the proposed Act, there is a lack of clarity around that this will look like in practice, as the term is not defined. Bill C-69 does mandate the establishment of participant funding programs at three key points in the IA process. These include: 1) the early planning phase, 2) during the IA process where the designated project is referred to a review panel, including during the design or implementation of follow-up programs in relation to these assessments, and 3) for regional and strategic assessments.[381] However, where the Minister approves the substitution of an IA process, these participant funding obligations do not apply.[382]

3.2.3.4 Regional and Strategic IA Under Bill C-69

The necessity for regional and strategic IAs was one point that was heavily advocated for during the consultation process leading up to Bill C-69. Regional IA is "used to assess baseline conditions and the cumulative impacts of all projects and activities within a defined region" and strategic IAs are used to evaluate the implications of government plans, programs and policies on project IAs.[383] The Expert Review Panel recommended that future IA legislation require regional IAs "where cumulative impacts may occur or already exist on federal lands or marine areas, or where there are potential consequential cumulative impacts to matters of federal interest."[384] The Panel suggested the creation of a Schedule to any proposed legislation identifying priority areas. With

[379] *Ibid*, cl 1, s 9(4).
[380] *CEAA, 2012*, *supra* note 134, s 2(2).
[381] Bill C-69, *supra* note 135, cl 1, s 75(1).
[382] *Ibid*, cl 1, s 75(2).
[383] Expert Panel Review of Environmental Assessment Processes, *supra* note 333 at 76, 81
[384] *Ibid* at 80.

regards to strategic IA, the Panel recommended that "IA legislation require that the IA authority conduct a strategic IA when a new or existing federal policy, plan or program would have consequential implications for federal project or regional IA" and that "strategic IA [should] define how to implement a policy, plan or program in project and regional IA."[385]

Bill C-69 enables regional and strategic assessments but does not require them – initiation of a regional or strategic assessment is left to the discretion of the Minister. Regional assessment may be done on federal lands, partly on federal lands, or outside federal lands, and anyone may make a request for a regional or strategic assessment, to which the Minister must respond within a prescribed time limit.[386] In conducting regional and strategic assessments, the Minister may direct the IAA to complete the assessment, or may establish a committee with associated terms of reference to complete the assessment.[387] For regional assessments of areas partly or entirely outside federal lands, the Minister may enter into an agreement with another jurisdiction to conduct the assessment.[388] To date, the federal government has indicated a commitment to conduct a strategic assessment in respect of climate change.[389]

The conclusions of a regional or strategic assessment under Bill C-69 are not binding on project-level IA. As per clause 1, s. 22(1), the results of regional and strategic assessments are among a long list of factors to be taken into consideration during an IA. They are not listed as a factor requiring consideration during the Ministerial or Cabinet public interest determination on a project under clause 1, s.63. Additionally, there is little detail respecting how regional and strategic assessments are to be conducted. As Lawyer Anna Johnston outlines

> There are no requirements regarding participation on [regional] or [strategic] terms of reference, no direction that [regional assessments] consider alternative scenarios for development and protection in a region, and no provisions requiring the application or [regional and strategic assessment] outcomes in project assessment or regulatory decision-making.[390]

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[385] *Ibid* at 82-83.
[386] Bill C-69, *supra* note 135, cl 1, ss 92, 93, 97(1).
[387] *Ibid*, cl 1, ss 92, 93, 95.
[388] *Ibid*, cl 1, s 93(1)(a).
[389] Government of Canada, "Strategic Assessment of Climate Change" (2018), online: <www.strategicassessmentclimatechange.ca>
[390] Johnston, *supra* note 372 at 20.

3.2.3.5 Application of Bill C-69 to the Ring of Fire

As Bill C-69 is still before the Senate and has not yet received Royal Assent nor come into force, Bill C-69 will not apply to any EA processes that have already been initiated under current or former EA legislation. Transitional provisions within the Bill address the continuation of comprehensive studies started under *CEAA* as well as EAs initiated under *CEAA, 2012*, including projects such as Noront's "Eagle's Nest" project, which was initiated as a comprehensive study under *CEAA* in 2011.[391] The EAs for both the Marten Falls Community Access Road and the Webequie Supply road are currently awaiting filing of a project description, and Bill C-69 will not apply to these assessments once these project descriptions are filed and the EA formally initiated.

3.3 CANADA'S CONSTITUTIONAL FRAMEWORK

3.3.1 SECTION 35 OF THE CONSTITUTION ACT, 1982

3.3.1.1 Origins and Components of the Duty to Consult and Accommodate

Overlaid on top of all of the aforementioned legislative requirements are constitutional obligations imposed on the Crown, including the DTCA. The DTCA arises from section 35 of the *Constitution Act, 1982*, which states

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.[392]

The DTCA is both a legal and constitutional obligation. As a legal obligation, the DTCA is "based on the Crown's assumption of sovereignty over lands and resources

[391] Bill C-69, *supra* note 135, cl 1, ss 178-183.
[392] *Constitution Act 1982*, *supra* note 14, s 35.

formerly held by Indigenous peoples."[393] The constitutional dimension of the DTCA is grounded in the honour of the Crown and enshrined in s.35 of the *Constitution Act, 1982*.[394] The honour of the Crown is always at stake in dealings with Aboriginal peoples.[395] "In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably"[396] in order to achieve the "reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[397] Reconciliation is a core goal of the process of the DTCA, which flows from the honour of the Crown and "arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in control of that people."[398] More specifically, the honour of the Crown may give rise to a fiduciary duty in instances where the Crown has assumed discretionary control over specific Aboriginal interests.[399] In relation to treaty-making and treaty interpretation, the Crown must avoid the appearance of "sharp dealings,"[400] as the recognition of Aboriginal and treaty rights in s.35 of the *Constitution Act, 1982* represents a promise of rights recognition.[401]

The case of *Haida Nation* is the foundational and leading case articulating principles related to the Crown's DTCA with Aboriginal peoples. First, the DTCA "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."[402] This means that the DTCA arises not only where there is an established right, but also where there is a credible but unproven claim.[403]

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[393] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 19, [2017] SCJ No 40 [*Clyde River*].
[394] *Ibid* at para 19.
[395] Throughout this subsection of the report, the term "Aboriginal" is used to mirror the statutory language under s.35 of the *Constitution Act, 1982*.
[396] *Haida Nation v BC (Minister of Forests)*, [2004] 3 SCR 511 (SCC) at para 17, [2004] SCJ No 70 [*Haida Nation*].
[397] *Delgamuukw, supra* note 36 at para 31.
[398] *Haida Nation*, *supra* note 396 at para 32.
[399] *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245 at para 79, [2002] SCJ No 79.
[400] *Badger, supra* note 216 at para 41.
[401] *Haida Nation*, *supra* note 396 at para 20.
[402] *Ibid* at para 35.
[403] *Ibid* at para 37.

Second, the scope and content of the DTCA may vary, and is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title."[404] The scope of the DTCA also varies with the "seriousness of the potentially adverse effect upon the right or title claimed."[405] The DTCA exists along a spectrum, and different duties are owed according to the strength of the claim. At one end of the spectrum are instances where a claim to Aboriginal title is weak, the Aboriginal right is limited, or the potential for infringement is minor. In these cases, the only duty on the Crown may be to "give notice, disclose information, and discuss any issues raised in response to the notice."[406] At the other end of the spectrum lie instances "where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high."[407] In these cases, the DTCA requires deep consultation, which may include the opportunity to make submissions, formal participation in the decision-making process, and the provision of written reasons.[408] The scope of the DTCA and duties owed by the Crown are assessed on a case-by-case basis.

Third, legal responsibility for the DTCA remains with the Crown, as it is a positive constitutional duty placed on the Crown. While the Crown may delegate procedural aspects of consultation to proponents or may rely on steps undertaken by a regulatory agency (i.e. the Canadian Environmental Assessment Agency or the NEB) to fulfill the DTCA in whole or in part, the ultimate responsibility for ensuring the DTCA is met lies with the Crown. The honour of the Crown cannot be delegated to proponents, and the Crown may need to take further measures upon completion of a regulatory process in order to ensure the DTCA was adequate.[409]

Finally, the DTCA has been described as a "two-way street," and good faith is required on both sides.[410] Obligations are imposed on both parties to the consultation. This means that the Crown must have the intention of substantially addressing the

[404] *Ibid* at para 39.
[405] *Ibid* at para 39.
[406] *Ibid* at para 43.
[407] *Ibid* at para 43.
[408] *Ibid* at para 44.
[409] *Ibid* at para 53; *Clyde River*, *supra* note 393 at para 22.
[410] *Haida Nation*, *supra* note 396 at para 42.

Aboriginal community's concerns through the process of the DTCA. The specific obligations of the Crown in each instance of consultation vary with the strength of the claim, as outlined above. Aboriginal complainants who are parties to consultation "must not frustrate the Crown's reasonable, good faith attempts" nor "take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultations, agreement is not reached."[411] Other obligations imposed on Aboriginal communities include defining the elements of their claim with clarity.[412]

3.3.1.2 Challenges with the Application of the Duty to Consult and Accommodate in Resource Development Projects

The requirement to fulfill the DTCA arises frequently in relation to resource development projects, and disputes over the requirement and scope of this constitutional duty often spark litigation between Indigenous communities and the Crown. Where an Indigenous community has an established or asserted Aboriginal or treaty right, the Crown is required to consult with the communities whose rights could be impacted by the development. When consultation goes awry, whether because impacted communities were overlooked and not consulted or where the parties disagree on the necessary scope of consultation, and a project approval or licence is issued despite this potentially inadequate consultation, Indigenous communities may commence a judicial review of the project approval. As the goal of the DTCA is to achieve reconciliation between the parties to the consultation, litigation is an unsatisfactory result, which does not often does not promote this ultimate goal. Courts have explicitly said that "true reconciliation is rarely, if ever, achieved in courtrooms."[413] The cost of litigation also makes this a prohibitive option for many Indigenous communities. Many communities face frequent infringement of their rights through multiple resource development projects within their traditional territory and cannot afford to pursue litigation for each instance of inadequate consultation. Communities often do not even have the capacity or funding to support their meaningfully engagement in the consultation process in the first place, as participant funding programs

[411] *Ibid* at para 42.
[412] *Ibid* at para 36.
[413] *Clyde River, supra* note 393 at para 24.

through provincial and federal EA processes are inadequate or non-existent and development proposals numerous.[414] As a result, communities may be left with no remedy for infringements of their rights due to the inaccessibility of the justice system. In response to this challenge, Indigenous communities have issued documents such as Consultation Protocols, which set out the requirements for an adequate consultation process that the Crown or project proponents must abide by, including the provision of funding for the Indigenous community to meaningfully participate in the consultation process. This issue is explored further in Part 4 of this report.

A second challenge inherent in the DTCA is that the DTCA is primarily aimed at providing procedural rights rather than substantive rights. While regulatory processes such as the EA process may work to fulfill the requirements of the DTCA, the existing framework, as well as the proposed framework under Bill C-69, does not envision a joint decision-making process for resource development projects within the traditional territories of Indigenous communities. The DTCA provides Indigenous communities with the right to be consulted and may result in project amendments and accommodations with respect to established or asserted Aboriginal or treaty rights. However, the DTCA does not give Indigenous communities the right to veto a development project, as outlined above, and does not require that the Crown obtain FPIC from Indigenous communities for all projects. FPIC is a requirement mandated by the United Nations Declaration on the Rights of Indigenous Peoples and is discussed below in the subsequent subsection of this report. This lack of requirement for consent has been one factor giving rise to an increase in Indigenous-led IA processes, as communities have sought to evaluate the impacts of proposed projects and exercise decision-making authority in accordance with their own governing practices and Indigenous legal traditions. A full review of Indigenous-led IA practices can be found in Part 4 of this report.

3.4 INTERNATIONAL OBLIGATIONS

[414] Expert Panel Review of Environmental Assessment Processes, *supra* note 333 at 31-32.

3.4.1 THE *UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*

3.4.1.1 Overview of the Development of UNDRIP

In addition to the domestic legal obligations and statutes outlined above, international legal obligations also shape and influence the actions of Canada. A final factor of the legislative framework impacting development of the Ring of Fire is UNDRIP. UNDRIP was adopted into international law by the UN General Assembly in 2007, where it received support from 144[415] States, with 4 States voting in opposition (Australia, Canada, New Zealand, and the United States of America), 11 States abstaining from the vote, and 34 absences.[416] UNDRIP represented a "major turning point for the promotion and protection of Indigenous peoples' rights,"[417] and, today, is the

> most comprehensive international instrument on the rights of Indigenous peoples. It establishes a universal framework of minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous peoples.[418]

UNDRIP "addresses both individual and collective rights; cultural rights and identity; rights to education, health, employment, language and others", and "affirms the rights of Indigenous peoples to remain distinct and to pursue their own priorities in economic, social, and cultural development."[419]

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[415] Official records from the UN General Assembly indicate that 143 States voted in support of UNDRIP. However, "subsequently the delegation of Montenegro advised the Secretariat that it had intended to vote in favour" of UNDRIP. As a result, some sources list 143 votes in favour of UNDRIP while others indicate 144. See: United Nations, General Assembly, Press Release, GA/10612, "General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President" (13 September 2007), online: <www.un.org/press/en/2007/ga10612.doc.htm>.

[416] United Nations Department of Economic and Social Affairs, "United Nations Declaration on the Rights of Indigenous Peoples" (2007), online: *United Nations* <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

[417] Brenda L Gunn, "Overcoming Obstacles to Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada" (2013) 31 Windsor YB Access Just 147 at 148.

[418] *Ibid*.

[419] Council for International Development, "United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP): Understanding New Zealand's responsibilities under UNDRIP" (2019), online (pdf): <www.cid.org.nz/assets/Key-issues/Human-development/Convention-Series-8-UNDRIP.pdf>.

UNDRIP is unique in that it is the "only declaration in the UN which was drafted with the rights-holders, themselves, the Indigenous peoples."[420] Development of the Declaration took several decades and moved slowly, as several States, particularly those who voted in opposition, expressed concerns with core elements of the document, "namely the right to self-determination of Indigenous peoples, and the control over natural resources existing on Indigenous peoples' traditional lands"[421] including provisions related to free, prior and informed consent. Throughout the negotiation of UNDRIP, many concessions and amendments were made to the original text, although the final Declaration largely achieves the goals of Indigenous peoples. These concessions included the language around self-determination, as oppositional states feared that its inclusion in the Declaration would undermine State sovereignty, giving Indigenous peoples' unbridled rights over lands, territories and self-government. As a result, the final version of UNDRIP adopted by the UN General Assembly includes language stating its commitment to State sovereignty with an emphasis on individualistic and liberal human rights, as the principles of UNDRIP are to be implemented according to domestic laws and policies.[422] In practice, this means that UNDRIP is to be implemented through the settler laws of signatory States, a point which has been largely critiqued by scholars as this limits the overall effectiveness and power of the Declaration.[423] Despite these concessions, UNDRIP "challenges or at least pushes the liberal human rights paradigm by explicitly referring to the right to self-determination, embracing the collective rights and expressing an understanding of the interrelationship between the right to heritage, land and development" and represents a positive development in the realization of many of these fundamental rights for Indigenous peoples around the world.[424]

[420] Victoria Tauli-Corpuz, "Statement of Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous Issues, on the Occasion of the Adoption of the United Nations Declaration on the Rights of Indigenous Peoples" (2007) 11:3 Austl Indigenous L Rev 1 at 1.
[421] United Nations Department of Economic and Social Affairs, *supra* note 416.
[422] Karen Engle, "On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights" (2011) 22:1 Eur J Intl L 141 at 143.
[423] See: Engle, *Ibid*.
[424] *Ibid* at 142.

3.4.1.2 Key Articles in UNDRIP Relevant to Land and Land Governance

There are several key articles of UNDRIP that relate directly to land, and the governance of land of Indigenous peoples, which are directly applicable to natural resource extraction and development. First, the principle of FPIC is central within UNDRIP and gives Indigenous communities the right to offer or withhold consent to developments that may have an impact on their territories or resources. Several criteria must be met in order for FPIC to exist:

- ***Free*****:** consent must be obtained without force, coercion, intimidation, manipulation, or pressure from the government or company seeking consent;

- ***Prior*****:** there must be sufficient time to review and consider all relevant factors, starting at the inception stage, in advance or any authorization for, and continuously throughout the planning and implementation of activities;

- ***Informed*****:** consent must be granted based on an understanding of adequate, complete, understandable, and relevant information relative to the full range of issues and potential impacts that may arise from the activity or decision; and

- ***Consent*****:** consent can only be given by the legitimate representatives of the peoples affected, with any caveats or conditions stipulated by the people whose consent is given.[425]

UNDRIP provides specific examples of instances where FPIC is required from Indigenous peoples, "specifically, though not only, in situations where a development project may affect Indigenous lands and territories or the resources therein."[426] Article 32 is particularly relevant to the Ring of Fire. It reads:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free and informed consent prior** to the approval of any project

[425] Ginger Gibson & Gaby Zezulka, "Understanding Successful Approaches to Free, Prior, and Informed Consent in Canada. Part I" (2015), online (pdf): *Boreal Leadership Council* <borealcouncil.ca/wp-content/uploads/2015/09/BLC_FPIC_Successes_Report_Sept_2015_E.pdf> at 8.
[426] *Ibid* at 9.

> affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[427]

UNDRIP calls for FPIC from Indigenous peoples in several other circumstances, including: relocation from their lands and territories,[428] in implementing legislative or administrative measures that may affect Indigenous communities,[429] the taking of their cultural, intellectual, religious, or spiritual property,[430] and the storage of hazardous materials on Indigenous lands.[431]

FPIC imparts a different standard on resource development projects than Canada's current constitutional requirement of the DTCA. Under the duty to consult and accommodate, Indigenous communities cannot exercise a veto over decisions about what can be done with the land in cases where their Aboriginal rights or title claims have not yet been proven.[432] The standard of consent exists only where established rights has been made out, such as Aboriginal title, and even then, the Crown can infringe on these rights in certain circumstances.[433] In contrast, FPIC cannot exist where an Indigenous community does not have the option to meaningfully withhold consent.[434] As Professor Shin Imai points out, while the standard of consent has not been adopted by governments or the courts, "industry practice has largely moved to the consent standard in the form of Impact Benefit Agreements" which are negotiated directly between proponents and Indigenous communities.[435] It is arguable whether Indigenous communities in can truly offer meaningful consent in situations where there are vast power and economic imbalances between themselves and the Crown or project proponents.

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[427] UNDRIP, *supra* note 28 at Article 32 [emphasis added].
[428] *Ibid* at Article 10
[429] *Ibid* at Article 19.
[430] *Ibid* at Article 11.
[431] *Ibid* at Article 29.
[432] *Haida Nation*, *supra* note 396 at para 48.
[433] *Ibid*.
[434] Gibson & Zezulka, *supra* note 425 at 8.
[435] Shin Imai, "Consult, Consent and Veto: International Norms and Canadian Treaties" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto, ON: University of Toronto Press, 2017) at 405.

Second, and directly intertwined with FPIC, UNDRIP also addresses the issue of governance and decision-making authority over lands and resources. Article 18 of UNDRIP reads:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

In combination with Part 1 of Article 32, outlined above, UNDRIP stresses the importance that Indigenous communities should be able to determine what uses are made of their lands, and that these decisions be made by the communities themselves, in accordance with their customary decision-making methods. As UNDRIP is to be applied through the domestic laws of signatory nations, these articles may manifest themselves through independent or joint decision-making models within the EA regime. This point was articulated by the Expert Review Panel report in relation to EA processes. The Expert Review Panel stated that

> Explicitly acknowledging the ability of Indigenous Peoples to be directly involved in decision-making also allows for the recognition of their right to self-determination and their inherent jurisdiction, and enables them to protect and uphold a suite of other rights – basic human rights as expressed through UNDRIP, as well as their s.35 Aboriginal and treaty rights.
>
> UNDRIP is clear that all decision-making processes that impact the rights of Indigenous Peoples must be in accordance with the distinctive governance institutions, laws and customs of the relevant Indigenous Peoples. Accordingly, Indigenous Peoples must have the ability to select their own representatives to participate on their behalf within EA processes, and maintain and develop internal decision-making institutions and distinctive customs.[436]

Indigenous governance over land is not currently recognized under *CEAA, 2012*, and is also absent from the proposed *Impact Assessment Act*, as Bill C-69 does not suggest a model for joint decision-making, nor the requirement for Indigenous consent prior to project approval. As a result, Indigenous governance over lands and resources has been exhibited by communities opting to engage in their own IA processes, which will be explored thoroughly in the subsequent section of this report.

[436] Expert Panel Review of Environmental Assessment Processes, *supra* note 333 at 29.

3.4.1.3 The Adoption of UNDRIP in Canada

Canada has a contested history with UNDRIP, being one of only four Nations that initially voted in its opposition. Along with the United States of America, Australia and New Zealand, Canada has a settler-colonial history, and had initial reservations about endorsing the document. At that time, Canada publicly stated the country had significant

> Concerns with respect to the wording of the current text, including provisions on lands, territories and resources; on free, prior and informed consent when used as a veto; on self-government without recognition of the importance of negotiations; on intellectual property; on military issues; and on the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, Member States and third parties.[437]

Canada also stated that "the provisions in the Declaration on lands, territories and resources [were] overly broad and unclear and are susceptible of a wide variety of interpretations, discounting the need to recognize a range of rights over land and possibly putting into question matters that have already been settled by treaty in Canada."[438]

Canada initially gave a qualified Statement of Support under the minority Conservative government of Stephen Harper in November, 2010, but it wasn't until 2016, nearly a full decade after the adoption of UNDRIP, Canada announced its adoption of the Declaration with no reservations or qualifications.[439] Indigenous and Northern Affairs Minister Carolyn Bennett stated at the UN's Plenary Session on May 10, 2016 that "by adopting and implementing the Declaration, we [the Canadian government] are excited that we are breathing life into s.35 [of the *Constitution*] and recognizing it as a full box of rights for Indigenous Peoples in Canada."[440] This announcement came shortly after the 2015 election of Justin Trudeau and his Liberal majority government, a government that has continually expressed commitment to rebuilding relationships with the country's First Nation, Métis and Inuit peoples.[441] Trudeau campaigned on an election platform that

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[437] UNGAOR, 61st Session, 107th Plen Mtg, UN Doc A/61/PV.107 (2007).
[438] *Ibid*.
[439] Tim Fontaine, "Canada Officially Adopts UN Declaration on Rights of Indigenous Peoples," *CBC News* (10 May 2016), online: <www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272>.
[440] *Ibid*.
[441] The Aboriginal and treaty rights of First Nations, Métis and Inuit peoples are recognized and affirmed by s.35 of the *Constitution*.

promised “a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition, rights, respect, co-operation and partnership.”[442] Adoption and implementation of UNDRIP was one of the Calls to Action under the Truth and Reconciliation Commission, which the Government has also committed to implementing, and is seen by many as a necessary step in achieving reconciliation with Indigenous peoples.[443]

3.4.1.4 Implementation of UNDRIP in Canada

The decision of Canada to implement UNDRIP through s.35 of the *Constitution* may have limiting effects on the power of the Declaration to achieve its objectives, causing an implementation gap, particularly in the area of environmental assessment. Many EA disputes that have found their way to the judiciary have revolved around disputes over lands and resources on traditional territories of Indigenous communities. Often, these disputes are among the most controversial, and the political nature of these disputes was one reason the Liberal government vowed to reform EA processes to better involve Indigenous communities and implement the principles of UNDRIP. Rather than achieve reconciliation, EA processes have exacerbated conflict and increased the burden on Indigenous communities. There is a widespread belief that current EA processes fail to adequately account for Indigenous rights, resulting in a lack of trust in EA processes, lack of confidence in EA decisions, and decisions from Indigenous communities to either not participate in EA processes, or to create their own parallel and independent assessment frameworks, as outlined in the subsequent section of this report.[444]

Implementation of UNDRIP was a core focus of the Expert Review Panel process, with both the Expert Panel report and numerous participants putting forward suggestions for reforming Canada’s current EA processes, which have caused increasing conflict in

[442] Liberal Party of Canada, *supra* note 329 at 46.
[443] See Truth and Reconciliation Commission of Canada, 2012, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 4; Call to Action No. 43 from the TRC states: “We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.” Call to Action No. 44 states: “We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*.”
[444] Expert Panel Review of Environmental Assessment Processes, *supra* note 333 at 26.

recent years. Two key areas of focus were: participation in decision-making in accordance with Indigenous Peoples' own institutions, laws and customs (Article 18 of UNDRIP); and the principle of FPIC (Article 19 of UNDRIP).[445] The Panel stated that

> Explicitly acknowledging the ability of Indigenous Peoples to be directly involved in decision-making also allows for the recognition of their right to self-determination and their inherent jurisdiction, and enables them to protect and uphold a suite of other rights – basic human rights as expressed through UNDRIP, as well as their s.35 Aboriginal and treaty rights.
>
> UNDRIP is clear that all decision-making processes that impact the rights of Indigenous Peoples must be in accordance with the distinctive governance institutions, laws and customs of the relevant Indigenous Peoples. Accordingly, Indigenous Peoples must have the ability to select their own representatives to participate on their behalf within EA processes, and maintain and develop internal decision-making institutions and distinctive customs.[446]

Despite the Government of Canada's strong discourse around the implementation of UNDRIP, Bill C-69, which sets out the government's proposed new IA regime, fails to adopt these key recommendations from the Expert Panel. Rather than making transformative changes to address the numerous shortfalls of the existing EA process, the government opted to begin its work by making incremental changes to the existing broken model, a model which has failed to give life to UNDRIP in the past.

3.4.1.5 The Legal Status of UNDRIP in Canada as an Instrument of International Law

Finally, it is important to note that UNDRIP is a Declaration rather than a Convention. Canada has argued that this distinction means that UNDRIP is not legally binding under international law, and that it is "only political in nature, that it does not create any procedural or substantive rights, and that it is not customary international law," as UNDRIP is merely an aspirational document.[447] However, several arguments can be made against this position taken by Canada. First, the presumption of conformity "requires that Canadian law be interpreted consistent with Canada's international

[445] *Ibid* at 27.
[446] *Ibid* at 29.
[447] Yvonne Boyer, "Using the UN Framework to Advance and Protect the Inherent Rights of Indigenous Peoples in Canada" in Terry Mitchell, ed, *The Internationalization of Indigenous Rights: UNDRIP in the Canadian Context* (Waterloo: Centre for International Governance Innovation, 2014) 11 at 13.

obligations."[448] As "declarations are part of the development of international legal norms and by voting in favour of the Declaration, states have indicated a commitment to uphold the rights contained in it."[449] As an international human rights declaration, the minimum standards for Indigenous rights as set out in UNDRIP should inform domestic law, and domestic law should conform to these international norms.[450] Second, Canadian courts have generally taken the approach that customary international law is adopted into Canadian law, provided there is no express conflict, where Canada has not taken the position as a persistent objector.[451] Given Canada's endorsement of UNDRIP, along with other positive actions taken in the international forum, Canada clearly recognizes and accepts a core set of Indigenous peoples' rights, and this it can be argued that rights contained in UNDRIP "reflect customary international law [and] should be incorporated into Canadian law."[452] Despite these arguments, UNDRIP has yet to be successfully cited and fully endorsed by the SCC, limiting Canada's action on UNDRIP to being primarily within the political realm, through federal government announcements such as the ten "Principles respecting the Government of Canada's Relationship with Indigenous Peoples"[453] and the creation of a "Recognition and Implementation of Rights Framework".[454]

Domestically, a Private Member's Bill from New Democratic Party NDP MP Romeo Saganash was introduced in the House of Commons in April 2016, and received support from the federal Liberal government in November 2017. [455] Bill C-262, titled the *United*

[448] Gunn, *supra* note 417 at 167.
[449] Council for International Development. *supra* note 419 at 1.
[450] Boyer, *supra* note 447 at 13.
[451] Gunn, *supra* note 417 at 164.
[452] *Ibid* at 165.
[453] Department of Justice, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" (2017), online: *Government of Canada* <www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.
[454] Justin Trudeau, "Government of Canada to Create Recognition and Implementation of Rights Framework" (14 February 2018), online: *Prime Minister of Canada* <pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework>; Justin Trudeau, "Remarks by the Prime Minister in the House of Commons on the Recognition and Implementation of Rights Framework" (14 February 2018), online: *Prime Minister of Canada* <pm.gc.ca/eng/news/2018/02/14/remarks-prime-minister-house-commons-recognition-and-implementation-rights-framework>.
[455] John Paul Tasker, "Liberal Government Backs Bill that Demands Full Implementation of UN Indigenous Rights Declaration," *CBC News* (21 November 2017), online: <www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037>.

Nations Declaration on the Rights of Indigenous Peoples Act,[456] would require the Government of Canada, in consultation and cooperation with Indigenous peoples in Canada, to "take all measures necessary to ensure that the laws of Canada are consistent with the UNDRIP"[457] and would recognize UNDRIP "as a universal international human rights instrument with application in Canadian law."[458] The Bill would also require the Government of Canada, in consultation and cooperation with Indigenous peoples, to "develop and implement a national action plan to achieve the objectives of UNDRIP."[459] Bill C-262 has passed all three readings in the House of Commons, and is currently before the Senate, where it has passed First Reading. It will be crucial to follow any amendments to this Bill, as changes in the mandatory language would derogate from the government's perceived duties to uphold and implement UNDRIP under domestic law.

[456] Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016, (as passed by the House of Commons 30 May 2018)
[457] *Ibid*, cl 4
[458] *Ibid*, cl 3.
[459] *Ibid,* cl 5.

4 REVIEW OF INDIGENOUS-LED APPROACHES TO IMPACT ASSESSMENT

The recent political and legal climate in Canada has led to a robust re-evaluation of the current settler EA process. As outlined in the preceding section of this report, this re-evaluation largely began at the federal level with the election of Prime Minister Justin Trudeau's Liberal government. Trudeau's campaign platform responded to existing dissatisfaction with the laws that were repealed and enacted by Stephen Harper through Bill C-38, and included a promise to restore lost protections to the environment and initiate a review of Canada's environmental assessment and associated regulatory processes.[460] Through the Expert Review Panel process and culminating with the introduction of the proposed *Impact Assessment Act* in Bill C-69, a breadth of discussion over new approaches to EA has gained momentum across the country. In addition to proposed federal legislative changes, these discussions have also led to legislative changes at the provincial level, with British Columbia recently modernizing their provincial legislation with the introduction of Bill 51.[461] Conversations have centred around moving towards approaches labelled by environmental groups as "next-generation" EA and sustainability assessment,[462] with a strong emphasis on the need for strategic and regional assessment in order to properly address cumulative effects, and the need for joint decision-making between settler governments and Indigenous governing bodies.[463]

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[460] Liberal Party of Canada, *supra* note 329 at 41-42.

[461] Bill 51, *Environmental Assessment Act*, 3rd Sess, 41st Parl, British Columbia, 2018 (third reading 26 November 2018).

[462] While the term "sustainability" is a term used frequently throughout the literature around EA reform, the term "sustainability" is not necessarily a term adopted and used by Indigenous communities in completing their own impact assessments. Although "sustainability" is an inherent theme underlying why all of the communities explored in the case studies below are engaging in these types of assessments, the concept is reflected using other terms through their legal traditions and obligations to the land, which have been represented below only to the extent that the communities themselves have included explicit mention of them within their own impact assessment processes.

[463] See: Expert Panel Review of Environmental Assessment Processes, *supra* note 333; Chetkiewicz & Lintner, *supra* note 8; Robert Gibson, Meinhard Doelle & A John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016), 29 J Envtl L & Prac 257; Jason MacLean, Meinhard Doelle & Chris Tollefson, "Polyjural and Polycentric Sustainability Assessment: A Once-In-A-Generation Reform Opportunity" (2016), 30 J Envtl L & Prac 35; Anna Johnston, "Imagining EA 2.0: Outcomes of the 2016 Federal Environmental Assessment Reform Summit" (2016), 30 J Envtl L & Prac 1.

Parallel to these discussions regarding the reform of settler EA law, there has been a recent rise in alternative models to the conventional state-led approach. Indigenous-led IAs of resource development proposals within their traditional territories are one example of a response directly addressing the perceived deficiencies within the current settler approach.[464] Anishinaabe scholar Wapshkaa Ma'iingan (Aaron Mills) argues that both intense conflict with development companies, such as the conflict endured by KI First Nation and the Ardoch Algonquin First Nation, and legal disempowerment by the Crown has inspired Indigenous communities to manifest parts of their law in a positivist form. This has been initiated through a revitalization of their traditional laws, with the goal of facilitating outsider understanding of these laws.[465] As a result of this initiative, "First Nations and other affected communities are more organized, informed, and willing to act in civil and legal ways to ensure their rights and voices are respected, including requiring consent for development and demanding negotiations directly with governments."[466] As Indigenous communities have historically not had meaningful voices nor an active role in decision-making within the settler EA process, Indigenous-led approaches seek to remedy these shortcomings by grounding assessments in the legal traditions and values of respective communities.

4.1 OVERVIEW OF INDIGENOUS-LED IMPACT ASSESSMENT

A 2018 report titled "Impact Assessment in the Arctic: Emerging Practices of Indigenous-Led Review" submitted to the Gwich'in Council provides a working definition of Indigenous-led IA, which will be adopted for the purposes of this report. The authors describe Indigenous-led IA as:

> A process that is completed prior to any approvals or consent being provided for a proposed project, which is designed and conducted with meaningful input and an adequate degree of control by Indigenous-parties – on their own terms and with their approval. The Indigenous parties are involved in the scoping,

[464] The tern IA is used throughout this part of the report when referring to Indigenous-led assessment models, as these assessments signal a broader approach to assessment than conventional EA models.
[465] Wapshkaa Ma'iingan (Aaron Mills), "Aki, Anishinaabek, Kaye Tahsh Crown" (2010) 9 Indigenous LJ 107 at 142.
[466] Chetkiewicz & Lintner, *supra* note 8 at 39.

> data collection, assessment, management planning, and decision-making about a project.[467]

The authors of this report point to a number of developments and factors in recent years that have led to changes in conventional EA processes, particularly in relation to the level of engagement of Indigenous peoples in the process, and their role in decision-making. These factors include:

- Court cases challenging the EA approach, leading to integration of Indigenous culture, rights and knowledge in project decisions;

- The landmark Aboriginal title case of *Tsilhqot'in Nation* which highlighted the growing power of Indigenous communities in relation to land and resource use decision-making;

- Recent commitments towards reconciliation and the adoption of UNDRIP which require a re-visioning of Canada's relationship with Indigenous peoples;

- Modern land claims settled between Canada and Indigenous groups which require that Indigenous culture and rights and decision-making powers are central to effective IA; and

- The increased use of Indigenous-led IA both outside of and alongside the colonial system that more closely match their priorities, worldviews, and legal customs.[468]

Indigenous-led IAs are unique in that they grounded in the legal traditions each individual community or Nation. As a result, they have an enhanced ability to highlight local realities, capacities, challenges, priorities, practices, and cultural values, so as to inform community decision-making moving forward. These types of assessments "often look and work very differently from the existing legislated processes, in part because they are tied to very different goals and aspirations – indeed, entirely separate worldviews."[469] A number of goals that are common for a Nation opting to engage in an Indigenous-led approach to IA include:

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[467] Ginger Gibson et al, "Impact Assessment in the Arctic: Emerging Practices of Indigenous-led Review" (2018) at 10, online (pdf): *Gwich'in Council International* <gwichincouncil.com/sites/default/files/Firelight%20Gwich%27in%20Indigenous%20led%20review_FINAL_web_0.pdf>.
[468] *Ibid* at 11.
[469] *Ibid* at 13.

- Recognition of its inherent rights to govern in its territory and steward its lands and waters;

- Embedding of own governance and decision-making processes into land and resource decision-making;

- Protection of areas in which a specific project is proposed, because it is highly important for cultural, spiritual, or environmental reasons (and concern that the state system may not protect these values);

- Formalizing more deeply engaged planning process than the existing legislated system allows for, which will lead to the nation being able to **accept, reject, or change** the major project in order to accommodate the particular interests of the nation; and

- Engaging its members and leadership more meaningfully into the impact assessment process than the current system allows for.[470]

Common characteristics that distinguish Indigenous-led IA include:

- A process derived from and steeped in the culture, traditional knowledge, and stewardship approach of the nation;

- Explicit assertion that the process and decisions that come out of it are legally binding as legitimate elements of an Indigenous group's overall governance [and] stewardship rights and responsibilities within its territory […];

- A process that meaningfully engages Indigenous group members and their values at many different points, [including] the use of culturally appropriate information sharing and decision-making mechanisms to increase community engagement and understanding of the project and its potential impacts;

- Indigenous laws and norms are at the centre of the process and decision-making;

- Indigenous knowledge is often central to the decisions and brought in systemically through every phase of decision-making. This leads to increased support for the process and ability to socialize information at the community level, and increases the "defensibility" of the findings at the community level;

[470] *Ibid* at 12.

- Cultural values tend to be more broadly defined in Indigenous-led assessment […] and are often at the core of Indigenous-led IA […] There is typically a widely shared intent to ensure that the culture, language and way of life are protected throughout a review;

- More timeline and process flexibility than the legislated IA frameworks;

- More focus on oral discussion of issues and less on paper-driven process steps;

- More emphasis on proponents as information providers, and less on them as estimators of impact of impact significance or acceptability;

- Less separation of valued components into separate silos, and more openness to decision-making on projects as a whole (holistically) against cultural laws and norms, sustainability, effects on future generations, and net gains to Indigenous values; and

- A greater willingness to consider a future without the project if costs are deemed to outweigh benefits, as determined using Indigenous priority criteria and weighting. In other words, Indigenous-led IAs have led to withholding of consent for a major project more often (to date) than is the norm in the legislated EA process.[471]

Indigenous-led approaches to IA completed to date can be broadly categorized into three categories: i) Indigenous-led IAs conducted for particular projects; ii) IAs conducted in partnership with the Crown or project proponent; and, iii) Indigenous-developed IA models, such as cumulative effects management programs and consultation protocols, that are not project-specific, but rather govern development in traditional territory more broadly. Through a case study approach examining selected examples falling within each of these three categories, it will become evident how these Indigenous-led approaches fill a number of the gaps left by the settler legislative regime through the application of the principles identified above, and how they enable Indigenous communities to exercise their inherent jurisdiction over their traditional lands and resources. This case study approach also includes an analysis of how these models, or

[471] *Ibid* at 13.

components of these models, might articulate with Canada's current settler legal regime for EA, where Indigenous authorities support that integration.

4.2 CASE STUDIES OF INDIGENOUS-LED APPROACHES TO IMPACT ASSESSMENT

4.2.1 INDIGENOUS-LED IAs CONDUCTED FOR PARTICULAR PROJECTS

In recent years, there has been a rise of Indigenous-led IAs conducted for particular projects, which have arisen as a result of a number of controversial, large-scale resource development projects that have been proposed in the province. This category of Indigenous-led IA features strongly in British Columba, as many Indigenous communities have not signed historic or modern treaties with the Crown. Projects situated on their traditional territories should rightfully require FPIC before they move forward, although this requirement does not reflect the current state of the settler legal regime. The following case studies seek to outline how different approaches to Indigenous-led IA have been used to grant or withhold consent for particular projects, and address how these assessment models differ from the settler approach to EA.

4.2.1.1 Tsleil-Waututh Nation Assessment of the Kinder Morgan Trans Mountain Pipeline Project

The Tsleil-Waututh Nation ("TWN"), known as the "People of the Inlet," is one of the many groups of Coast Salish peoples living in the Pacific Northwest. The Nation currently has a population of about 500 people, and their traditional territory, which they have occupied since time immemorial, includes the land around the Burrard Inlet in British Columbia, and the waters draining into it.[472] The territory includes approximately 1,900 km^2 of land, encompassing watersheds northwards to Mount Garibaldi, eastwards to Coquitlam Lake, and westward to Howe Sound.[473] The TWN holds Aboriginal title over

[472] Tsleil-Waututh Nation, "Our Story" (2019), online: <twnation.ca/our-story/> [Tsleil-Waututh Nation, "Our Story"].
[473] Tsleil-Waututh Nation, "About Tsleil-Waututh Nation" (2019), online: <twnation.ca/about/> [Tsleil-Waututh Nation, "About"].

part of this land in the eastern Burrard Inlet.[474] Historically, the TWN relied heavily on cycles of hunting, harvesting and preserving foods, and on trade with neighbouring Nations. Today, their primary community is located on the north shore of the Burrard Inlet in North Vancouver.[475] The Nation is not party to any treaty with the Crown and has never ceded or relinquished their responsibility to their territory.[476] They have been in negotiations for a treaty agreement with Canada and British Columbia since 1994.[477]

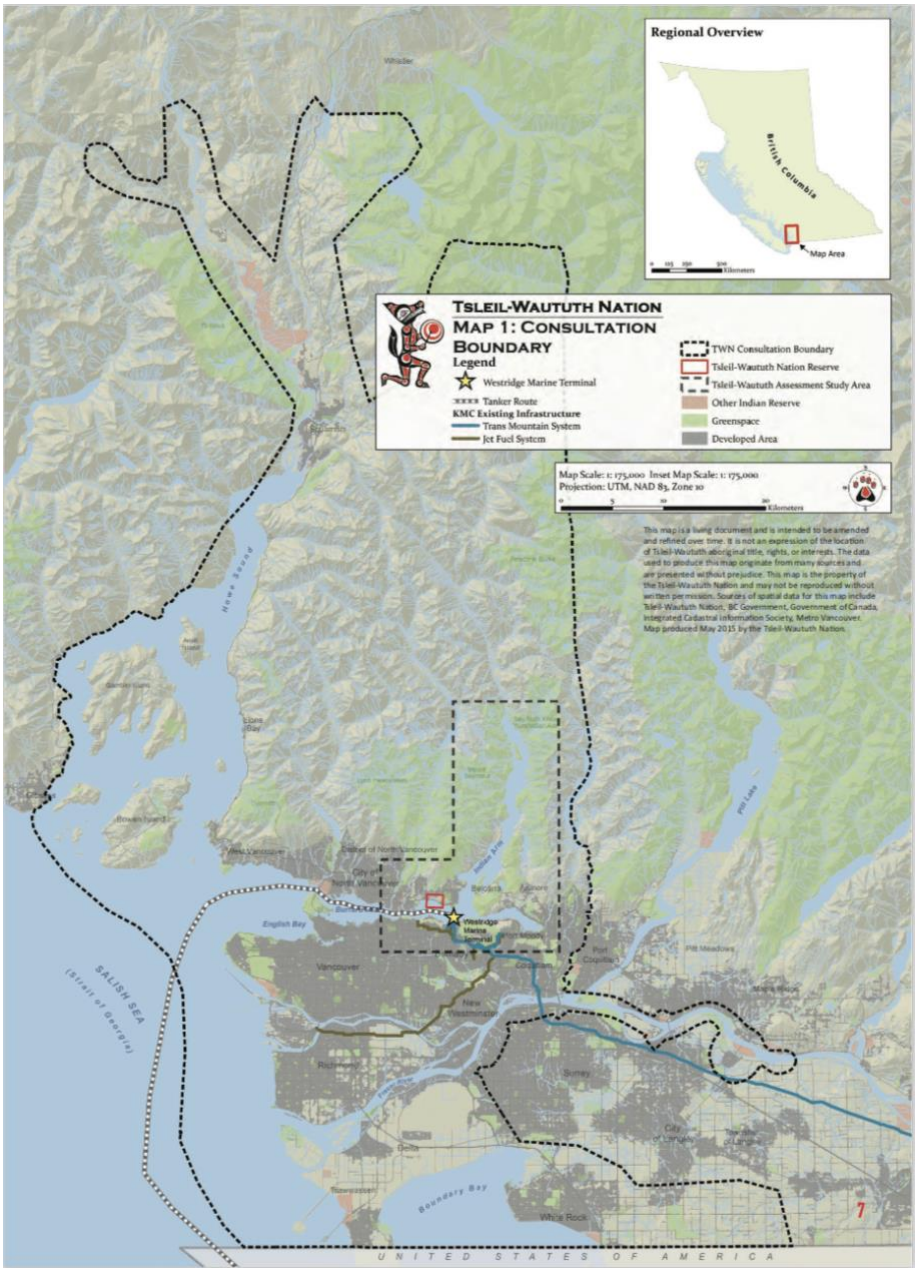
The TWN has a "sacred trust, a responsibility to care for and restore [their] traditional territory to its former state," as they understand that the health of their peoples is interconnected with the land, air and waters of their territory.[478] This is a sacred and legal obligation to "protect, defend and steward the water, land, air, and resources in their territory" and to "maintain or restore conditions that provide the environmental, cultural, spiritual, and economic foundation for the community to thrive."[479] Their "birthright and obligation as Tsleil-Waututh people is to care for the lands and waters of [their] territory to ensure future generations can thrive."[480]

In exercising their sacred trust to the land, the TWN established the Sacred Trust Initiative, whose mandate is to stop the Kinder Morgan Trans Mountain pipeline project that was approved by the federal government to run through their territory without their consent. The Kinder Morgan pipeline project would increase tanker traffic in the Burrard Inlet, and oil spills resulting from the project as well as the construction of the project itself would directly impact their community and irreparably harm their environmental and cultural values.[481] Through the Sacred Trust Initiative, the TWN developed a comprehensive strategy to stop the proposed pipeline, including direct engagement with the federal and provincial governments, legal action in the courts, and public and First Nation outreach. One aspect of this strategy was the completion of an independent IA

[474] Tsleil-Waututh Nation, Treaty, Lands & Resources Department, "Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal" (2015) at 25, online: <twnsacredtrust.ca/assessment-report-download/>.
[475] Clogg et al, *supra* note 33 at 11.
[476] Tsleil-Waututh Nation, "About," *supra* note 473.
[477] Tsleil-Waututh Nation, "Our Story," *supra* note 472.
[478] *Ibid*.
[479] Sacred Trust Initiative, "About Us" (2019), online: *Tsleil-Waututh Nation* <twnsacredtrust.ca/about-us/>.
[480] Tsleil-Waututh Nation, "About," *supra* note 473.
[481] Sacred Trust Initiative, *supra* note 479.

under the community's Stewardship Policy, which is an expression of TWN jurisdiction and law, mandating a review of any proposed development inside the TWN's Consultation Area, pictured below in **Figure 5**.[482] Released in May 2015, the Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal[483] ("the Assessment") highlighted the reasons why the TWN has decided to withhold support for the Kinder Morgan project.

Figure 5: Map Depicting the TWN's Consultation Area[484]



[482] Clogg et al, *supra* note 33 at 12.
[483] Tsleil-Waututh Nation, Treaty, Lands & Resources Department, *supra* note 474.
[484] *Ibid* at 7.

The goal of the Assessment was to examine the potential impacts of the Kinder Morgan project on the TWN's title, rights, and interests. These include: archaeological and cultural heritage sites, contemporary economy, environmental stewardship, resource access and harvest or use, title and governance, and the water.[485] A table listing and describing the nature of all TWN interests that were relevant in the Assessment is included as **Appendix 7**. With regard to the scope and process of completing the Assessment, the TWN assessed the Kinder Morgan project proposal as it was described in the materials filed with the NEB, who was the responsible authority for the purposes of the federal EA process. The Assessment focused on the impacts within the TWN Consultation Area, which is delineated on the map in Figure 5, above.[486] In completing the report, the TWN engaged five experts to provide technical advice about the project proposal, and also relied on the traditional knowledge of TWN members.[487] The Assessment was completed using a two-lens approach, as set out in the TWN Stewardship Policy. The first lens looks at the potential negative effects of the project and seeks to "determine whether the project is a good land-use decision from the perspective of the potential effects in the Consultation Area and under the terms of the Stewardship Policy."[488] If the project proposal passed the first lens, the second lens asks whether the project proposal "will provide benefits to the community that outweigh its negative effects."[489] While community feedback was sought to review and discuss potential effects of the project, ultimate decision-making authority rested with the elected Chief and Council to either grant or withhold consent for the project.[490]

The Assessment itself was grounded in TWN legal principles, which are reflected in the Stewardship Policy. Three principles are outlined in the Assessment report:

1) TWN has a sacred obligation to protect, defend, and steward the water, land, air, and resources of the territory;

[485] *Ibid* at 25.
[486] *Ibid* at 50.
[487] *Ibid*; The five experts retained by TWN provided technical advice on: oil spill risk assessment, oil spill trajectory analysis, the behaviour, fate and consequences of spilled dilbit, and an oil spill air quality assessment.
[488] *Ibid* at 51.
[489] *Ibid* at 51.
[490] *Ibid* at 51.

2) TWN's stewardship obligation includes maintaining and restoring conditions in our territory that provide the environmental, cultural, spiritual and economic foundation for (i) cultural transmission and training, (ii) spiritual preparation and power, (iii) harvest and consumption of safe, abundant wild foods to feed the present community, our ancestors, and other beings, and (iv) control over sharing of resources; and

3) Failure to be "highly responsible" in one's actions toward the people, the Earth, the ancestors, and all beings has serious consequences, which may include (i) loss of physical sustenance, (ii) loss of access to resources or social status, and (iii) loss of the tools and training that allow TWN members to reach their full potential.[491]

The Assessment sought to consider the impacts of the project on TWN title, rights, and interests from a holistic perspective, including interconnected environmental issues as well as cultural, spiritual, legal and governance rights and responsibilities of the TWN.[492] The TWN "combined TWN legal principles, traditional knowledge and community engagement with state of the art expert evidence including expert reports related to oil spill risk, spills and cleanup, human and biophysical health impacts, anthropology and archaeology."[493] The TWN compiled a table listing each of the TWN rights and interests with the corresponding impacts that marine shipping and oil spills would have on each. The TWN also assessed potential cumulative effects of each risk, and the effects that would result for the TWN community.[494] This table is attached to this report as **Appendix 8.** Ultimately, after applying the two-lens approach, the TWN concluded that the project failed at the first lens and recommended that Chief and Council continue to withhold the TWN's support for the project.[495] On the basis of the recommendations, the Chief and Council passed a resolution confirming disapproval of the project under TWN law. The Assessment as well as the resolution were filed as evidence in the NEB's review of the project.[496]

A core component of the TWN assessment was the use of maps. Extensive mapping work was completed as a part of the Assessment in order to outline the TWN's

[491] *Ibid* at 53-55.
[492] Sacred Trust Initiative, *supra* note 479.
[493] Clogg et al, *supra* note 33 at 12.
[494] Tsleil-Waututh Nation, Treaty, Lands & Resources Department, *supra* note 474 at 80-81.
[495] *Ibid* at 86.
[496] Clogg et al, *supra* note 33 at 14.

rights and interests across their traditional territory. Additionally, these maps were used to outline pre-contact baseline conditions to assist in measuring cumulative effects, and to outline the current conditions of the TWN's territory as a result of industrial development throughout the 20th century. Land-use maps were used to outline: TWN village sites,[497] the defensive network historically employed by the TWN,[498] archaeology sites,[499] pre-contact resource use,[500] seasonal movement patterns where the TWN access resources including berries, salmon and other fish, duck, deer, elk, shellfish and mountain goat,[501] the locations of current resource harvesting camps,[502] important bird and fish conservation areas,[503] the locations of marine mammal sightings,[504] major salmon-bearing rivers and streams,[505] and current shellfish gathering sites.[506] Additional mapping was used to show the potential impacts that the project would have on TWN territory. These maps included: the increase in tanker and tug traffic on the Burrard Inlet,[507] oil spill scenario locations,[508] and the location of sensitive habitat in relation to potential oil spill spread.[509]

This TWN Assessment embodies numerous characteristics and goals of Indigenous-led approaches to IA enumerated above. By grounding the assessment in their sacred obligation to their traditional territory, the TWN was able to evaluate the risks and impacts of the Kinder Morgan project against these core community rights and interests using a clear an authoritative assessment process which represented an exertion of their inherent right to govern over their territories.

While the TWN withheld consent for the Kinder Morgan project after completing their IA process, the project was initially approved by the federal government, and the TWN had to resort to litigation as a part of their strategy to advocate against the project's

[497] Tsleil-Waututh Nation, Treaty, Lands & Resources Department, *supra* note 474 at 14.
[498] *Ibid* at 13.
[499] *Ibid* at 15.
[500] *Ibid* at 58.
[501] *Ibid* at 18.
[502] *Ibid* at 19.
[503] *Ibid* at 32-33.
[504] *Ibid* at 34-35.
[505] *Ibid* at 37.
[506] *Ibid* at 38-39.
[507] *Ibid* at 46.
[508] *Ibid* at 67.
[509] *Ibid* at 72-73.

approval. Following the initial EA conducted by the NEB, the federal government granted approval of the Kinder Morgan pipeline, stating that the project was in the national interest, and that if mitigation measures and conditions were implemented, the project would not cause significant adverse environmental effects.[510] TWN was one of several applicants who swiftly launched a successful judicial review of Cabinet's approval of the project, arguing that the NEB's "process and findings were so flawed that [Cabinet] could not reasonably rely on the Board's report" and that Canada failed to fulfil the DTCA owed to Indigenous peoples.[511] The Federal Court of Appeal quashed the Cabinet approval and remitted the project to Cabinet for redetermination, who directed the NEB to reconsider aspects of the project, particularly the impacts of marine shipping on wildlife species and critical habitat identified in the *Species At Risk Act*. After reconsideration, the NEB recommended approval of the project for a second time, and the project decision now rests with Cabinet, who has 90 days to issue a decision on the project that is now federally owned.[512]

4.2.1.2 Stk'emlúpsemc Te Secwépemc Nation Assessment of the KGHM Ajax Gold Mine Project

A second example of a uniquely completed Indigenous-led IA is the Stk'emlúpsemc Te Secwépemc Nation ("SSN") Assessment of the KGHM Ajax Gold Mine Project. The SSN is a governance group of the Secwépemc Nation, and consists of two Indian Bands – the Tk'emlúps te Secwépemc and the Skeetchestn.[513] Also known as "the people of the confluence," the SSN are members of the interior British Columbia Salish Secwépemc peoples, located in the Secwépemc traditional territory at the confluence of

[510] Government of Canada, "Minister Carr Issues Statement regarding Trans Mountain Expansion" (8 April 2018), online: <www.canada.ca/en/natural-resources-canada/news/2018/04/minister-carr-issues-statement-regarding-trans-mountain-expansion.html>.
[511] *Tsleil-Waututh Nation v Canada (AG)*, 2018 FCA 153 at para 4, [2018] 3 CNLR 205.
[512] National Energy Board, "Trans Mountain Pipeline ULC: Application for the Trans Mountain Expansion Project – National Energy Board reconsideration of aspects of its OH-001-2014 Report as directed by Order in Council PC 2018-1177" (2019), online (pdf): <www.neb-one.gc.ca/pplctnflng/mjrpp/trnsmntnxpnsn/trnsmntnxpnsnrprt-eng.pdf>; Department of Finance Canada, Agreement Reached to Create and Protect Jobs, Build Trans Mountain Expansion Project" (29 May 2018), online: *Government of Canada* <www.fin.gc.ca/n18/18-038-eng.asp>.
[513] Stk'emlúpsemc Te Secwépemc Nation, "About" (2019), online: <stkemlups.ca/about/> [SSN, "About"].

the two Thompson Rivers and Kamloops Lake.[514] The SSN has approximately 1,000 members living both on and off reserve, and their traditional territory spans approximately 180,000 km^2.[515] In 2007, the two bands decided to re-unite through a Resource Sharing Protocol Memorandum of Understanding in order to protect their collective interests and strengthen their socio-economic situations.[516] By joining together, they were better positioned to be able to manage the conservation, negotiation and management of resources in their shared territory, as they have done since time immemorial.[517]

KGHM Ajax Mine was one of many resource development project proposals situated within the SSN's territory. Located approximately 2 kilometres southwest of Kamloops, BC, the project was a proposed open pit copper and gold mine, that would have a lifetime of approximately 23 years.[518] The Ajax Mine was situated within an area of significant cultural importance to the SSN, which they refer to as Pípsell, or, Jacko Lake.[519] Oral histories associated with this land, recounted in the Trout Children Story, are foundational to Secwépemc law, and deal with the reciprocal and mutually accountable relationships between humans and the environment.[520] The SSN have asserted Aboriginal rights and title over Secwepemcúlecw (Secwépemc traditional territory), including over Pípsell and the project area, which they assert has never been surrendered or extinguished.[521] In addition to the Trout Children Story, the assessment was grounded in the Memorial to Sir Wilfred Laurier (1910), where the Chiefs of the

[514] Pull Together, "Meet the Nations: Stk'emlupsemc te Secwépemc" (2019), online: <pull-together.ca/tkemlups-te-secwẻpemc/>
[515] *Ibid.*
[516] SSN, "About," *supra* note 513.
[517] *Ibid*.
[518] Canadian Environmental Assessment Agency, "Ajax Mine Project: Joint Federal Comprehensive Study/Provincial Assessment Report" (2017) at iii, online (pdf): *Government of Canada* <www.ceaa-acee.gc.ca/050/documents/p62225/119687E.pdf>.
[519] Stk'emlúpsemc Te Secwépemc Nation, "SSN Pípsell Report: For the KGHM Ajax Project @ Pípsell" (2017) at 22, online (pdf): <drive.google.com/file/d/0B92rPs-T5VkGWVpacENEWTM5MDA/view> [SSN, "Pípsell Report].
[520] *Ibid* at 25.
[521] Stk'emlúpsemc Te Secwépemc Nation, "Decision of the SSN Joint Council on the Proposed KGHM Ajax" (2017) at 3, online: <stkemlups.ca/files/2013/11/3-2017.03.04-SSN-Joint-Council-Decision-Document-.pdf> [SSN, "Decision of the SSN Joint Council"].

interior of British Columbia asserted their title and sovereignty over their respective territories, UNDRIP, and the laws of Canada.[522]

Aspects of the Ajax Mine were assessed under both provincial and federal EA processes through a joint comprehensive assessment under *CEAA*. While the SSN requested to collaborate in carrying out these processes, their request was denied. Due to the inadequacies of the settler approach, the SSN was required to develop their own project assessment process for the Ajax Mine. In doing so, their objective was "to facilitate informed decision-making by the SSN communities in a manner which [was] consistent with [their] laws, traditions, and customs and assess project impacts in a way that respect[ed] [their] knowledge and perspectives."[523] Their review process was:

- Founded on [their] laws and traditional governance structures that transcend time;
- Centred on [their] rich cultural perspectives, collective knowledge and history that goes back millennia;
- Built on the Principle of Walking on Two Legs – Secwépemc and Western information was provided in both oral and written format;
- A long view that delved into long-term intergenerational impacts as well as the pre-contact past to address the legacy of wrongs that [their] people have faced since Canada and British Columbia's foundation; and
- In-depth, examining aspects that are currently lost in the BC and Canadian environmental processes and inclusive of information regarding the "intangible" impacts to spirit, culture and immeasurable impacts.[524]

The SSN established a Review Panel, the first Indigenous-led panel review process in North America, bringing together 26 representatives from each of their two communities. The Review Panel consisted of youth, elders, and other family members

[522] Stk'emlúpsemc Te Secwépemc Nation, "SSN Review Process: Impacts and Infringement Report, Decision and Recommendations" (2016), online (pdf): *MiningWatch Canada* <miningwatch.ca/sites/default/files/2016march30-ssnreviewprocessoverview.pdf>.
[523] Stk'emlúpsemc Te Secwépemc Nation, "Honouring the Vision of Our Ancestors" (2017) at 2, online (pdf): <stkemlups.ca/files/2013/11/SSN_4Pager-v13-12.02-WEB.pdf> [SSN, "Honouring the Vision of our Ancestors"].
[524] SSN, "Decision of the Joint Council," *supra* note 521 at 6.

who were appointed by their families, as well as the elected Chiefs and Councillors.[525] The question the Review Panel was asked to answer was: "In recognition to the Declaration of Title to Pípsell […] does the Stk'emlúpsemc Te Secwépemc Nation give their free, prior and informed consent to change the land use objective to allow for development of the lands and resources for the purposes of the Ajax Mine Project?"[526] The Review Panel received evidence and submissions from over 80 presenters, both oral and written, and deliberated over 9.5 months, culminating in the release of the Pípsell Report in February 2017.[527] After analyzing this report, the Review Panel provided recommendations in a second report[528] to the SSN Joint Council, who held the final decision-making authority for the project. The Joint Council withheld their consent for the project in accordance with the Stk'emlúpsemc Te Secwépemc Nation's laws, traditions, customs, and land tenure systems, recognizing that Pípsell was a cultural keystone area with fundamental significance for the Nation.[529]

By conducting their own review panel process, the SSN sought to address several inadequacies of the settler approach to EA. One of these inadequacies that they sought to remedy was the tendency for the settler approach to independently assess individual "value components." The SSN believe that "an impact on one part will impact all the parts of [their] world, as [they] are all connected."[530] They also saw the settler approach to EA as "a perpetuation of imbalance which exists between First Nations, governments and proponents." As "government and industry both having greater resources to undertake studies and review [there is] an imbalance of information before, during and after environmental assessments."[531] By holding a review panel process and employing the Principle of Walking on Two Legs, the SSN sought to level this imbalance by gathering

[525] Stk'emlúpsemc Te Secwépemc Nation, "Honouring our Sacred Connection to Pípsell" (2017) at 3, online (pdf): <stkemlups.ca/files/2013/11/2017-03-ssnajaxdecisionsummary_0.pdf>.
[526] SSN, "Decision of the Joint Council," *supra* note 521 at 7.
[527] SSN, "Pípsell Report," *supra* note 519.
[528] Stk'emlúpsemc Te Secwépemc Nation, "SSN Panel Recommendations Report: For the KGHM Ajax Project @ Pípsell" (2017), online (pdf): <drive.google.com/file/d/0B92rPs-T5VkGZVNlbzhuZ0VhMk0/view>.
[529] Stk'emlúpsemc Te Secwépemc Nation, "The Pípsell (Jacko Lake & area) Decision" (2017), online: <stkemlups.ca/files/2013/11/4-2017.03.04-SSN-Pipsell-Decision-Declaration.pdf>.
[530] SSN, "Honouring the Vision of Our Ancestors," *supra* note 523 at 3.
[531] SSN, "Pípsell Report," *supra* note 519 at 16.

knowledge and hearing from both traditional knowledge holders within the community as well as those experienced in methods of Western science.

In the final report of the review panel, SSN acknowledged that capacity was a constant challenge both for SSN to engage in consultation on the proposed Ajax Mine project through the settler regime, as well as to complete their own review process. They were able to negotiate some capacity funding once they made their Declaration of Title at Pípsell and notified Canada and British Columbia of their intention to proceed with their own assessment process for the proposed project, although the amount received was only a portion of the amount projected by SSN to conduct the entire process with certainty.[532]

The Ajax Mine project was ultimately rejected by the federal government in June 2018, as the federal Cabinet determined that the project was likely to cause significant environmental effects that could not be justified in the circumstances.[533]

4.2.1.3 Squamish Nation Assessment of the Woodfibre LNG Pipeline and Plant Project

A final example of an independent Indigenous-led IA is the Squamish Nation's assessment of the Woodfibre liquefied natural gas ("LNG") pipeline and plant project. The Squamish Nation are a Coast Salish people who reside in the lower mainland of British Columbia. Their traditional territory is approximately 6,730 km^2, including the present-day cities of Vancouver, Burnaby, and New Westminster, North and West Vancouver, the District of Squamish, and the Municipality of Whistler.[534] With more than 3,600 members, over 60% of the Squamish Nation population now live on reserve, including several urban reserves in Vancouver and Squamish.[535] The Squamish Nation have existed and prospered within their traditional territory since time immemorial, and have never ceded or surrendered title to their lands, rights to their resources, or the power to make decisions within their territory.[536]

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[532] *Ibid* at 269.
[533] Government of Canada, "Decision Statement" (2018), online: *Canadian Environmental Assessment Agency* <www.ceaa-acee.gc.ca/050/evaluations/document/123178?culture=en-CA>.
[534] Squamish Nation, "Our Land" (2013), online: <www.squamish.net/about-us/our-land/>.
[535] Squamish Nation, "The Nation Today" (2013), online: <www.squamish.net/about-us/the-nation-today/>.
[536] *Ibid*.

In recent years, there has been an increase in LNG development within British Columbia. In 2013, Woodfibre LNG and FortisBC proposed to build an LNG plant at the site of the former Squamish Nation village of Swiy'a'at, seven kilometres southwest of Squamish. The proposal also included a 52-kilometre twinned pipeline to supply the plant, running from Indian Arm to Squamish, and would necessitate two to four LNG tankers travelling up Howe Sound each month to and from the plant.[537] The project was subject to an EA under both provincial and federal legislation, a process the Squamish Nation felt was inadequate, for several reasons. First, they felt that the settler process was inadequate when it came to identifying Squamish Nation Aboriginal title and rights and the corresponding impacts the pipeline and LNG plant would have on the Squamish Nation's interests, including culturally significant and sacred areas, environmentally sensitive land, and aquatic habitats.[538] Second, they felt the settler process did "not consider Squamish Nation governance over lands and waters that may be impacted by the project or the economic component of Aboriginal title."[539] Finally, they believed that the settler process could not obtain Squamish consent. They believed that consent required an informed decision by the Squamish Nation, and shared decision-making with the Crown.[540] As a result, the Squamish Nation opted to conduct their own IA process beginning in 2014, parallel to the settler process.[541]

This Squamish Nation assessment was conducted using yet another unique method, different from the prior two examples. Named the "Squamish Process," the Squamish Nation's IA process is "a comprehensive program designed to protect sensitive marine and land environments in and near the Squamish Estuary, Howe Sound and beyond – all in traditional Squamish Nation territory."[542] The process "allows the Nation

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[537] Squamish Nation, "Summary: PGL's Environmental Report on Woodfibre LNG Proposal – Update: Issue 3" (2015) at 2, online (pdf): <www.squamish.net/wp-content/uploads/2015/07/SN-WoodfibreUpdate-Summary-03.pdf> [SN, "Woodfibre Update: Issue 3"].
[538] Squamish Nation, "Woodfibre LNG Proposal – Update: Issue 1" (2015) at 1, online (pdf): <www.squamish.net/wp-content/uploads/2015/05/SN-WoodfibreUpdate-01.pdf>.
[539] *Ibid*.
[540] Aaron Bruce & Emma Hume, "The Squamish Nation Assessment Process: Getting to Consent" (2015) at 8, online (pdf): *Ratcliffe & Company LLP* <www.ratcliff.com/sites/default/files/publications/The%20Squamish%20Nation%20Process.%20Getting%20to%20Consent%20A%20Bruce%20and%20E%20Hume%20November%202015%20%2801150307%29.PDF>.
[541] *Ibid*.
[542] SN, "Woodfibre Update: Issue 3," *supra* note 537 at 2.

to make an informed decision based on the best information available from its perspective, feedback from its members, and advice from independent consultants and scientists."[543] Once an assessment is completed through the Squamish Process, the Nation will have significant certainty that thorough consideration has been given to the proposed project, and they will be in a position to give consent for the project.[544]

In engaging in their own independent assessment process, the Squamish Nation was conscious about their lack of recognized jurisdictional authority to engage in an IA off-reserve, as there was no authorizing legislation under setter law enabling them to do so. In order to overcome this, and to "create a process outside of the typical EA process that respects the inherent rights to govern," the Squamish Nation had to "create a contractual arrangement with project proponents to set the terms and conditions of participating in its legal process."[545] This "Framework Agreement," which may vary with each individual project, highlights deviations from the standard settler approach to EA. These include:

- The Squamish Process is confidential – the proponent must agree not to provide any information regarding Squamish Nation rights, title, or other interests to the provincial or federal government without their consent;

- The Squamish Nation does not formally participate in the EA, but agrees to use technical information submitted in the Crown process in its assessment of the process to avoid duplication and to make the Squamish nation process efficient and less costly;

- The proponent agrees to provide supplemental information to the Squamish Nation through an information request process, even if the information is not required under the Crown EA process;

- The proponent agrees to pay process fees that will fully fund the Squamish Process; and

- If the conclusions of the Squamish Process point to approval, the Nation will issue an Environmental Certificate setting out the conditions of the approval. This takes

[543] Bruce & Hume, *supra* note 540 at 8.
[544] *Ibid*.
[545] *Ibid* at 9.

the form of a legally binding agreement, but is not the same as, and is separate from, any form of impacts and benefits agreement.[546]

The Squamish Process differs from the settler approach to EA in several ways, including how the project is defined, how issues are scoped, how impacts are measures, and how a decision is made. Fundamentally, the Squamish Process relies heavily on community engagement to make each of these determinations, as it is the cornerstone of the independent review process. The Squamish Process follows six steps:

1. ***Introduce Proposed Project***: the proponent introduces the project in a neutral way to the community in a way that does not assume that the all community members know that the proposed project is, what natural resources it will be extracting or selling, or the business the company is engaged in. The community provides initial views, and outlines the Squamish Process so that members understand the process moving forward.[547]

2. ***Technical Information Collection***: The Squamish Nation participates in the Crown EA on a purely technical level through an independent consultant, who does not represent or speak on behalf of the Squamish Nation's Aboriginal rights or title. Participation is limited to obtaining studies and seeking clarity from the proponent on these studies. The Squamish Nation will review the proponent's reasoning to determine whether they agree or disagree with their conclusions on issues such as potential effects of the project. If the proponent's conclusions are not supported by data, the Squamish Nation may request supplemental information, shifting from the Crown process to the Squamish Process, as this information is shared with the Nation confidentially, outside the Crown process.[548]

3. ***Defining Interests and Scoping Assessment***: The Squamish Nation reviews the information collected to determine which Squamish Nation values may be impacted. The Squamish Process has adopted the valued component concept used by the Crown in order to maintain consistent language, but has defined it in their own unique way to reflect its perspective of land management. Definition of the values are heavily influenced by community input, with community hall meetings, focus group meetings, email and phone accounts, and direct dialogue used to inform these values. Land use plans, ethnographies, and traditional use and occupancy studies are also used.[549]

[546] *Ibid* at 9-10.
[547] *Ibid* at 11.
[548] *Ibid* at 12.
[549] *Ibid* at 13-14.

4. ***Assessment****:* In determining the significance of the effects of the project, the focus is placed on ensuring that the ecosystem can bear whatever impacts might occur due to the project. The Squamish Process assessment report avoids the use of definitive terms for measuring the importance of impacts (i.e. very significant or not significant) as this is subjective to each individual, but expresses what the review team understands to be impacts of highest concern and identifies potential mitigation/ In assessing impacts on valued components, the Squamish Process incorporates technical information, traditional use and occupancy studies, and community engagement, knowledge and cultural history.[550]

5. ***Present Results to Community and Chiefs and Council***: The results of the Squamish Process are presented to the Squamish Nation community for their review at an open community meeting, where they have the opportunity to develop with the review team potential conditions of project approval.[551]

6. ***Final Squamish Decision Making and Conditions*****:** The impacts of the project are set out in the assessment report and submitted to Chiefs and Council. The Chiefs and Council will vote to either reject or accept the recommended draft conditions on the project. If Council approves the conditions, the proponent will be required to enter into a legally binding agreement that sets out the process to satisfy the conditions, mechanisms for enforcing compliance and remedies for non-compliance. If Council rejects the conditions, the Squamish Nation will either re-engage with the proponent and Crown to improve the conditions or will pursue legal options available to it. The conditions are the basis for the discussion with the proponent and the Crown regarding a shared decision on the project and reconciliation of interests.[552]

In applying the Squamish Process to the Woodfibre LNG project, the Squamish Nation retained Pottinger Gaherty (PLG) consultants to commission an extensive independent environmental review. This review addressed both technical aspects of the project, information for which was obtained primarily through the Crown EA process, and also addressed specific concerns raised by Squamish Nation community members.[553] This report was submitted to the Squamish Nation Council in June 2015. After review, the Council developed a list of "25 Conditions" which formed the basis for negotiating

[550] *Ibid* at 14-16.
[551] *Ibid* at 16.
[552] *Ibid* at 16.
[553] SN, "Woodfibre Update: Issue 3," *supra* note 537 at 2.

agreement for the project.[554] The Squamish Nation would not give consent for the project unless all 25 Conditions were met. This list of 25 Conditions was released publicly, and, five days later, as a direct result of the announcement of the 25 Conditions, "Woodfibre LNG requested suspension of the formal environmental process, asking for more time to study the conditions. That delay was granted."[555]

The Squamish Process enabled the Squamish Nation to directly influence the settler EA approach, directly influence the design of the project, exercise their governance authority over the land, and to ensure that the project would be enforced in a way that addressed the impacts that they were concerned about. This was done through contractual, binding agreements with the project proponent, rather than the Crown. In November 2018, the Squamish Nation Council voted 8 to 6 to approve the Woodfibre LNG project, entering into three agreements with Woodfibre LNG, FortisBC, and the Province of British Columbia, and making the project the first to be awarded an environmental certificate by an Indigenous government. As part of the approval, the proponent must remain compliant with the Squamish Nation's legally binding conditions issued under the Squamish Process.[556] Benefits were also negotiated for the community, including $225-million in cash over 40 years, the opportunity for qualified Squamish Nation businesses be awarded up to $872-million in contracts for the project, and the option for the Nation to buy 5% of the project.[557]

It is important to note that one risk inherent in this model is that the reluctance to fully participate in the Crown EA process may preclude the Squamish Nation from successfully launching a claim against a project approval on the basis that the Crown failed to uphold the DTCA in the event that the Crown opts to approve a project for which the Squamish Nation has withheld consent. As per *Haida Nation* and subsequent litigation on the DTCA, the DTCA is a "two-way street."[558] Indigenous communities must not thwart

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[554] *Ibid*; See: *Ibid* at 7-8 for a complete list of the 25 Conditions.
[555] *Ibid*.
[556] Squamish Nation, Media Release, "Squamish Nation Council Approves Woodfibre LNG Project" (18 November 2018), online: <www.squamish.net/squamish-nation-council-approves-agreements-with-woodfibre-lng-project/>.
[557] The Squamish Chief, "Deal Between Squamish Nation and Woodfibre LNG Worth over $1.1 Billion" *The Squamish Chief* (29 November 2018), online: <www.squamishchief.com/news/local-news/updated-deal-between-squamish-nation-and-woodfibre-lng-worth-over-1-1-billion-1.23512792>.
[558] *Haida Nation, supra* note 396 at para 42.

the government's attempt to engage in discussions and must articulate their claims with clarity. Under the Squamish Process, the Squamish Nation only engages in the Crown EA process through a consultant on a purely technical basis and does not share any information about rights or title with the government. This level of engagement may be looked on unfavourably in subsequent litigation, and may rule out judicial review on the basis of inadequate execution of the DTCA as an available legal option.

4.2.1.4 Opportunities for Recognition of Indigenous-led IA in Bill C-69

Following the SCC's decision in *Tsilhqot'in Nation*, some have viewed these independent Indigenous-led IAs as an example of communities exercising the right to proactively use and manage the land, consistent with the bundle of rights associated with Aboriginal title and the exercise of each Nation's sovereign law-making authority. However, none of these assessments have received recognition by a Canadian court as a valid expression of law within the Canadian legal system. Several lawyers from West Coast Environmental Law "envision future 'conflict of laws' litigation where the courts are called on to reconcile a Canadian legal decision [i.e. approval of the Kinder Morgan pipeline project] with an Indigenous legal decision [i.e. the IAs outlined above] in the context of Canadian constitutional protection for Aboriginal title and rights."[559] They suggest that "these questions could extend beyond Canadian borders through complaint resolution mechanisms at the UN Human Rights Committee, or through the UN Special Rapporteur on the Rights of Indigenous peoples, grounded in the UNDRIP."[560]

More recently, Bill C-69 has opened some space for recognition of independent Indigenous-led IA within the settler regime. Section 22(1) of the proposed *Impact Assessment Act* sets out the factors that the IAA or a Review Panel must take into account when carrying out an IA. Section 22(1)(r) requires that "any study or plan that is conducted or prepared by a jurisdiction – or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition *jurisdiction* in section 2 – that is in respect of a region related to the designated project and that has been provided with respect to the project"

[559] Clogg et al, *supra* note 33 at 16.
[560] *Ibid*.

must be considered in the course of an impact assessment.[561] This provision presumably mandates the consideration of independent Indigenous-led IAs, such as the examples outlined above, and may also include the findings from models such as the Metlakatla First Nation's Cumulative Effects Program, described below. However, as will be explored in succeeding portions of this paper, joint decision-making authority, which is at the core of the requirement for FPIC under UNDRIP, remains absent from the proposed IA regime in Bill C-69.

4.2.2 INDIGENOUS-LED IAs CONDUCTED IN PARTNERSHIP THE WITH CROWN OR PROJECT PROPONENT

A second general category of Indigenous-led IAs that have been completed are those conducted in partnership between an Indigenous body and the Crown, such as an environmental assessment agency, or with a project proponent. There is a wide variety of possible processes falling within this category, "ranging from the legislated requirement for joint decision-making at a nation-to-nation level, to bilateral engagement of Indigenous groups with the Crown at key steps in an impact assessment."[562] As the following examples will outline, this type of assessment has typically occurred in cases where there is a unique legislative framework in place, such as a modern treaty. However, it may be possible for Indigenous governing bodies to play a more active role in the assessment process under other legislative frameworks, such as the IA process envisioned in Bill C-69's *Impact Assessment Act*.

4.2.2.1 The Tłı̨chǫ Government and the Fortune Minerals NICO Poly-Metallic Mine

Situated in the Northwest Territories ("NWT"), the Tłı̨chǫ, also known as the Dogrib, are a group of Dene people who live in the lands east of the Mackenzie River between Great Slave Lake and Great Bear Lake.[563] There are four main Tłı̨chǫ communities within their traditional territory, Behchoko, Whatì, Gamètì, and Wekweètì,

[561] Bill C-69, *supra* note 135, cl 1, s 22(1)(r); A full explanation of the meaning of an Indigenous Governing Body will be discussed below.
[562] Gibson et al, *supra* note 467 at 19.
[563] June Helm & Thomas D Andrews, "Tlicho (Dogrib)" (2015), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/tlicho-dogrib>.

and many others live in the urban centre of Yellowknife.[564] The Tłı̨chǫ are signatories to Treaty 11, signed with the Government of Canada on August 22, 1921.[565] The Government of Canada was interested in signing treaties with the Nations in this territory due to oil and gas prospects in the Mackenzie Valley region, and they wanted to have some certainty over title to the land and access to the resources in the area. The promises and terms of Treaty 11 have been highly disputed, as Indigenous communities did not view the treaties as having been land cessations. In 1973, the case of *Re Paulette and Registrar of Titles (No 2),* (1973)[566] was decided by the NWT Supreme Court, holding that the Treaty "could not legally terminate Indian land rights. The Indian people did not understand or agree to the terms appearing in the written version of the treaties, only the mutually understood promises to wildlife, annuities, relief and friendship became legally effective commitments."[567] This decision, which was affirmed by the SCC,[568] highlighted the uncertainties of Treaty 11, and gave rise to the modern treaty process in the territory.

The Tłı̨chǫ submitted a regional claim to the Government of Canada in 1992, which led to the signing of a modern treaty in August 2003. The Tłı̨chǫ Land Claims and Self-Government Agreement[569] ("Tłı̨chǫ Agreement") was negotiated by the Dogrib Treaty 11 Council, the Government of the NWT, and the Government of Canada, and is the "first combined comprehensive land claim and self-government agreement in the NWT."[570]

The Agreement created the Tłı̨chǫ Government, which is the governing authority on Tłı̨chǫ lands, and has the power to pass laws, enforce its own laws, and establish its own government structure and manage its affairs.[571] This includes: use, management, administration and protection of Tłı̨chǫ lands and renewable and non-renewable

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[564] Executive and Indigenous Affairs, "Concluding and Implementing Land Claim and Self-Government Agreements: Tłı̨chǫ" (2019), online: *Government of Northwest Territories* <www.eia.gov.nt.ca/en/priorities/concluding-and-implementing-land-claim-and-self-government-agreements/tlicho>.
[565] Tłı̨chǫ Ndek'àowo Government, "Chronology of the Tłı̨chǫ Negotiation Process" (21017), online: <tlicho.ca/cec-assembly/our-story/chronology>.
[566] 42 DLR (3d) 8, 9 CNLC 307 (NWTSC).
[567] *Ibid* at 30.
[568] [1977] 2 SCR 628, 72 DLR (3d) 161 aff'g (1973), 42 DLR (3d) 8, 9 CNLC 307 (NWTSC).
[569] Land Claims and Self-Government Agreement among the Tłı̨chǫ and the Government of the Northwest Territories and the Government of Canada, 25 August 2003, online (pdf): <www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/ccl_fagr_nwts_tliagr_tliagr_1302089608774_eng.pdf>.
[570] Executive and Indigenous Affairs, *supra* note 564.
[571] *Ibid*.

resources, land use planning for Tłı̨chǫ lands, managing and harvesting of fish and wildlife on Tłı̨chǫ lands, and managing the rights and benefits provided under the Tłı̨chǫ Agreement.[572] Each of the four Tłı̨chǫ communities also have Community Governments, which replaced the *Indian Act* band structure.[573] The Tłı̨chǫ Agreement gave ownership of 39,000 km^2 of land to the Tłı̨chǫ Government, including subsurface resources, $152-million over 14 years in capital transfer payments, and a share of resource royalties collected by the government from resource development in the Mackenzie Valley.[574]

The Tłı̨chǫ Agreement has been fundamental in restructuring the relationships between the Tłı̨chǫ Government and other regional authorities and resource development proponents. One example of how the Tłı̨chǫ Agreement has impacted the EA process is the Fortune Minerals NICO poly-metallic mine project. Fortune Minerals Limited first proposed to build the poly-metallic mine in 2009, which would be located approximately 50 kilometers north of Whatì and 160 kilometers northwest of Yellowknife.[575] The project, which would be an underground and open pit mine, anticipated to run for approximately 20 years, is wholly surrounded by Tłı̨chǫ lands that are defined within the Tłı̨chǫ Agreement, although not directly located on them.[576] In addition to the mine itself, a new 27-kilometer all-season access road to the community of Whatì was required, which would cross directly through Tłı̨chǫ lands.[577]

Under the Tłı̨chǫ Agreement and the *Mackenzie Valley Resource Management Act*,[578] the to the Tłı̨chǫ Government was established as a legislative decision-maker in the EA process, and thus was able to exercise authority throughout the entirety of the assessment process.[579] Under s.131 of the *MVRMA*, consent is required from the Tłı̨chǫ Government for approval of projects wholly or partly across Tłı̨chǫ Lands. In practice, this means that the Tłı̨chǫ Government "can provide comment on the final report of the Report

[572] *Ibid*.
[573] *Ibid*.
[574] *Ibid*.
[575] Mackenzie Valley Review Board, "Report of Environmental Assessment and Reasons for Decision: EA0809-004 Fortune Minerals Limited NICO Project" (2013) at 5, online (pdf): <reviewboard.ca/upload/project_document/EA0809-004_NICO_Report_of_EA_and_Reasons_for_Decision.PDF>.
[576] *Ibid* at 6.
[577] *Ibid* at v.
[578] SC 1998, c 25 [*MVRMA*].
[579] Gibson et al, *supra* note 467 at 20.

of the Environmental Assessment [issued by the Mackenzie Valley Review Board], and then accept, require additional review of, add of modify conditions (in consultation with the Review Board), or reject the recommendations."[580] In this case, the Tłı̨chǫ Government issued a decision to accept the Report of the Environmental Assessment issued by the quasi-judicial Review Board resulting in the project's approval, with subsequent negotiations over benefit-sharing pending through an Impact-Benefit Agreement with the proponent.[581]

In relation to the Nico mine project, the Tłı̨chǫ Government's central role "assured the appropriate involvement of both traditional knowledge and western scientific methods in the assessment and conditions for project approval."[582] Under the MVRMA, traditional knowledge is given an equal role in guiding the EA. The Tłı̨chǫ Government was also "actively involved to ensure key issues related to scoping, traditional knowledge, and adequate Indigenous engagement were meaningfully dealt with."[583] Future permits and licences required by the project will also require consideration of traditional knowledge.[584]

In order to support the review, the Tłı̨chǫ Government negotiated with both the proponent and the Crown for funding, which covered a portion of the cost of the assessment.[585] The Tłı̨chǫ Government also has the ability to implement taxation and collect revenues through revenue-sharing agreements, ensuring they have a continuous source of income, and do not have to negotiate directly with proponents and the settler government for funding for each individual project. This regular revenue stream enables the Tłı̨chǫ Government to build internal capacity, as they do not have to rely on annual allocations which would otherwise constrain their ability to actively engage in all stages of the assessment process.[586] In this case, the Tłı̨chǫ Government's financial resources were used to hire technical reviewers, engage the community, and ensure community-

[580] *Ibid.*
[581] Tłı̨chǫ Ndek'àowo Government, News Release, "Tłı̨chǫ Government Approves Environmental Assessment Report" (30 October 2018), online: <tlicho.ca/news/tlicho-government-approves-environmental-assessment-report>.
[582] Gibson et al, *supra* note 467 at 20.
[583] *Ibid*.
[584] *Ibid* at 22.
[585] *Ibid* at 22.
[586] *Ibid*.

based capacity building. The steps that they used for the NICO assessment process "are now being used to manage subsequent reviews in Tłı̨chǫ lands."[587]

4.2.2.2 Opportunities for Partnership in the Proposed Bill C-69

Bill C-69, which would enact the *Impact Assessment Act* if passed by Parliament, contemplates the possibility for partnership opportunities and collaboration between jurisdictions when carrying out an IA, thus creating a new legislative framework. While the provisions of the Act are discretionary rather than mandatory, there remains the possibility for partnership between an Indigenous community and the Crown. The Summary of Part 1 of the Bill states that the *Impact Assessment Act* "provides for cooperation with certain jurisdictions, including Indigenous governing bodies, through the delegation of any part of an impact assessment, the joint establishment of a review panel or the substitution of another process for the impact assessment."[588]

An "Indigenous governing body" is defined in the body of the Act as "a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*."[589] An "Indigenous governing body" is also included within the definition of "jurisdiction." "Jurisdiction" is defined as meaning

> (f) an Indigenous governing body that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project
>
> (i) under a land claim agreement referred to in section 35 of the *Constitution Act, 1982*, or
>
> (ii) under an Act of Parliament other than this Act or under an Act of the legislature of a province, including a law that implements a self-government agreement;
>
> (g) an Indigenous governing body that has entered into an agreement or arrangement referred to in paragraph 114(1)(e).[590]

[587] *Ibid* at 23.
[588] Bill C-69, *supra* note 135, at Summary.
[589] *Ibid,* cl 1, s 2.
[590] *Ibid,* cl 1, s 2; s 114(1)(e) allows the Minister, "if authorized by the regulations, to enter into agreements or arrangements with any Indigenous governing body not referred to in para (f) of the definition of *jurisdiction* in section 2 to (i) provide that the Indigenous governing body is considered to be a

These definitions suggest that the *Impact Assessment Act* would restrict collaboration activities only to those Indigenous governing bodies that are recognized as jurisdictions under Canadian law.[591] If an Indigenous governing body does not fall within the definition under s.2 of the Act, they must receive recognition from Cabinet through a Governor in Council regulation before being eligible to enter into agreements with the Minister qualifying the body as a jurisdiction capable of carrying out a delegated part of an IA.[592] The requirement for Cabinet recognition creates a procedural barrier for Indigenous governing bodies who are not already recognized under federal statutes like the *Indian Act*,[593] provincial legislation, or a treaty, as the Governor in Council regulatory process takes from 6 to 24 months.[594] This statutory regime also reinforces the issue that the government does not recognize the legitimate governing authority of Indigenous governments such as hereditary chiefs.

The provisions related to delegation and substitution raise the possibility for an Indigenous governing body to complete a portion of an IA, or to substitute their own process to assess the effects of a designated project, if the Minister believes that it would be an appropriate substitute. In approving a substitution, the Minister must be satisfied that the process to be substituted will consider the same mandatory factors set out in s.22(1) of the proposed Act, that federal authorities with relevant specialized or expert information will be able to participate, that the public will be given an opportunity to participate and access records in relation to the assessment, and that the substituted

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jurisdiction for the application of this Act on the lands specified in the agreement or arrangement, and (ii) authorize the Indigenous governing body, with respect to those lands, to exercise powers or perform duties or functions in relation to impact assessments under this Act – except for those set out in section 16 [the Impact Assessment Agency's decision about whether an impact assessment is required] – that are specified in the agreement or arrangement."

[591] Johnston, "*supra* note 372 at 18.

[592] Cl 1, s 109(3) of Bill C-69 states that "The Governor in Council may make regulations respecting agreements or arrangements referred to in paragraph 114(1)(d) or (e)." This means that, in order for the Minister to be able to enter into an agreement with an Indigenous governing body that falls outside the definitions within the proposed Act, Cabinet must first make a regulation recognizing the Indigenous governing body, and must delegate power to the Minister to enter into an agreement with the body for the purposes of the Act.

[593] RSC 1985, c I-5.

[594] Treasury Board of Canada Secretariat, "Guide to the Federal Regulatory Development Process" (2014), online: *Government of Canada* <www.canada.ca/en/treasury-board-secretariat/services/federal-regulatory-management/guidelines-tools/guide-federal-regulatory-development-process.html>.

jurisdiction will submit a report to the Minister which will be made public.[595] Additionally, where an assessment is to be completed by a Review Panel, s.39(1) of the proposed Act stipulates that the Minister may enter into an agreement with another jurisdiction, including an Indigenous governing body, to establish a JRP to conduct the IA.[596] However, this possibility is precluded where the project falls under the regulatory authority of the CNSC or the Canadian Energy Regulator.[597]

Should the Minister opt to collaborate with another jurisdiction, including an Indigenous governing body, Bill C-69 would give the Minister the authority to establish a longer time limit for the completion of the IA, both for assessment completed by IAA, and for those completed by a Review Panel.[598] This time extension enables some flexibility from the settler approach to EA, as Indigenous communities often find the strict timelines prohibitive of their meaningful participation. The flexible time limit could take into consideration different methods of assessment or knowledge gathering used by Indigenous communities.

Despite these provisions allowing for partnership and cooperation, the provisions of the proposed Act do not envision a true partnership model where each jurisdiction would have equal decision-making authority. One drawback of the proposed Act is that while the Act seeks to promote collaboration with Indigenous jurisdictions and also mentions UNDRIP, "it does not require the government to obtain the consent of Indigenous authorities on any decisions – process or final.[599] Obtaining FPIC from Indigenous peoples is a core component of UNDRIP which Bill C-69 fails to adhere to. Under the proposed Act, decision-making authority rests solely with the Minister, and joint decision-making is not contemplated.[600]

4.2.3 INDIGENOUS-DEVELOPED IA MODELS

A core challenge with each of the preceding forms of Indigenous-led approaches to IA is the capacity of the Indigenous community to carry out an assessment on such a

[595] Bill C-69, *supra* note 135, cl 1, s 33(1).
[596] *Ibid,* cl 1, s 39(1).
[597] Ibid, cl 1, s 39(2).
[598] *Ibid,* cl 1, ss 28(5), 37(2).
[599] Johnston, *supra* note 372 at 3.
[600] Bill C-69, *supra* note 135, cl 1, s 65(1).

scale. For many Indigenous communities, the funding to hire consultants and carry out a number of studies over several years is not realistic. In the case of full Indigenous-led IAs conducted for particular projects, these assessments are typically conducted by Indigenous nations in British Columbia, who are not parties to any treaties. These communities are far better resourced than remote, historic treaty communities, such as those within the Far North of Ontario. In the case of IAs conducted in partnership between Indigenous bodies and the Crown or a project proponent, unique legislative circumstances exist, enabling these types of assessments to take place. In some cases, there are modern treaties that mandate the existence of co-management boards and joint decision-making, and in other cases more specific pieces of provincial or territorial legislation govern the EA process.

This third category of Indigenous-led IAs seeks to address some of these capacity issues by highlighting examples where Indigenous communities have either designed IA processes that are responsive to the capacities of the community, or where the community has developed a process designed to intersect with the settler approach to EA.

4.2.3.1 Metlakatla First Nation Cumulative Effects Management Program

The Metlakatla First Nation is a coastal community located in northwestern British Columbia. They are one of seven communities belonging to the Tsimshian First Nation, a unique group consisting of linguistically and culturally related people.[601] The community of Metlakatla Village, located on one of the community's ten reserves, is about 7 kilometres northwest of Prince Rupert, and is accessible only by boat. The community has a total of approximately 985 registered members, with 90 residing on reserve, and the remainder off reserve.[602]

The traditional territory of the Metlakatla encompasses an area of approximately 20,000 square kilometers of land and sea on the northwest coast of British Columbia, in

[601] Majorie M Halpin & Margaret Seguin, "Tsimshian Peoples: Southern Tsimshian, Coast Tsimshian, Nishga, and Gitksan" in Wayne Suttles, ed, *Handbook of North American Indians, Volume 7: Northwest Coast* (Washington, DC: Smithsonian Institution, 1990) 267 at 267.
[602] Indigenous and Northern Affairs Canada, "Registered Population: Metlakatla First Nation" (2019), online: *Government of Canada* <fnp-ppn.aandc-aadnc.gc.ca/fnp/Main/Search/FNRegPopulation.aspx?BAND_NUMBER=673&lang=eng>.

the area now known as the Great Bear Rainforest.[603] The Metlakatla First Nation has relied on the ocean as well as the temperate rainforests in the region since time immemorial, and their culture and economy have always been linked to the lands and waters.[604] Traditional harvesting, including fishing, still remains an integral component of the Metlakatla economy, culture and way of life.[605]

The Metlakatla First Nation has been impacted by development in their territory since contact with the Europeans. The imposition of the reserve system affected their traditional ways of life and limited their ability to control planning and development throughout their traditional territory. Since 1876, approximately 40 canneries were established within their traditional territory, logging and fishing became large commercial industries, and mining, hydroelectricity, and port development have impacted their lands.[606] They were not meaningfully consulted during the decision-making process for many of these past developments within their territory.

Most recently, there has been an increase in proposals for LNG projects, pipelines and other developments within the traditionally territory of the Metlakatla First Nation. Given the magnitude of the proposed development and the uncertainty of its impacts in the region, the Metlakatla Development Corporation, an agency that oversees economic development initiatives for the Metlakatla First Nation, "entered into a collaborative research partnership with Simon Fraser University to study the potential cumulative effects of developments and to investigate management strategies to minimize impacts and maximize benefits to the community."[607] A key goal of this research collaboration was to develop the Cumulative Effects Management ("CEM") program to track and manage Metlakatla values that are most likely to be impacted by future development and require

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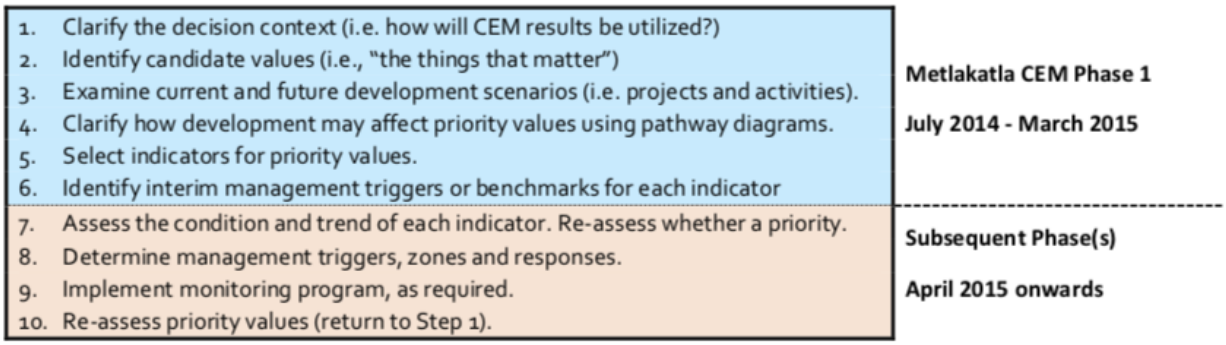
[603] Brennan Hutchinson, *Cultural Values in Cumulative Effects Management: A Case Study with the Metlakatla First Nation* (Master of Resource Management [Planning], Simon Fraser University School of Resource and Environmental Management, 2017) at 64.
[604] British Columbia Assembly of First Nations, "Community Profile: Metlakatla" (2019), online: <www.bcafn.ca/community/metlakatla/>.
[605] Hutchinson, *supra* note 603 at 66.
[606] Liam Haggarty & John Lutz, "Working in Hartley Bay: A Work History of the Gitga'at" (2006), online: *University of Victoria, Coasts Under Stress Project* <apps.neb-one.gc.ca/REGDOCS/File/Download/778474>; Ministry of Jobs, Tourism and Skills Training, "BC Major Projects Inventory" (December 2015) at 98-106, online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/economic-development/develop-economic-sectors/mpi/mpi-2015/mpi_dec_2015_edition_final.pdf>.
[607] Hutchinson, *supra* note 603 at 67-68.

management attention as a result of past, present and future human actions.[608] The goal of the CEM program is to inform decisions at two levels: "1) the individual project scale via the environmental assessment process and 2) at a territory-wide scale to guide broader land, marine, and community planning and establish parameters and key considerations for future development."[609]

The CEM program is an innovative and tailored approach to assessment that is particular to the territory of the Metlakatla First Nation and was "carefully designed to inform environmental assessment and treaty processes, investment choices, as well as a larger adaptive management focus."[610] The program is divided into the following phases:

Figure 6: Phases of the Metlakatla First Nation CEM Program[611]



Phase 1, titled "Develop CEM Values Foundation," forms the basis for the CEM framework. A key component of the CEM program is the identification of "priority values" – "components or aspects of the biophysical and social environment that are of high importance to the Metlakatla people and that are considered most likely to be affected by current and future developments."[612] During Phase 1 of the CEM program, Compass Resource Management Ltd., (consultants to the Metlakatla First Nation) and Simon Fraser University researchers along with members of the Metlakatla First Nation worked

[608] Metlakatla First Nation, "Metlakatla Cumulative Effects Management: Phase 1 Executive Summary" (2015) at ii, online (pdf): <www.metlakatla.ca/sites/default/files/CEM%20Phase%201%20Executive%20Summary%205June15.pdf>.
[609] *Ibid* at i.
[610] Compass Resource Management Ltd, "Metlakatla Cumulative Effects Management – A Cumulative Effects Framework for a BC First Nation" (2018), online: <compassrm.com/portfolio/metlakatla-cumulative-effects-management/>.
[611] Metlakatla First Nation, *supra* note 608 at i.
[612] Hutchinson, *supra* note 603 at 68.

together to develop a report that explained the methods of the CEM program, and the priority values and indicators identified by Metlakatla members."[613] In developing a list of priority values, Metlakatla community members and Metlakatla leadership participated in two workshops to produce a list of priority values that were important to the community. Compass Resources Management Ltd. "worked with experts and traditional knowledge holders to identify indicators for monitoring the condition of priority values over time."[614] 10 priority values and 12 indicators under the five pillars of Cultural Identity, Governance, Social/Health, Economic Prosperity, and Environment were prioritized.[615] They include:[616]

Pillar	Priority Values	Indicators
Environment	Chinook Salmon	- Abundance - Critical juvenile habitat
	Butter Clams	- Population density
Social and Health	Adequate Housing	- Number of households in core housing need
	Access to Health Services	- Ambulatory Care Sensitive Conditions rates
	Chronic Health Conditions	- Diabetes prevalence - Hypertension prevalence
	Personal Safety	- Crime severity
Economic Prosperity	Wealth Distribution	- Income equality
	Economic Self-sufficiency	- High school completion rate
Governance	Governance of Metlakatla	- Stewardship ability
Cultural Identity	Food, Social, and Ceremonial Activities	- Food, Social, and Ceremonial activity participation rates

Community members were made aware that when prioritizing cultural values, they should be attuned to the specific context of resource development and the cumulative effects within their traditional territory.[617] Another factor taken into consideration when developing the list of priority values was the capacity for the community to monitor the value, or the opportunity for the Metlakatla First Nation to enter into partnerships with other organizations in order to do so. For example, while the Metlakatla do not have the

[613] *Ibid.*
[614] Compass Resource Management Ltd, *supra* note 610.
[615] Hutchinson, *supra* note 603 at 72.
[616] Metlakatla First Nation, *supra* note 608 at i.
[617] Hutchinson, *supra* note 603 at 71.

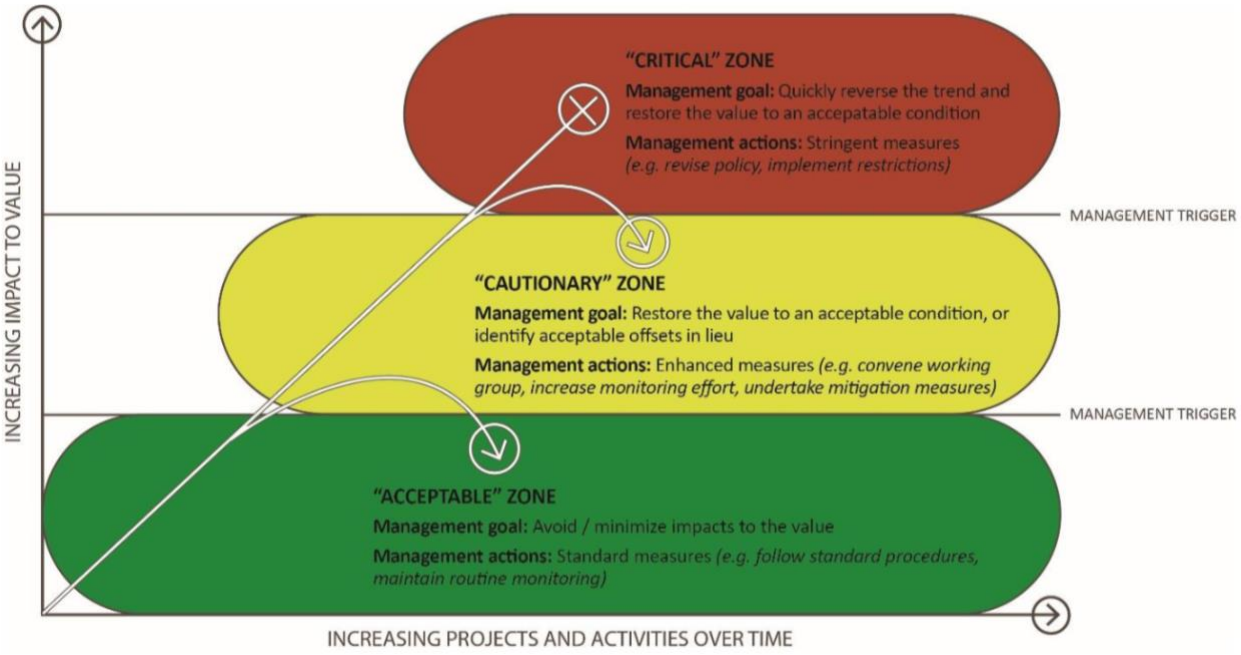
capacity to monitor the abundance of Chinook salmon, they were able to partner with the federal Department of Fisheries and Oceans in order to do so.[618] Other potential priority values identified in the community workshops, such as Red Laver Seaweed and Dungeness Crab, were excluded from the final list due to the lack of capacity to collect necessary data.[619]

"Managing the condition of these priority values necessitates the identification of management triggers, zones, actions, and goals."[620] As such, Phase 1 of the CEM program also requires measuring the condition of each indicator using metrics in order to determine which actions to take as a result. For example, the priority value "Butter Clams" is evaluated based on the indicator "population density." The metric used to measure "population density" is the "# of individuals per m^2 (per beach)."[621] Both Indigenous knowledge and Western science are used in measuring these indicators. The metrics for socio-economic priority values are evaluated against "Comparative Benchmarks" (the metrics of other geographic regions), while the metrics of biophysical priority values are used to trigger management actions, if necessary.[622] A table setting out the CEM Values Foundation developed by Metlakatla First Nation is included as **Appendix 9**.

Phase 1 of the CEM program also requires development of "interim management triggers and or benchmarks for each indicator." In doing so, the CEM program applies a tiered management system, outlined below in **Figure 7**, which works to prioritize the most impacted values and identify actions to take to mitigate impacts thereby bringing the value back into an "acceptable zone."

Figure 7: CEM Tiered Management System[623]

[618] Katerina Kwon, *Grounded in Values, Informed by Local Knowledge and Science: The Selection of Valued Components for a First Nation's Regional Cumulative Effects Management System* (Master of Resource Management [Planning], Simon Fraser University School of Resource and Environmental Management, 2016) at 81.
[619] *Ibid*.
[620] Metlakatla First Nation, *supra* note 608 at ii.
[621] *Ibid* at v.
[622] *Ibid* at iv.
[623] *Ibid* at ii.



Each "zone" requires a tailored approach in order to manage the priority value. Values within the green "acceptable" zone may warrant standard procedures and routine monitoring.[624] Values in the yellow "cautionary" zone trigger restorative action, or, "in cases where the cost of restorative measures outweigh the benefits (from a societal perspective), offsets that benefit other priority values or are acceptable to the stakeholders can be implemented in lieu."[625] Values in the red "critical" zone require "stringent measures intended to quickly restore a value's condition."[626] The goal of the CEM is to ensure that priority values never reach the red "critical zone" as effective cumulative effects management and responses should be in place to manage the value before it reaches that level.[627] Phase 1 also works to identify implementation pathways and implementation partners to assist in implementing management actions for each priority value.[628]

Phase 2 of the CEM program involves conducting a pilot project and developing a broader implementation plan to the expand the program to include other candidate priority values. The Metlakatla First Nation has identified 4 priority values on which to pilot the

[624] *Ibid* at ii.
[625] *Ibid.*
[626] *Ibid.*
[627] *Ibid.*
[628] *Ibid* at iv-v.

CEM program: Butter Clams, Adequate Housing, Food, Social, and Ceremonial Activities, and Employment. Meanwhile, CEM collaborators are currently working to gather baseline data for the indicators, assessing their condition, and defining management triggers and actions for each of the priority values.[629]

One need that was identified for implementation of the CEM program was the need to collect community-specific baseline socio-economic data. While the National Household Survey gathers demographic, social and economic information about all people in Canada, including Aboriginal peoples, there was little data available about the Metlakatla First Nation due to low participation rates.[630] As a result, a Metlakatla Membership Census was developed for use in the community in order to support the data needs of the CEM program. The census was targeted at community members over the age of 15 who resided in the Metlakatla traditional territory.[631] The census aimed to gather information related to the priority values identified for the CEM program.[632] In order to administer the census, survey administers went door-to-door, giving participants the option to complete either a computer-assisted questionnaire using an iPad that the administrator carried, or a paper-based questionnaire.[633] A pilot census was administered in 2015, with a second census administered in 2016. In order to gather a robust set of baseline data and to properly track and manage changes to priority values over time, consistent data need to be collected over time.[634]

Overall, the CEM program focuses on the cumulative effects of multiple projects within the Metlakatla First Nation's traditional territory, rather than focusing on project-specific effects. Currently, the impacts of development are "managed in large part by project-based federal and provincial assessment processes. Although project-based impact assessment can help mitigate some adverse effects, it is a narrowly focused,

[629] Hutchinson, *supra* note 603 at 68.
[630] Kwon, *supra* note 618 at 34.
[631] Tanishka Gupta, *Collecting Baseline Socio-Economic Data for Socio-Economic Impact Assessment: The Metlakatla Membership Census* (Master of Resource Management [Planning], Simon Fraser University School of Resource and Environmental Management, 2017) at 35-36.
[632] *Ibid* at 41.
[633] *Ibid* at 45.
[634] *Ibid* at 53.

reactive process that fails to adequately incorporate community goals and address long-term cumulative effects of past, present, and future projects and activities."[635]

This program was developed independently of any regulations or legislation, which allowed the Metlakatla First Nation the freedom to develop a program attuned to the realities of their territory. While the CEM program is still in its initial development stages, it represents a model that other Indigenous communities may be able to adopt in order to assess and address cumulative effects as a result of development in their territory. The CEM program was uniquely tailored to the capacities and needs of the community, and it embodies several of the common characteristics of Indigenous-led IA, notably the meaningfully engagement of community members, the use of Indigenous knowledge, and the broad definition of cultural values.

4.2.3.2 Opportunities for Intersection and Recognition within Settler Approaches to EA

Despite the fact that the CEM program was designed to *operate outside the settler EA process*, there may be opportunity for the model to intersect with and influence the settler regime at various stages.

First, the **baseline data** collected through the CEM program may be beneficial in assessing environmental impacts of proposed projects. This fact was also highlighted by the Tsleil-Waututh Nation's independent assessment of the Kinder Morgan pipeline project. Proponents generally assess baseline data using the conditions of the environment at the time of the project proposal, ignoring the cumulative impacts of numerous developments already existing on a Nation's traditional territory. Integrating Indigenous knowledge, including the types of data collected through the CEM program that are tracked over numerous years, would be beneficial in showing baseline information that a project proponent would otherwise not have access to as part of their assessment. This information may date back several years, or several generations to the pre-contact era as was the case in the Tsleil-Waututh Nation's assessment.

Second, the proposed *Impact Assessment Act* outlined in Bill C-69 mandates consideration of a number of factors during an IA. These include direct, cumulative and

[635] Katerina Kwon et al, "From Reactive to Proactive in First Nations Planning: A Case Study of the Metlakatla Experience in British Columbia" (2016) 56:4 Plan Can 41.

interactive effects, impacts on Indigenous peoples, Indigenous and community knowledge, and any assessments by Indigenous jurisdictions.[636] An Indigenous community with a model such as the CEM program in place would be in a better position to advocate against a particular project as they would be able to **directly point to impacts that the project would have within their traditional territory on their priority values, as measured using indicators and metrics.** A community may be able to point to past development and pinpoint how those developments have impacted community values, thus providing a comparison against which to measure the potential impacts of proposed projects.

Third, having a solid foundation of data may also help in advocating for certain enforceable conditions to be placed on the project upon approval, and may help shape an appropriate monitoring and follow-up program to assess cumulative or regional impacts of the project in a more proactive manner.

Finally, the proposed *Impact Assessment Act* also contemplates the possibility for the Minister to enter an agreement with another jurisdiction, including an Indigenous governing body, to conduct "a regional assessment of the effects of existing or future physical activities carried out in a region that is comprised in part of federal lands or in a region that is entirely outside federal lands."[637] This raises the possibility for a community such as Metlakatla First Nation, who has a CEM program in place, to collaborate with the federal government to assess the cumulative and regional impacts of development in spaces such as their traditional territory.

4.2.3.3 Saugeen Ojibway Nation Consultation Protocol

A second example of an Indigenous-developed model that intersects with the settler approach to EA is the Consultation Protocol developed by the Chippewas of Nawash Unceded First Nation and the Chippewas of Saugeen First Nation, two Anishinaabe communities collectively referred to as the Saugeen Ojibway Nation ("SON"). The Chippewas of Nawash occupy the Neyaashiinigmiing Reserve on the east shore of the Saugeen (Bruce) Peninsula, with a registered population of 2,720 members,

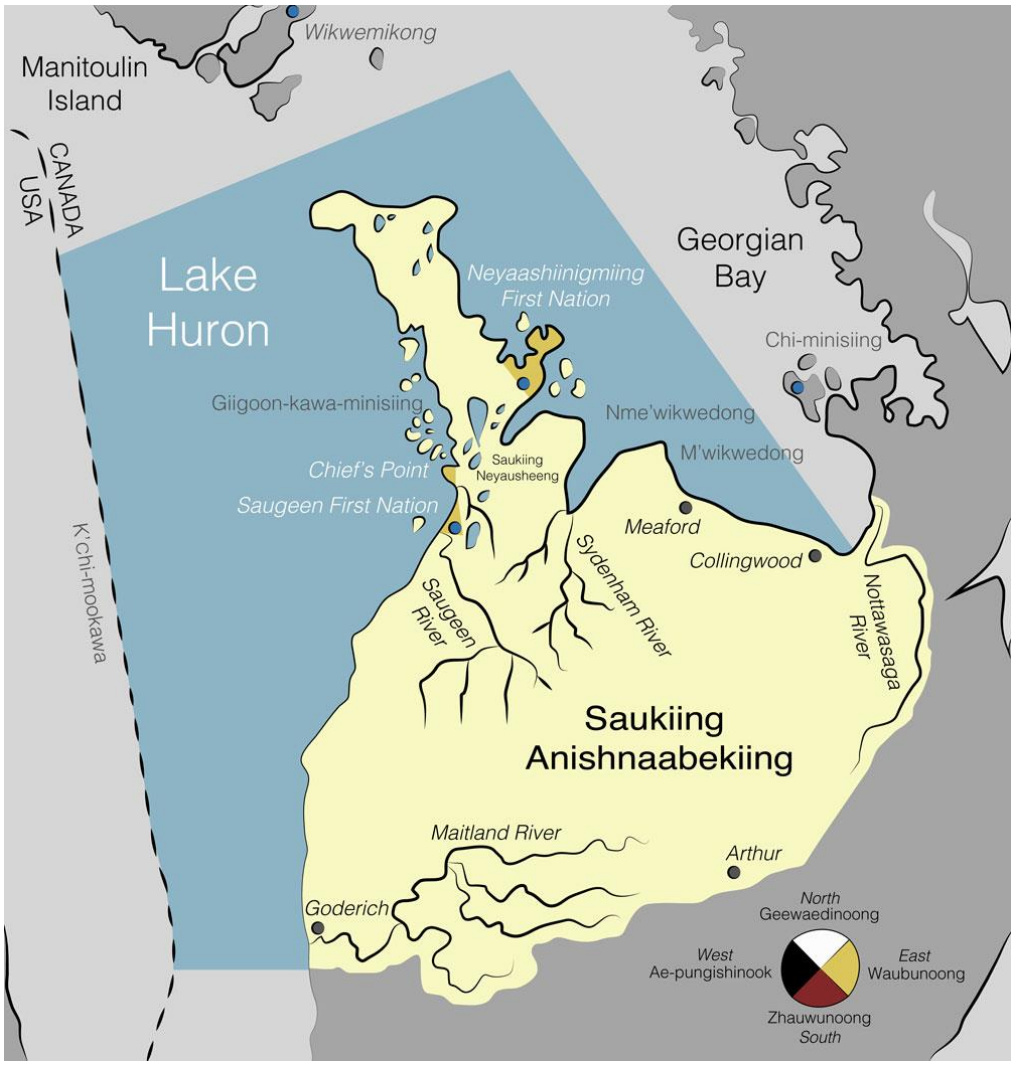
[636] Bill C-69, *supra* note 135, cl 1, s 22(1)
[637] *Ibid,* cl 1, s 93(1).

approximately 725 of whom reside on reserve.[638] The Saugeen First Nation occupy a reserve north of the Saugeen River on the western shore of the Bruce Peninsula, with a registered population of 1,636 members, 755 of whom reside on reserve.[639]

The Anishinaabe Nation historically occupied the region around the Great Lakes, travelling seasonally following the animals and plants that nourished them.[640] The SON traditional territory comprises an area of land approximately 6,500 km^2, pictured below in **Figure 8**, and encompasses much of the Bruce Peninsula in southwestern Ontario, extending south of Goderich, and east of Collingwood.[641] Their traditional territory also includes more than 500 km of shoreline, and 10,000 km^2 of Lake Huron.[642] The SON have occupied these lands since time immemorial, and have a duty to be stewards of the land.[643]

Figure 8: SON Traditional Territory[644]

[638] Indigenous and Northern Affairs Canada, "Registered Population - Chippewas of Nawash First Nation" (2019), online: *Government of Canada* <fnp-ppn.aandc-aadnc.gc.ca/fnp/Main/Search/FNRegPopulation.aspx?BAND_NUMBER=122&lang=eng>.
[639] Indigenous and Northern Affairs Canada, "Registered Population – Saugeen" (2019), online: *Government of Canada* <fnp-ppn.aandc-aadnc.gc.ca/fnp/Main/Search/FNMain.aspx?BAND_NUMBER=123&lang=eng>.
[640] Hadley Friedland, Maegan Hough & Renée McBeth, eds, "Accessing Justice and Reconciliation: Anishinabek Legal Traditions Report – Community Partner: Chippewas of Nawash Unceded First Nation #27" (2012) at 6, online (pdf): *University of Victoria Faculty of Law, Indigenous Bar Association, The Truth and Reconciliation Commission of Canada* <www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-265.pdf>.
[641] Chantel M LaRiviere & Stephen S Crawford, "Indigenous Principles of Wild Harvest and Management: An Ojibway Community as a Case Study" (2013) 41:6 Hum Ecology 947 at 948.
[642] *Ibid.*
[643] Saugeen Ojibway Nation Environment Office, "About Us" (2018), online: <www.saugeenojibwaynation.ca/about/>.
[644] *Ibid*.



Before the arrival of the British, the SON occupied and utilized a land base of about 8,090 km^2. However, colonization has drastically reduced this land base, and much of the land was opened to settlement, leaving the SON without enough lands to support themselves. Five main treaties were signed with the British Government in the 1800s, which opened up the traditional territory of SON for sharing with the settlers. These treaties, which the Crown viewed as land surrenders, are: Treaty 41 ½ (1836), Treaty 67 (1851), Treaty 72 (1854), Treaty 82 (1857) and Treaty 93 (1861).[645] The first treaty, Treaty 41 ½, opened up approximately 6,500 km^2 of Anishinaabe land south of Owen Sound for shared use. In signing the Treaty, the SON was promised that, "in return, the

[645] Friedland, Hough & McBeth, *supra* note 640 at 10.

Saugeen Peninsula would be protected forever for Anishinaabe use, including the land of Manitoulin Island (a sacred settlement site)."[646] However, the terms of the Treaty were not followed by the Crown, resulting in the need for Treaty 67 a mere 15 years later.[647] Treaty 72, signed in 1854, resulted in the establishment of reserves for SON, the land for which was exempted from the Treaty. "The Crown told the Anishinaabe that despite their promises, they could not prevent the Peninsula's settlement" and told the Anishinaabe that "their rights would be better protected if they moved to smaller reserves."[648] In Treaty 72, the SON ceded just less more 2,020 km^2 of the Saugeen Peninsula, and the proceeds of sale were to be held in trust.[649] Despite the move to these reserves, the Anishinaabe still viewed the treaties as giving them access to their broader traditional territory.[650] As settlement continued, the Anishinaabe's land continued to diminish, including some of the land that had been set aside for reserves.[651]

The SON did not view these treaties as land surrenders, but rather as "means of building a nation-to-nation relationship and protecting the relationship that First Nations had with their land."[652] One way they have sought to maintain and assert this nation-to-nation status is through the development of a document titled "Principles for Proponents working in the Traditional Territories of the Saugeen Ojibway Nations" ("Consultation Protocol").[653] The Consultation Protocol is a set of principles and assertions from SON that must be adhered to by any proponent who wishes to engage in development within the traditional territories of SON. Along with an accompanying document titled "SON Consultation Process,"[654] which sets out a step-by-step guide to the consultation process as envisioned by SON, these documents are aimed at directing how proponents should

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[646] *Ibid*.
[647] *Ibid*.
[648] *Ibid.*
[649] Saugeen Ojibway Nation Environment Office, *supra* note 643.
[650] Friedland, Hough & McBeth, *supra* note 640 at 10.
[651] *Ibid*.
[652] Saugeen Ojibway Nation, "Claims Update Newsletter" (2016) at 3, online (pdf): <www.saugeenojibwaynation.ca/wp-content/uploads/2018/02/Claims_Newsletter_2016.pdf> [SON, "Claims Update Newsletter"].
[653] Saugeen Ojibway Nation, "Principles for Proponents working in the Traditional Territories of the Saugeen Ojibway Nations" (2018), online (pdf): <www.saugeenojibwaynation.ca/wp-content/uploads/2018/01/SON_Consult_Principles_for_Proponents.pdf> [SON, "Consultation Protocol"].
[654] Saugeen Ojibway Nation, "SON Consultation Process" (2018), online (pdf): <www.saugeenojibwaynation.ca/wp-content/uploads/2018/01/SON-Consultation-Process-Flowchart.pdf> [SON, "Consultation Process"].

fulfil the DTCA, as the procedural elements of this duty are often delegated to proponents by the Crown. The Consultation Protocol is heavily premised on environmental protection at its core, as the principles of consultation and accommodation arise primarily within the sphere of EA and project approval. Even where a project does not require a full EA but merely an approval, licence, or permit from the Crown, the DTCA will still be engaged if the project falls within the traditional territory of SON, and the Consultation Protocol and Consultation Process will apply.

The basis for SON's assertions in the Consultation Protocol is the historic occupation of their territory, including their current occupation of reserve lands, and the existence of subsistence fisheries and land-based harvesting practices throughout their territory. The document states that "the SON's traditional territories have been their home long before contact and will continue to be their home for generations to come. The full expression of SON's rights depends on healthy, biologically diverse ecosystems." The Consultation Protocol requires that SON have a strong presence throughout the EA process. These assertions include:

- SON must have full participation in any environmental screening or assessment process;

- SON is entitled to share and have access to all necessary information relating to environmental screening or assessment reports and processes, especially those that might reveal potential impacts on SON's rights, claims and way of life;

- SON must have full participation in the ongoing monitoring of the project; and

- A separate Environmental Agreement will be required, which will include any terms and conditions identified by SON in their environmental review of the project, delivery of environmental monitoring data for SON evaluation, periodic independent evaluation of the proponent's environmental performance, collection of baseline data for use as environmental health indicators, regular environmental reporting to SON, review and approval by SON of environmental management plans, and endorsement of the precautionary principle.[655]

[655] Saugeen Ojibway Nation, "Consultation Protocol," *supra* note 653 at s 3(a)-(d).

The Consultation Protocol also stresses the importance of the vitality of the First Nation as a whole. As many projects, legislation, policies and practices have been incompatible with SON's rights, interests, and way of life in the past, SON requires that:

- The proponent must accommodate the rights and interests of the SON such that the project contributes to the SON's well-being and does not undermine it;

- Any adverse impact or infringement upon SON's rights and way of life and the sustainability of these interests within their traditional territories must be fully addressed and mitigated by the proponent; and

- The proposed project must be consistent with SON's vision for the land and waters of their traditional territories, respectful of their rights and interests and it must contribute to the cultural, economic and social vitality of their people.[656]

Finally, the Consultation Protocol also addresses the issue of capacity and funding for SON, particularly around the issue of hiring experts to review information provided by proponents, and the requirement that SON be able to conduct its own expert reviews of projects so that they can have a proper conversation with the proponent about any potential impacts of a project. SON has always taken the view that they should not have to pay anything for consultation as the DTCA does not rest with them, and they have nothing to gain from it. As such, the Consultation Protocol states that "the proponent must provide the SON with sufficient funding to ensure that SON can participate fully in the negotiation of a Protocol Agreement and in the consultation process itself, which includes the various studies, and stages of the assessment process."[657] This funding includes costs related to technical review by SON experts, consultation process costs for meetings including travel costs for staff, research and logistical support by SON's environmental office staff, and for the preparation of agreements and other information.[658]

This particular issue was recently litigated by SON in the case of *Saugeen First Nation v Ontario (MNRF)*.[659] In this case, the proponent, T & P Hayes Ltd, submitted an application for a license to build a limestone quarry on the Saugeen Peninsula in 2008,

[656] *Ibid* at s 4(a)-(c).
[657] *Ibid* at s 9(a).
[658] SON, "Consultation Process," *supra* note 654 at 2.
[659] 2017 ONSC 3456 (Div Ct), [2017] 4 CNLR 213.

within the traditional territory of the SON. While the parties agreed that the Crown had a DTCA with SON in determining whether to approve the license, the parties disagreed on the scope of the duty, and whether it was discharged.[660] From the perspective of the proponent and the Ministry of Natural Resources and Forestry ("MNRF"), the impact of the limestone quarry on SON's traditional territories would be minimal or non-existent, as there were already hundreds of small limestone quarries within southern Ontario.[661] However, SON saw the project as a part of a broader issue – since there are over 500 quarry and aggregate projects within their territory, the cumulative impact of these projects place strain on both the human and financial resources of SON that could otherwise be put to beneficial use within their communities. Instead, SON struggles to keep pace with the numerous requests for consultation, and they lack the resources to hire expert advice to properly assess each project.[662] At any given time, there were dozens of licence applications pending, and SON did not have the resources to track each and every application. They did not hear of the project in question in this litigation until 2011, three years after the application had been submitted by the proponent to the MNRF.[663]

When engaging in the DTCA for the limestone quarry, SON provided the proponent with a proposed consultation process, and also requested funding in order to meaningfully participate in the consultation process. SON wished to hire their own technical experts to peer review studies and other information, estimating funding at a modest $13,000 for initial site assessments and peer review reports, and also requested funding for SON staff participation in meetings, arguing that these costs should be borne by the Crown and the proponent.[664] These requests were initially rejected by the MNRF, although they eventually agreed to provide $8,514 for peer review of technical reports and $2.400 for hydrogeological expertise.[665] However, this funding was never provided. The MNRF

[660] *Ibid* at para 2.
[661] *Ibid* at paras 30-31.
[662] *Ibid* at paras 32, 46.
[663] *Ibid* at para 45.
[664] *Ibid* at para 67.
[665] *Ibid* at para 109.

approved the project in March 2016 after numerous failed attempts at consultation, and SON was not informed about this approval until July 2016.[666]

Ultimately, the Court held that the scope of the DTCA in this case fell in the middle of the spectrum.[667] This required the Crown to give formal notice to SON about the project, give information ton SON about the project, provide SON with funding to hire expert assistance, communicate with SON about SON's concerns regarding the project after SON has the benefit of its expert evidence, and follow a reasonable process thereafter to complete adequate consultations, and, where appropriate, accommodation.[668] The Court held that none of these steps required to discharge DTCA were met in a timely way in this case.

Additionally, the Court recognized that SON's disinclination to spend community resources to review someone else's project was a reasonable position.[669] The findings in this case are "vital to First Nations, who often have countless requests to participate in consultation with few resources. Where projects aren't going to financially benefit First Nations at all, the financial demands of participating in consultation in order to protect First Nations' rights drain a community's ability to provide other necessary community services."[670]

Finally, it is key to recall that the question of whether or not the DTCA has been discharged is evaluated by the courts on a reasonableness standard. This gives Indigenous communities some leverage over determining the process of consultation through developing their own consultation protocol and process, as SON has done. As evidenced in the Consultation Process from SON, attached to this report as **Appendix 10,** the community has set out requirements regarding: information sharing, required meetings between the community and the proponent, including necessary topics of discussion, confirmation of funding, independent expert review of information, internal consultation between the two SON communities, negotiation of a consultation and

[666] *Ibid* at para 114.
[667] *Ibid* at para 141.
[668] *Ibid* at para 141.
[669] *Ibid* at para 158.
[670] Maggie Wente, "Consultation Funding and a Fair Process Required to Meet Consultation Obligations" (2017), online (blog): *Olthuis Kleer Townshend LLP* <www.oktlaw.com/consultation-funding-fair-process-required-meet-consultation-obligations/>.

accommodation agreement with the proponent, and participation in long-term environmental monitoring. The goal of SON in setting out this Consultation Protocol was to exercise their governance over their territory. The development of a Consultation Protocol is a common step that has been taken by other treaty communities in Ontario, including Alderville First Nation,[671] Brunswick House First Nation,[672] Curve Lake First Nation,[673] KI First Nation,[674] Mitaanjigamiing First Nation,[675] Taykwa Tagamou Nation,[676] and Webequie First Nation,[677] among others. Where these community-developed processes are reasonable, it is advisable for proponents and the Crown to abide by them when discharging their DTCA. The court appreciates a good and reasonable process, and so derogation from a reasonable consultation protocol may result in a finding against the Crown.

In addition to the Consultation Protocol and Consultation Process, SON has asserted their rights and jurisdiction over land by way of two assertions of Aboriginal title. In 2003, SON filed an Aboriginal title claim to parts of Lake Huron and the Georgian Bay watersheds, which is the first Aboriginal title claim to land under navigable waters. They argue that their ancestors had exclusive occupation of the area before the assertion of British sovereignty in the 1760s, that their land rights in the territory have never been surrendered, and that the treaties between the Crown and SON do not include or mention lakes or waterbeds in the territory claimed, and so SON still owns that land.[678] If successful, they will hold an absolute right to the lakebed, including control over harbours

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[671] Alderville First Nation, "Alderville First Nation Consultation Protocol" (2015), online (pdf): <caid.ca/AFNConPro2015.pdf>.
[672] Brunswick House First Nation, "Consultation Policy: Draft v.5" (2016), online (pdf): <brunswickhousefirstnation.com/download/BHFN%20Consult%20Policy_DRAFT_rev5_Nov25_2015.pdf>.
[673] Curve Lake First Nation, "Consultation and Accommodation Standards" (2016), online (pdf): <www.curvelakefirstnation.ca/documents/CLFN%20Consultation%20and%20Accommodation%20Standards%202016.pdf>.
[674] Kitchenuhmaykoosib Inninuwug First Nation, "Kitchenuhmaykoosib Inninuwug protects watershed and sets consultation protocol through referendum" (6 July 2011), online: <kilands.org/2011/10/14/ki-protects-watershed-and-sets-consultation-protocol-through-referenduml/>.
[675] Mitaanjigamiing First Nation, "Manito Aki Inaajimowin - Consultation Protocol" (2013), online (pdf): <www.mitaanjigamiing.ca/sites/default/files/Manito%20Aki%20Inaajimowin%20signed%20copy%20April%204%2C%202013.pdf>.
[676] Taykwa Tagamou Nation, "Consultation and Accommodation Protocol" (2011), online (pdf): <taykwatagamounation.com/ttn/images/ttnconsultationprotocol.pdf>.
[677] CNW Newswire, "Webequie First Nation Reaffirms Community Rights in Ring of Fire" (23 November 2011), online (pdf): <ringoffirenews.files.wordpress.com/2011/11/webequie-rof-statement-23nov11.pdf>.
[678] SON, "Claims Update Newsletter," *supra* note 652 at 6.

and fishing quotas.[679] The Aboriginal title claim has been scheduled for a three-year trial and will be heard by the court in the near future. SON has also filed an Aboriginal title claim to the entirety of the Saugeen Peninsula, including land under navigable rivers and lakes.[680]

As these examples of Indigenous-led IA display, there are numerous unique and effective ways for an Indigenous community to assert their rights and advocate within, parallel to, or independently from the settler EA process. While the model chosen by each community was dependent on their own legal traditions and obligations, their capacity, available funding, and the nature of the project in question, the foundational goals of each Indigenous community's work has been the protection of their rights and interests, and the desire to safeguard the values that are important to the community. As such, Indigenous-led IAs look different across the country, and they are grounded in the obligations that communities have to their traditional territory. While each of these models share similar underlying goals and rationales, there is no single model that can be taken and applied uniformly to each and every resource development project. Rather, the underlying principles from each model may be drawn out and adapted to reflect the realities faced by individual communities. The final portion of this research report will recall and apply the lessons learned from these case studies to the Neskantaga First Nation's situation in the Ring of Fire.

[679] Joan Taillon, "Saugeen Ojibway go to Trial" (2004), online: *Aboriginal Multi-Media Society* <ammsa.com/publications/ontario-birchbark/saugeen-ojibway-go-trial>.
[680] SON, "Consultation Protocol," *supra* note 653 at 1.

5 DISCUSSION AND ANALYSIS: CONSIDERATIONS FOR NESKANTAGA FIRST NATION

This report has set out the numerous complex and intertwined factors that have come to bear on the Ring of Fire development, outlining why, more than ten years after the first discovery of minerals in the region, the Ring of Fire remains an inaccessible and undeveloped area in the Far North of Ontario. This challenges that exist in relation to the Ring of Fire region, particularly from an EA perspective, are not entirely unique, and similar challenges have surfaced in relation to other natural resource development projects across the country. Current approaches to EA, both within Ontario and across the rest of Canada, have proven to be an unacceptable approach to assessing development for many Indigenous communities, and the review of Indigenous-led approaches to IA has worked to unpack the numerous alternative approaches Indigenous communities have taken to exercise inherent governance authority over the lands and resources within their traditional territories. The final section of this report will pull together all of the lessons learned, and provide a targeted analysis of central considerations that must be worked through to help guide an Indigenous community, such as Neskantaga First Nation, towards making an informed decision about how to engage with the assessment process for the Ring of Fire.

This analysis is broken into three general sections. First, this analysis will cover some preliminary framing questions and considerations that any Indigenous community should turn their attention to before deciding whether to either go down the route of conducting an independent IA participate strategically in the Crown EA process. Second, this analysis will work through issues unique to a decision to conduct an independent, Indigenous-led IA, drawing from the case studies explored in the first and second categories of Indigenous-led IA within the preceding section of this report – Indigenous-led IAs conducted for particular projects, and IAs conducted in partnership with the Crown or project proponent. Finally, this analysis will outline key opportunities for strategic engagement with the conventional EA framework, drawing from the third category of Indigenous-led approaches to IA explored in the subsequent portion of this report – Indigenous-developed IA models.

To preface this analysis, it is important to note that "there are no best practices in Indigenous-led project assessment; it is about what emerging options and choices work best for the individual Indigenous community, nation, or cultural group."[681] There is no "one size fits all" approach for Indigenous communities, which is why each of the case studies explored in the preceding section of this report all look unique, and respond to the nuanced challenges and opportunities available to each community and nation.

5.1 PRELIMINARY FRAMING QUESTIONS AND CONSIDERATIONS

The decision of whether and how to engage in the assessment process for any particular project is a challenging and crucial decision for any Indigenous community, as each possible avenue for engagement may lead to different opportunities of influence and different ways to exercise inherent governance rights. A number of preliminary considerations can help guide the decision-making, enabling Neskantaga First Nation to reflect on which approach may be within their means when advocating in relation to the Ring of Fire developments.

5.1.1 COMMUNITY GOAL AND VISION

A preliminary consideration that should feature early on in any community discussions is the overall goal of Neskantaga First Nation in engaging in the assessment process. Joan Kuyek, a sessional instructor at Carlton University and former National Coordinator of MiningWatch Canada, has emphasized the importance that the community have a vision in place for what they want their future to look like, and an understanding of core values that are of priority importance for the community.[682] This includes making the positions of the community regarding any mining development known upfront. Kuyek highlighted the benefit that can flow from community declarations, pointing to the example of the KI First Nation Watershed Declaration, which was adopted in 2011 after a community referendum.[683] It applies to a 13, 025 km^2 area of lakes, rivers forest, and wetlands in KI First Nation's traditional territory, and it provides the community with a

[681] Gibson et al, *supra* note 467 at 47.
[682] Interview with Joan Kuyek, 13 March 2019, Toronto, ON (telephone).
[683] Kitchenuhmaykoosib Inninuwug First Nation, *supra* note 674.

mandate when engaging in discussions with the government and corporations.[684] The Watershed Declaration states

> We declare all waters that flow into and out of Big Trout Lake, and all lands whose waters flow [to] those lakes, rivers, and wetlands, to be completely protected [by] our continued care under KI's authority, laws and protocols…No industrial uses, or other uses which disrupt, poison, or otherwise harm our relationship to these lands and waters will be permitted.[685]

As a part of the community visioning process, Kuyek suggested that the development of documents such as a Watershed Declaration, which represent an articulation of Indigenous law and governance authority, would help to build the community's pride in the land, as well as invigorate the role the community can play in protecting the land.[686] This renewed sense of pride and obligation can flow into any route for IA that Neskantaga First Nation opts to pursue.

As a part of this visioning process, the community should also consider at an early stage what sorts of values and priorities they might hope to protect through the IA process, such as certain species of fish, particular areas of land, or other socioeconomic activities that are core to the community. A discussion around priority values within the community may form an integral component of whichever approach to IA is chosen. For example, both the Squamish Nation Process, as well as the Metlakatla CEM Program included elements of information gathering and focus group discussion to help gain an understanding about the concerns each community hoped to address through the IA process. The Squamish Nation implemented these discussions within their IT process itself, the Squamish Process, using community input to shape the scope of their assessment and define the valued components to be assessed. The Metlakatla First Nation implemented a community census in order to support the development and implementation of the CEM program, which helped to identify and narrow a list of priority values they wished to be addressed through the CEM Program. Defining these core values helps to develop a vision and desired outcomes of the IA process, and definition of these values at an early stage can help to shape the IA process itself.

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[684] *Ibid*.
[685] *Ibid.*
[686] Interview with Joan Kuyek, *supra* note 682.

5.1.2 DESIRED OUTCOMES OF AN INDIGENOUS-LED IA PROCESS

Indigenous communities should also think about the goals they hope to achieve through the IA process as part of this early visioning work. Ugo Lapointe, the Canada Program Director with MiningWatch Canada, has emphasized that the Indigenous-led IA process may be a means to several different ends.[687] Outcomes of an Indigenous-led IA progress can include:

- ***Control over the process, leading to the integration of Indigenous values as a fundamental starting point for any review***:[688] This outcome is inherent in the examples of Indigenous-led IAs conducted for particular projects. For example, through the development and implementation of their own IA processes, the TWN, the SSN, and the Squamish Nation were able to ensure their IAs were grounded in the legal traditions of their communities, and respected the values that were of core importance to them. This outcome is also inherent in the examples of Indigenous-developed IA models, including the Metlakatla CEM Program and the SON Consultation Protocol. The Metlakatla CEM Program is an articulation of the exercise of the community's inherent governing authority over the land, taking into account a number of "priority values" that the community had the capacity to monitor. The SON Consultation Protocol, designed to influence the fulfilment of the DTCA, dictates the community's stance on development within their traditional territory, setting out the process they expect to be followed should the government or a proponent wish to develop a project on their lands.

- ***Changes to the project and unique mitigations***:[689] This outcome is most strongly evident through the Squamish Nation's assessment process, the Squamish Process, as contractual obligations were set in place with the project proponent to ensure that binding conditions established by the Squamish Nation were implemented in order for the proponent to obtain the consent of the Nation. This led to alterations to the project, directly mandated by the Squamish Nation.

- ***Increased local benefits***:[690] In the traditional sense, this outcome is most strongly evident through the Squamish Nation's assessment process. Upon granting consent and approval for the Woodfibre LNG project within their traditional territory, the Squamish Nation negotiated benefits for the community, including cash

[687] Interview with Ugo Lapointe, 9 November 2018, Toronto, ON.
[688] Gibson et al, *supra* note 467 at 41.
[689] *Ibid.*
[690] *Ibid.*

benefits, the option to buy a percentage of the project, as well as the opportunity for Squamish Nation businesses to bid on contracts for the project. However, benefits should not be thought of strictly in monetary terms, as Indigenous-led IA processes benefit the communities involved in other ways. Indigenous-led IA processes may also lead a revitalization of traditional knowledge, and an increased sense of obligation to the land. For example, the SSN process brought together 26 representatives from two communities, and over 80 presenters shared their knowledge and concerns about the project.

- ***The opportunity to re-use any newly developed processes for future projects:***[691] "While setting up an Indigenous-led IA process for the first time is the hard part, […] future assessments start to benefit from lessons learned and economies of scale and effort."[692] Where the assessment process is project-specific, each can be adapted to apply to different projects in different contexts. Each process is an exercise of Indigenous law and governing authority over the land, based on principles and values core to each community, and the processes developed can be adapted to different types of resource development projects within their traditional territory. The examples of the Metlakatla CEM Program and the SON Consultation Protocol are also examples of processes designed to operate on a long-term basis, and processes such as the Squamish Process and the TWN's Stewardship Policy are applicable to any development within the territory.

This list of outcomes is not exhaustive, nor are the outcomes mutually exclusive. As communities have the power to determine the manner and method through which they chose to engage, whether through an independent IA process or through the settler EA process, Indigenous-led IA processes can be developed and tailored to achieve whichever outcomes are most important to the community. A community vision can help identify the desired outcomes of the process, as the community can work to ensure the process selected works to protect the values most important to them and is responsive to the limited capacities of the community, both financial and human resource-related.

[691] *Ibid.*
[692] *Ibid*.

5.1.3 COMMUNITY CAPACITY

Capacity is perhaps the most crucial consideration for Indigenous communities when deciding whether and how to engage in an Indigenous-led IA process. There are three elements to capacity: funding, human resources, and relationship building.[693] This core issue will be discussed below in relation to each category of Indigenous-led IA process, as the community capacity, and funding requirements and opportunities vary greatly according to each unique model. At a preliminary stage, it may be beneficial to identify and "define a core internal team [within the community], with a mixture of technical (e.g. lands department) and leadership capacity and legal advisors, to identify the appropriate approach."[694] This core team can work to assess what external capacity may be required for each possible option, and begin to assess the associated costs, and determine which IA strategies may be feasible for the community.

5.1.4 EARLY CONSIDERATION OF ENABLING FACTORS

The report titled "Impact Assessment in the Arctic: Emerging Practices of Indigenous-Led Review" prepared for the Gwich'in Council International in 2018 provides a comprehensive overview of considerations, aptly termed "enabling factors," that an Indigenous community should keep in mind when beginning to think about possible avenues for engagement in an IA process. Communities considering whether to shoulder the burden and opportunity of intense engagement, either through an Indigenous-led IA or through strategic engagement with the conventional EA process, should "conduct an early community assessment of which of the enabling factors they have in place and what the implications may be of their presence or absence."[695] The report categorizes these enabling factors into three sections, and the authors suggest that communities think through each of these factors, and conduct a "readiness assessment," noting which are in place, and which may be absent:, and considering what level of responsibility the community may be ready to take on

1. **External Context:**
    - Is there legislation or anther legal instrument in place?

[693] *Ibid* at 38.
[694] *Ibid* at 54.
[695] *Ibid* at 34.

- Is the proposed project large or complex?
- Is the proposed project in a strategically important location?

2. **Nation Characteristics and Context:**
    - Does the community have a strong connection to the area? Is the area of high importance?
    - Does the community have high leverage?
    - Is there high pre-existing internal capacity?
    - Is there a high degree of internal intra- or inter-community cohesion?
    - Is there an opportunity to shadow the conventional EA process?
    - Does the community have history with or knowledge of this type of project?
    - Is there an Indigenous-endorsed land use plan in place?

3. **Proponent and External Government Characteristics:**
    - Is there an existing contractual agreement or relationship with the project proponent?
    - Is the proponent and/or the government supportive or willing to engage in an Indigenous-led process?
    - Is the proponent and the government willing to fund the process?
    - Is the proponent and the government willing to endorse and implement the outcomes of an Indigenous-led process?[696]

Careful consideration of these enabling factors may help an Indigenous community to narrow and focus their discussions about which avenue to pursue – an independent IA, an IA in partnership with the project proponent or the Crown, or to engage directly within the conventional EA process. The presence or absence of any number of enabling factors will help an Indigenous community weigh these various options, and focus their resources on the process that is within their capacity, and accomplishes the goals they hope to achieve. It is important that Indigenous communities turn their minds to this analysis at the earliest possible opportunity. A number of these enabling factors are subjective, and can best be discussed within Neskantaga First Nation by leadership and community members, taking into consideration their history and past involvement with the Ring of Fire development. However, others, notably those falling into the first and third categories above, require a more detailed an in-depth examination, as their implications may vary

[696] *Ibid* at 36.

depending on the type of IA process selected. The following subsections of this report will work to unpack a number of these enabling factors in the context of both an independent, Indigenous-led IA, as well as in the context of the conventional EA process.

5.2 MAKING A DECISION TO CONDUCT AN INDEPENDENT, INDIGENOUS-LED IA

Before determining whether to engage in an independent IA process, there are several risks and opportunities that Indigenous communities should be aware of before making a commitment. The two most crucial considerations include: the legislative environment within which the independent IA process would operate, and capacity and funding limitations and opportunities.

5.2.1 EXTERNAL CONTEXT: THE LEGISLATIVE ENVIRONMENT

The case studies explored throughout this report have worked to outline some of the reasons that Indigenous communities have opted to engage in the IA process in the ways that they did. A core rationale for most communities is the desire to exercise governance authority and jurisdiction over lands and resources within a community's traditional territory. Most fundamentally, the settler legislative context has a foundational impact on whether a community needs to develop and implement their own process, or whether they can engage and exercise governing authority through an alternative, pre-existing legislative regime that provides a framework to obtain FPIC.

Within the case studies, two unique legislative environments for EA were present – projects falling within the conventional EA process, and those located within modern treaty territory. Modern treaties often set out co-management regimes, and Indigenous communities may never need to develop their own independent process for IA.[697] This was the case for the Tłı̨chǫ Government, who are party to the Tłı̨chǫ Agreement. However, this is not the context that exists within northern Ontario. The Ring of Fire sits within historic Treaty 9 territory, and conventional EA processes govern any project development in the area. In places where the existing legislative model and conventional EA processes do not require the FPIC of the Indigenous peoples, communities have

[697] *Ibid* at 34.

generally opted to engage in their own independent IA processes, or a joint process with a project proponent. This is evident through the case studies of the TWN, the SSN, as well as the Squamish Nation. Each of these communities, located in British Columbia, hold Aboriginal rights and title over lands that stood to be impacted by the respective developments. Additionally, they have not signed modern treaties with the Crown, and thus no unique co-management or other legislative regime is in place. By developing and implementing their own IA processes, these communities were able to assess the projects based on their own legal traditions and obligations to the land, taking into account values that were of core importance to their respective communities.

5.2.1.1 Current Legislative Environment for the Ring of Fire

Presently, the legislative environment within the Ring of Fire does not require that the Crown or project proponent obtain the FPIC of Indigenous communities within the region, nor does the legislation envision joint decision-making for project approval. Where a project has the potential to impact established or asserted Aboriginal and treaty rights, the Crown only has a DTCA with impacted communities, which is typically fulfilled through the conventional EA process. The requirements of this DTCA vary with the strength of the claim to the Aboriginal or treaty rights, although even where there is a very strong rights claim in combination with a high potential for adverse impacts elevating the DTCA to a consent standard, the Crown may still infringe on these rights for pressing and substantial purposes. Despite the fact that the Government of Canada has endorsed UNDRIP, the requirement for true FPIC has not yet become a part of the legal reality within Canadian law. Additionally, the current EA framework under Ontario's *Environmental Assessment Act* and the federal *CEAA, 2012* does not contemplate the possibility for joint decision-making with Indigenous communities for proposed projects. Decision-making authority remains solely with the Minister or Cabinet.

5.2.1.2 Legislative Environment under Bill C-69: Delegation and Substitution

The proposed new federal IA framework set out in Bill C-69 also falls short of requiring joint decision-making for designated projects, and the final decision-making authority remains with either the Minister or Cabinet. However, Bill C-69 does allow for

the possibility for a portion of an IA to be delegated to an Indigenous governing body under clause 1, s.29, and the government may also substitute the IA process for that of an Indigenous governing body under clause 1, s.31(1). Should this delegation or substitution take place, the responsible Indigenous governing body must have an appropriate assessment framework in place that can address the same legislative requirements that the proposed *Impact Assessment Act* would examine under clause 1, s.22(1) of the Bill. There are very few limitations within Bill C-69 dictating the precise methods of carrying out a substituted assessment and no provisions addressing the method for a delegated assessment, which may allow for a more culturally appropriate method of assessment. A substituted process must include consultations with Indigenous communities that would be affected by the project, it must ensure the public can meaningfully participate, and the public must have access to the records used in the assessment.[698]

Should an Indigenous community opt to conduct an independent IA, some elements of these IAs are also recognized to a limited extent within Bill C-69. Clause 1, s.22(1) of the proposed Act requires that assessments conducted by the IAA or a review panel take into consideration

> **(q)** any **assessment of the effects** of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project; and
>
> **(r) any study or plan** that is conducted or prepared by a jurisdiction — or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition *jurisdiction* in section 2 — that is **in respect of a region** related to the designated project and that has been provided with respect to the project.[699]

Under these provisions, Indigenous-led IAs or regional studies, such as the Metlakatla First Nation's CEM Program, must be taken into consideration **during** the completion of an IA. This limits consideration of these Indigenous-led processes only to findings on the

[698] Bill C-69, *supra* note 135, cl 1, s 33(1).
[699] *Ibid*, cl 1, s 22(1).

effects of a designated project and does not mandate consideration of any ultimate conclusion of the IA, such as whether or not consent is granted.

It should be noted that clause 1, s.22(1) raises one inherent challenge for Indigenous communities: in order for the Indigenous IA to be considered for the purpose of assessing the effects of a project under the settler IA process, the Indigenous community must have completed their assessment in advance of the completion of the settler process. The time limitations within Bill C-69 remain quite stringent, and so communities must be aware of these limitations when determining whether they are able to complete their assessment in due time. For example, Ugo Lapointe highlighted that the SSN Review Panel assessment process of the Ajax Mine took two full years, in addition to a full year of engagement with the federal government.[700] Conventional EA processes under *CEAA, 2012* may take a maximum of two years, subject to extension, and 600 days under the proposed *Impact Assessment Act*. Thus, Indigenous communities should expect to have their independent process fully developed before any conventional EA begins so that they have ample time to mobilize their model and complete their assessment in due time for it to have maximum influence on the settler process.

5.2.1.3 Risks Inherent in the Current Legislative Environment

A major risk inherent in engaging in an independent, Indigenous-led IA process that operates outside of any settler legislative framework is the possibility that the conclusions and findings of the assessment will have no impact on the ultimate outcome of the project, and the community's decision may not be accepted by the state or the project proponent.[701] This is evident through the case study of the TWN and their assessment of the Kinder Morgan pipeline project. Despite the community's extensive review, the project was still recommended for approval by the NEB, and was initially approved by the federal government. The community had to resort to litigation to challenge this approval, arguing that the NEB's analysis of the project was inadequate and could not be used as the basis for Cabinet's approval of the project, and that the

[700] Interview with Ugo Lappinte, *supra* note 687.
[701] Gibson et al, *supra* note 467 at 35.

DTCA was not properly exercised. While the TWN's assessment was filed as evidence within the NEB's EA process, the fact that they withheld consent was not respected.

Some Indigenous communities have designed their independent IA processes in ways that work to alleviate this risk. For example, the Squamish Nation developed a relationship with the project proponent through contractual obligations, and required any conditions developed through their independent Squamish Process to be implemented in the final project design. Upon this guarantee that the proponent was willing to endorse the conditions, the Squamish Nation gave their consent to the project.[702] This agreement "played a key role in the success of [their] otherwise independent process."[703] Obtaining this type of guarantee requires a strong relationship with the project proponent, any may involve in entering into an agreement such as an Impact and Benefit Agreement with the project proponent. These types of contracts may be used to seek clarity of the IA process and define requirements for consent, although reaching this level of agreement with a proponent may require substantial political maneuvering.[704] For the Squamish Nation, they were the only nation in the vicinity of the project, and thus were the sole Nation engaging with the proponent and working to build a relationship. The Ring of Fire presents a starkly different picture, with several individual communities each taking different positions on the development since the dissolution of the Regional Framework process, impacting the overall leverage of each community on its own. This political climate may make it increasingly difficult for individual communities to develop relationships with project proponents as the Squamish Nation did, as each community is differentially impacted by the development.

5.2.2 CAPACITY AND FUNDING

For communities wishing to develop their own independent IA process, "funding is absolutely vital to any meaningful impact assessment. Every Indigenous-led impact assessment requires a large team and substantive effort."[705] The report titled "Impact Assessment in the Arctic: Emerging Practices of Indigenous-Led Review" examined three

[702] *Ibid* at 37.
[703] *Ibid* at 35.
[704] *Ibid, Ibid* at 37.
[705] *Ibid* at 38.

Indigenous-led IA case studies, including the Squamish Nation and the Tłı̨chǫ Government processes that were further explored in this report. The authors found that in each of these cases, "there were substantial funding resources put into play, and extensive human resources."[706] Additionally, for these case studies

> The Indigenous government mandated a core set of people to follow the impact assessment from the outset through to the close. Key skills were called upon, such as Indigenous knowledge holders, lawyers, and technical specialists (e.g., on key topics where project changes could be made with the insight of technical knowledge). Government, industry, and the Indigenous parties themselves may be called upon to assume some portion of the costs of these processes; as most Indigenous groups are the party least likely to have internal capacity in this regard, the question of accessing stable funding is critical from the outset.[707]

Each community explored within the preceding case studies experienced capacity issues in some form, whether due to financial constraints or due to human resource limitations. For example, the Squamish Nation Process struggled with a lack of adequate staffing, and "it was also difficult to get a large number of members to attend all of the meetings on the project."[708] However, extensive face-to-face interaction, both within the community as well as with the project proponent, made these particular Indigenous-led IAs possible, and "ongoing and intense meetings over a prolonged period led to the completion of the review."[709]

Financially, each example of independent Indigenous-led IA processes have featured some level of involvement and expertise from individuals external to the community, including consultants. Communities may hire a consultant to conduct necessary studies that are outside the capacity of the community, as was the case with the TWN's assessment of the Kinder Morgan pipeline project. The Metlakatla First Nation engaged a consultant and also partnered with Simon Fraser University to develop their CEM program. The Squamish Nation also engaged independent consultants to provide advice throughout the process, and represent the community in the conventional EA process. Should a community decide to engage in an independent IA process, their

[706] *Ibid*.
[707] *Ibid*.
[708] *Ibid.*
[709] *Ibid*.

assessment should be scoped so as to limit the level of effort and resources required according to the level of funding available. This may mean that the assessment only focus on values of critical importance to the community and particular aspects of the project, rather than assessing the entire project. For example, the TWN only commissioned studies from consultants to provide advice on the impacts of an oil spill in the Burrard Inlet.

In each case, funding was obtained from a mix of sources – from the proponent, from the Crown, and from the nation itself.[710] The Squamish Nation's Process included contractual obligations that the proponent pay fees that would fund the process. However, as previously mentioned, establishing a relationship of this type with a proponent may require substantial political maneuvering, and may be of greater challenge in the Ring of Fire where there are several communities impacted by potential development. The SSN was able to negotiate capacity funding from the governments of Canada and British Columbia, although the amount only covered a portion necessary to complete their extensive Review Panel process. Should any EA proceed through a federal process, participant funding is a mandatory component of the EA process under *CEAA, 2012*.[711] Bill C-69 also mandates the establishment of a participant funding program, although it does not mandate adequate funding levels nor address the need for ongoing funding throughout the IA process.[712] Under Bill C-69, this participant funding obligation does not apply with respect to substituted processes under clause 1, s.31.[713] However, as communities often find this federal amount inadequate to even participate in the EA process, these funds should not be relied on as an adequate means to conduct an independent IA process.

The "Impact Assessment in the Arctic: Emerging Practices of Indigenous-Led Review" report provides a useful set of framing questions and recommendations for Indigenous communities planning to develop their own Indigenous IA framework. A copy of this document has been attached to this report as **Appendix 11.**

[710] *Ibid* at 54.
[711] *CEAA, 2012, supra* note 134, ss 57, 58.
[712] Bill C-69, *supra* note 135, cl 1, s 75(1).
[713] *Ibid*, cl 1, s 75(2).

5.3 MAKING A DECISION TO ENGAGE WITH THE CONVENTIONAL EA PROCESS

Where engaging in a full independent IA process proves to be a non-feasible option, or where a community wishes to make an even greater impact on a project, Indigenous communities may opt to strategically engage in the conventional EA process to advance their interests and work towards their community vision. Similar concerns arise in this context, including determining where and how to focus attention, as well as capacity considerations.

5.3.1 STRATEGICALLY ENGAGING IN THE CONVENTIONAL EA PROCESS

When considering how to most effectively engage in the conventional EA process, Neskantaga First Nation may opt to focus their attention and resources in a few different ways. One option is to focus on gaps left by the conventional EA process, thereby addressing areas of concern that may not be adequately addressed by the proponent through their EA. The starting point for this type of intervention is to examine the Terms of Reference (provincially) or the Environmental Impact Statement Guidelines (federally) that are issued to the proponent. Under the proposed *Impact Assessment Act,* this document would be called the Tailored Impact Statement Guidelines. These documents set the stage for that the EA will look like, identifying the studies that a proponent should undertake, and the types of information that they will be gathering during the preparation of their EA or Environmental Impact Statement report. By preparing a submission to the EA process that addresses these gaps, Indigenous communities can work to bring new issues to the attention of the reviewing authority. As a result, the proponent may be required to undertake additional studies to address these issues, and the information may lead the implementation of unique mitigation measures or conditions that respond directly to the community's concerns. Guiding questions that may be asked when assessing Terms of Reference of Environmental Impact Statement Guidelines include:

- Is the level of detail requested for the project description appropriate?
- Are all project components listed?

- Is the level of analysis for evaluating the environmental effects of the project appropriate?

- Is an evaluation of project alternatives required?

- Are the proposed methods for First Nation consultation sufficient?

- Is there a requirement to assess all potential impacts of concern to your community?

- Do you agree with the temporal and special boundaries for the EA?[714]

Indigenous communities may also decide to shadow the conventional EA process, allowing the proponent to conduct work on topics such as engineering and biophysical effects assessment, but contributing to the assessment process through avenues that they are better equipped to address, and making this the core focus of their intervention in the process.[715] While similar to the strategic intervention outlined above, this type of intervention might focus on broader impacts that might not typically be addressed through a conventional EA. For example, Indigenous communities may be better positioned to address "specific baseline data and effects characterization studies on discrete topics, such as:

- Cultural IA;
- Community-specific socio-economic IA;
- Traditional knowledge and traditional land use studies; and
- Cumulative effects context studies across multiple valued components."[716]

The case study of the Metlakatla First Nation's CEM Program provides an excellent example of what this type of intervention might look like, and may be especially influential in individual project-specific EAs where cumulative effects are not adequately addressed. Through the CEM Program, Metlakatla worked within their community to identify a list of priority values, each of which was within their capacity to measure throughout time, such

[714] Chiefs in Ontario, *First Nations Environmental Assessment Toolkit for Ontario* (Toronto: Chiefs in Ontario, 2009) at 100.
[715] Gibson et al, *supra* note 467 at 48.
[716] *Ibid* at 48-49.

as the impact of development on specific species of concern, or on community wellness indicators. This body of evidence could be a valuable addition to an EA process, particularly where multiple projects are proposed within a community's traditional territory, and may encourage a broader assessment of the impacts of a proposed project where legislation might narrowly define the scope of an assessment.

A third approach that could be taken where capacity is limited is to focus on selected issues of core importance to the community, or on aspects which face the most significant impacts from the development. This could include items like protection of particular species that are of high value and importance to the community, the protection of water, the impacts on community wellness, or the disruption of traditional land uses. Both the Squamish Nation Process and the Metlakatla CEM Program feature some level of this type of advocacy, and extensive community consultation took place in order to identify these areas of priority.

Joan Kuyek suggested that the community visioning process can play a key role in strategizing where to focus energy during EA advocacy. Especially where resources to participate in an EA process are scarce, communities might choose to focus on presenting their alternative vision for their future, based in their legal traditions and obligations to the land. This may include suggesting alternative, closed-loop ways of community-building and development, focusing on opportunities to make lasting, positive change within their community.[717]

Whichever advocacy technique is selected, Indigenous communities should place the realities of their community at the forefront of the process, assisting the proponent and the Crown in understanding what impacts the project would have on their lives. Joan Kuyek particularly emphasized three EA process through which Indigenous communities have been especially effective in taking this approach: the North Kemess mine project in British Columbia, which was the first mining project to be turned down by the federal government, the Raven Coal Mine project on Vancouver Island, and the Tsilhqot'in Nation's intervention in the New Prosperity Mine EA in British Columbia.[718] In these examples, the communities were able to have EA hearings held in their own communities,

[717] Interview with Joan Kuyek, *supra* note 682.
[718] *Ibid.*

allowing them to talk about the proposed project in the context of their own situation. Kuyek stated that in the North Kemess mine EA, almost everyone from the community was involved, from children to elders. They approached the EA process from their own perspective, opting to tell their story through things like plays and stories, and also hired their own experts on technical matters.[719]

5.3.2 CAPACITY AND FUNDING

As compared to an independent IA, engagement in the conventional EA process may require significantly fewer resources, although this avenue for advocacy certainly does not come with a small burden. A negative implication of the current approach to EA in the Ring of Fire is that projects are being assessed individually on a project-by-project basis, rather than through a regional assessment. This means that there will be numerous EA process for communities to track and engage in, putting strain on both financial and human resource capacities. While federal EA processes require mandatory participant funding programs, providing impacted communities with some resources to participate in the EA process, provincial processes to not have this same obligation.

The recent case of *Saugeen First Nation v Ontario (MNRF)* is a positive precedent that Indigenous communities in the Ring of Fire can use to advocate for funding from the Crown throughout the EA process. In this case, the Ontario Superior Court of Justice held that SON was entitled to receive funding to hire independent expert assistance as part of the DTCA. Important to note is that in this particular case, the court found the DTCA fell in the middle of the spectrum. As such, this funding is not guaranteed where communities have a weak claim to Aboriginal or treaty rights in a particular region, or where the project will only have minor impacts. In order to provide a strong case for their claim, Ugo Lapointe emphasized the importance of documenting the land and demonstrating the connection to and use of the territory. Codifying knowledge such as who has authority over different parts of the land and how land-based decisions are traditionally made within the community, and use of the community's own language will all help to strengthen the community's claim, showing continuity of use throughout time through traditional stories,

[719] *Ibid.*

laws, and land use.[720] The SSN Review Panel assessment is an excellent example of this work. Lapointe stated that the SSN included traditional stories and used their own language throughout all communications with the government, showing that their connection to the land was not just something of the past, but also critically important in the present.[721] Many of the documents related to the SSN's assessment are written in their own language as well as English, including their final decision statement.

In order to boost internal capacity, Indigenous communities should also take advantage of training opportunities provided by the government. The Canadian Environmental Assessment Agency offers courses tailored towards Indigenous involvement in EA, the basis of EA, and about *CEAA, 2012*.[722] The proposed *Impact Assessment Act* would also establish a Capacity Building Program which would "provide longer-term financial support, outside of project-specific participant funding, to support the development of internal capacity within Indigenous communities and organizations." Details about this program have not yet been released.[723] Increasing knowledge and capacity throughout the community in the topic of EA may help to improve community engagement throughout the EA process, strengthening the impact that Neskantaga First Nation could have within a conventional EA.

5.3.3 HOW TO EFFECTIVELY ENGAGE WITH A PROJECT PROPONENT OR THE CROWN

Indigenous communities often engage in their own IA processes as a way of exercising their inherent decision-making authority through a process designed to lead to FPIC. While opting to participate in the conventional EA process eliminates a level of control over the process, Indigenous communities still have several prospects through which they can assert direction over how they wish to be consulted, and the standards they expect will be adhered to throughout the EA process. Issuing clear and reasonable

[720] Interview with Ugo Lapointe, *supra* note 687.
[721] *Ibid.*
[722] Canadian Environmental Assessment Agency, "Training opportunities regarding environmental assessment" (2018), online: *Government of Canada* <ceaa-acee.gc.ca/014/index-eng.aspx>.
[723] Government of Canada, "Step 1: Early Planning" (2018), online: <www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/step1-early-planning.html>.

guidance both to project proponents and the Crown works to set expectations upfront between the parties. Some of the tools available that Indigenous governments may choose to provide to proponents that seek project approvals are:

- Traditional knowledge protocols;
- A list of required studies that only the community is allowed to undertake;
- A process chart showing key points of engagement and requirements;
- Guidance to both the proponent and Crown agents on how to engage and consult with the community before, during, and after the project assessment; and
- A document that identifies the Indigenous consent regime and process, including minimum engagement and information requirements without which the community cannot provide informed consent.[724]

Within Ontario, Consultation Protocols are a common document issued by treaty communities. These types of documents effectively put project proponents and the Crown on notice as they provide an overview of the basis for Aboriginal rights claims within their territory, an overview of legal traditions and governing authority over the land, the requirement for nation-to-nation dialogue, as well as a process to be followed for consultation, including funding requirements.

5.4 CONCLUDING THOUGHTS

Through both independent Indigenous-led IAs, as well as Indigenous involvement in the conventional EA framework, there is the potential for a strong confluence of western and Indigenous law. In each of these cases, "the Indigenous party identifie[s] its knowledge base and [brings] it to bear to ensure that their values, language, and way of life [are] considered in the review."[725] Indigenous-led approaches to IA can "greatly change the project in order to protect and accommodate the culture and way of life. It also leads to fundamental changes in the language of impact assessment."[726] This is already evident in the language of Bill C-69. The recent rise in Indigenous-led IA has been

[724] Gibson et al, *supra* note 467 at 50.
[725] *Ibid* at 39.
[726] *Ibid.*

recognized within the Bill, and as a result, there is greater opportunity for Indigenous involvement throughout the proposed new IA processes than existed in *CEAA, 2012*. However, Professor John Borrows has questioned the adequacy of these types of legislative changes. He writes that

> While the enhancement of more inclusive structures, and the incorporation of a broader range of ideas, may assist democracies in making better environmental decisions, if the only result of Indigenous participation is that their knowledge is merely received as evidence of better practices, then it is unlikely Indigenous contributions will change the way our institutions relate to the environment. Currently, formal and informal legal institutions have very little experience with Indigenous knowledge, which raises serious questions about their ability to effectively evaluate Indigenous contributions. Therefore, in order to practically assess the value of Indigenous ideas, the standards used to judge First Nations input must also change. Just as there must be a change in both the people and ideas involved in Canadian institutions, so there must also be a shift in the ground upon which decisions are made. Indigenous legal knowledge must be an integral part of our decision-making standards within democracy. This knowledge must be considered and received as precedent in law to guide answers to the questions we have concerning the environment.[727]

Although this article from Borrows was published over 20 years ago, the sentiments are still valid and true today, and these concerns are especially poignant in the Ring of Fire region where the overwhelming majority of the population in the vicinity of any development are Indigenous peoples who would carry a disproportionate burden of the impacts. New IA legislation aims to include an ever increasing consideration of Indigenous knowledge, although those conducing the IA and making decisions on proposed project may have little to no experience interpreting and aptly applying this knowledge in their decisions. Whether Indigenous communities opt to engage in an independent IA process, or engage with the conventional EA process, communities should be mindful of the state's established way of conducting these types of assessments and their limitations of understanding. and whether their processes are cognizable to the conventional EA approach. Clearly articulating the community's conclusions and reasoning, as well as articulating how and why the community has

[727] John Borrows, "Living between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47:4 UTLJ 417 at 451.

reached those conclusions, will enable concerns to be cognizable for those in charge of the conventional EA process.

6 CONCLUSION

If anything has become obvious throughout the course of this research report it is that there are numerous layers of complexity inherent in development of the Ring of Fire. The past ten years of political negotiations have left Indigenous communities divided, resulting in an ever increasingly complex legal environment. As any potential development will be situated within the traditional territories of several Indigenous communities, all project approvals should be contingent on an FPIC-based model, ensuring that communities are properly informed about and have the opportunity to benefit from potential development. Where the conventional EA process and constitutional obligations fail to adhere to the standard of FPIC required by UNDRIP, Indigenous communities across the country have opted to pursue other avenues to express their inherent jurisdiction and apply their own laws. Indigenous-led approaches to IA have been an ever-increasing method used by communities to exercise their legitimate governing authority throughout their territories, and they have been transforming the EA landscape through the use of processes grounded in Indigenous legal traditions and community values.

While this report is not intended to be prescriptive, it has drawn out the risks and opportunities that the Neskantaga First Nation should be aware of and discuss when making a decision about how to advocate in the context of the Ring of Fire. As there are no best practices for Indigenous-led IA, communities must be attuned to the realities unique in each situation, and adapt the principles of Indigenous-led IA to the circumstances, in accordance with their own internal limitations and capacities. Although it has been over a decade since the first discovery of minerals in the Ring of Fire, development of these minerals is still in the early stages. The long road ahead leaves ample opportunity for intervention and advocacy that can work to ensure any potential development is thoroughly and properly assessed.

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APPENDICES

APPENDIX 1: York University Ethics Approval for Research Involving Human Participants

YORK
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Certificate #:	**2018-321**
Approval Period:	**11/08/18-11/08/19**

ETHICS APPROVAL

To: **Amanda Spitzig**
Faculty of Environmental Studies/Osgoode Hall Law School
Amanda.spitzig@gmail.com

From: Alison M. Collins-Mrakas, Sr. Manager and Policy Advisor, Research Ethics
(on behalf of Veronica Jamnik, Chair, Human Participants Review Committee)

Date: Thursday November 8th, 2018

Title: Laying the Groundwork for a Community Risk Assessment of the Ring of Fire and Related Infrastructure

Risk Level: ☒ Minimal Risk ☐ More than Minimal Risk

Level of Review: ☒ Delegated Review ☐ Full Committee Review

I am writing to inform you that this research project, **"Laying the Groundwork for a Community Risk Assessment of the Ring of Fire and Related Infrastructure"** has received ethics review and approval by the Human Participants Review Sub-Committee, York University's Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines.

Note that approval is granted for one year. Ongoing research – research that extends beyond one year – must be renewed prior to the expiry date.

Any changes to the approved protocol must be reviewed and approved through the amendment process by submission of an amendment application to the HPRC prior to its implementation.

Any adverse or unanticipated events in the research should be reported to the Office of Research ethics (ore@yorku.ca) as soon as possible.

For further information on researcher responsibilities as it pertains to this approved research ethics protocol, please refer to the attached document, **"RESEARCH ETHICS: PROCEDURES to ENSURE ONGOING COMPLIANCE".**

Should you have any questions, please feel free to contact me at: 416-736-5914 or via email at: acollins@yorku.ca.

Yours sincerely,

Alison M. Collins-Mrakas M.Sc., LLM
Sr. Manager and Policy Advisor,
Office of Research Ethics

RESEARCH ETHICS: PROCEDURES to ENSURE ONGOING COMPLIANCE

Upon receipt of an ethics approval certificate, researchers are reminded that they are required to ensure that the following measures are undertaken so as to ensure on-going compliance with Senate and TCPS ethics guidelines:

1. **RENEWALS:** Research Ethics Approval certificates are subject to annual renewal.
    a. Researchers will be reminded by ORE, in advance of certificate expiry, that the certificate must be renewed
        i. Researchers have 2 weeks to comply to a reminder notice;
        ii. If researchers do not respond within 2 weeks, a final reminder will be forwarded. Researchers have one week to respond to the final notice;
    b. **Failure to renew an ethics approval certificate or** (to notify ORE that no further research involving human participants will be undertaken) **may result in suspension of research cost fund and access to research funds may be suspended/withheld** ;

2. **AMENDMENTS:** Amendments must be reviewed and approved **PRIOR** to undertaking/making the proposed amendments to an approved ethics protocol;

3. **END OF PROJECT**: ORE must be notified when a project is complete; Failure to submit an "End of Project Report" **may result in suspension of research cost fund and access to research funds may be suspended/withheld.**

4. **ADVERSE EVENTS**: Adverse events must be reported to ORE as soon as possible;

5. **AUDIT:**
    a. More than minimal risk research may be subject to an audit as per TCPS guidelines;
    b. A spot sample of minimal risk research may be subject to an audit as per TCPS guidelines.

FORMS: As per the above, the following forms relating to on-going research ethics compliance are available on the Research website:

a. Renewal
b. Amendment
c. End of Project
d. Adverse Event

APPENDIX 2: Summary of Litigation related to Mining Conflicts in Ontario's Far North

Summary of Litigation related to Mining Conflict in Ontario's Far North

Prepared by: Amanda Spitzig | amanda.spitzig@gmail.com

2274659 Ontario Inc v Canada Chrome Corporation, 2016 ONCA 145, 394 DLR (4th) 471

- FACTS: Both parties had ownership interests in the Big Daddy chromite deposit in the Ring of Fire area, and were both seeking to build transportation links to these mineral deposits. In 2009, CCC staked 200+ unpatented mining claims along a transportation route running north to the claim, in hopes of building a railway. In 2009, the applicant, 2274659 Ontario Inc, a subsidiary of Cliffs Natural Resources, acquired ownership of the Black Thor chromite deposit located near the Big Daddy deposit, and wanted to build a gravel road to reach the deposit. The applicant made an application under s 21 of the *Public Lands Act* for disposition of surface rights over Crown lands so they could build this road, which would cross 108 of CCC's unpatented mining stakes. Under s 51 of the *Mining Act* the applicant sought the consent of CCC for the grant of the easement. CCC's refusal led to an application to the Mining and Lands Commissioner (MLC), under s 51(4) of the *Mining Act,* to dispense with the consent, which the MLC refused to grant.

- DECISION: The trial court set aside the MLC's decision to refuse to dispense with the consent. The ONCA affirmed this decision, stating that s 51(1) of the *Mining Act* gives priority to the claim holder to use the surface rights to explore and exploit minerals *on the claims*. In this case, the surface rights were merely being held by CCC to construct a railway corridor, to access an alternate mineral deposit. Although consent is dispensed, the court ruled that the granting of an easement for a road is a matter for the Ministry of Natural Resources to determine, after and environmental assessment and consultation with affected First Nations.

Northern Superior Resources Inc v Ontario, 2016 ONSC 3161, 267 ACWS (3d) 493

- FACTS: Between 2005 and 2007, Northern Superior Resources (NSR) staked claims for three areas, which were highly prospective areas for gold mining. In 2008, they entered into an option agreement with International Nickel Ventures Corporation, whose investment allowed for core drilling into the bedrock. At that time, there was no regulatory authority under the *Mining Act* which compelled engagement with the Sachigo Lake (SL) First Nation, but the parties entered into several "Letters of Engagement" over the years which contained the FN's acceptance of specified work to be done. The relationship began to deteriorate in 2012 when the SL FN claimed that NSR had acted in breach of a Letter by carrying out a drilling program that was not agreed to, and requested a new agreement for this activity. NSR claimed that the SL FN was aware of this activity, and Elders had visited the work sites. When the parties could not reach an agreement on the issue, NSR applied for an "Exclusion of Time" order under the *Mining Act* allowing them to leave the claims undisturbed while they resolved the issues. NSR asserts that Ontario owed it a duty of care, and argues that the failure of its relationship with the SL FN was the result of a breach of that duty of care, and that they should be compensated accordingly – NSR claimed $110-million in damages.

- DECISION: The Judge applied the test in *Anns v Merton London Borough Council* – they concluded that there is no constitutional duty of care imposed on the Crown by a legislative scheme towards NSR, and, even if such a constitutional duty did arise, it would be owed to the SL FN, not NSR. The Crown cannot independently owe a constitutional duty to protect exploration rights of a mining company and at the same time owe a constitutional duty to the FN affected by mining activity. Additionally, there was no proximity to the relationship – NSR never asked Ontario for any assistance with managing relations with SL FN. The action was dismissed.

God's Lake Resources: Ontario settles with God's Lake Resources in 2012

- Ontario acted in response to the claims of Kitchenuhmaykoosib Inninuwug (KI) First Nation to resolve the dispute between it and God's Lake Resources by issuing an Order withdrawing lands in the vicinity of the First Nation from prospecting and mining. The Minister of Northern Development and Mines has the power to withdraw lands that are the property of the Crown under section 35 of the *Mining Act*.
- A "Withdrawal Order" cannot remove pre-existing rights held by a mining company, so as a result, any existing mining lease that was held by God's Lake Resources was not affected by the Order.
- In order to deal with this aspect of the problem, Ontario agreed to pay God's Lake Resources $3.5-million in return for surrendering its lease and claims in the area.
- The Court in *Northern Superior Resources Inc v* Ontario (2016) stated that in issuing this Withdrawal Order and buying out God's Lake Resources, Ontario acted in a fashion that was consistent with its constitutional responsibilities and fiduciary obligations to KI FN.

Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation, 157 ACWS (3d) 460 (Ont Sup Ct), [2007] 3 CNLR 181

- FACTS: In July 2000, KI FN submitted a Land Entitlement Claim (LEC) to areas within the Big Trout Lake drilling zone, and placed a moratorium on any development in the area. KI FN believed that allowing drilling to take place in this zone would eliminate any opportunity for them to select the lands if their LEC is successful. Platinex was aware of this LEC, as well as the moratorium. In January 2006, Platinex requested a meeting with the KI community in an attempt to consult and lift the moratorium. When it was clear that Platinex could not change the community's decision, they cancelled the meeting, and sent a drilling team to the camp in February, 2006. The KI FN Chief delivered a letter to Platinex asking that the drilling activity cease, and members of the KI FN travelled to the camp to protest the work. Platinex left the drilling camp on February 25-26, 2006, claiming they feared for their safety.
- In July, 2006, the Judge made an order enjoining Platinex from engaging in a two-phase exploration program related to the Big Trout Lake Property for a period of five months, after which time the parties would meet again with the Judge to discuss the continuation of the order. A condition of this injunction was that the KI FN immediately set up a consultation committee to meet with representatives of Platinex and the Provincial Crown to develop an agreement to allow Platinex to conduct the drilling project. The parties engaged in consultations beginning in July 2006, but were unable to come to any agreement. This injunction was extended in January 2007, and remains in place at the present hearing at the Ontario Superior Court. Platinex argues that if the injunction is continued, they will become bankrupt.

- DECISION: In applying the test for an injunction, the Judge concluded:
    - Is there a serious issue to be tried? Yes.
    - Is there irreparable harm? KI FN has traditional harvesting rights on the Treaty 9 lands, and also concerns regarding their Land Entitlement Claim. However, these rights failed to meet the relatively high standard of probability required for the grant of injunctive relief.
    - Balance of conveniences – requires balancing the harm that each party will suffer, and whether that harm can be compensated for in damages: The Judge ruled in favour of Platinex, stating that they could be put out of business if the injunction were granted, and this cannot be compensated for in damages. This decision runs squarely against the reasoning given by the same Judge when granting the first injunction, where the court ruled that the KI FN's spiritual and cultural connection to the land, and their inability to select these lands in their Land Entitlement Claim outweighed the harm to Platinex.
- The parties reconvened in May, 2007 and developed a Consultation Protocol, Memorandum of Understanding, and timetable of activities. Platinex was granted permission to begin Phase One of its drilling program on June 1, 2007. The Memorandum of Understanding states that Platinex will establish a fund to benefit the KI community, and will contribute on a semi-annual basis 2% of all monies spent by Platinex in connection with Phase One.

Wahgoshig First Nation v Ontario, 2013 ONSC 632 (Div Ct), 226 ACWS (3d) 632

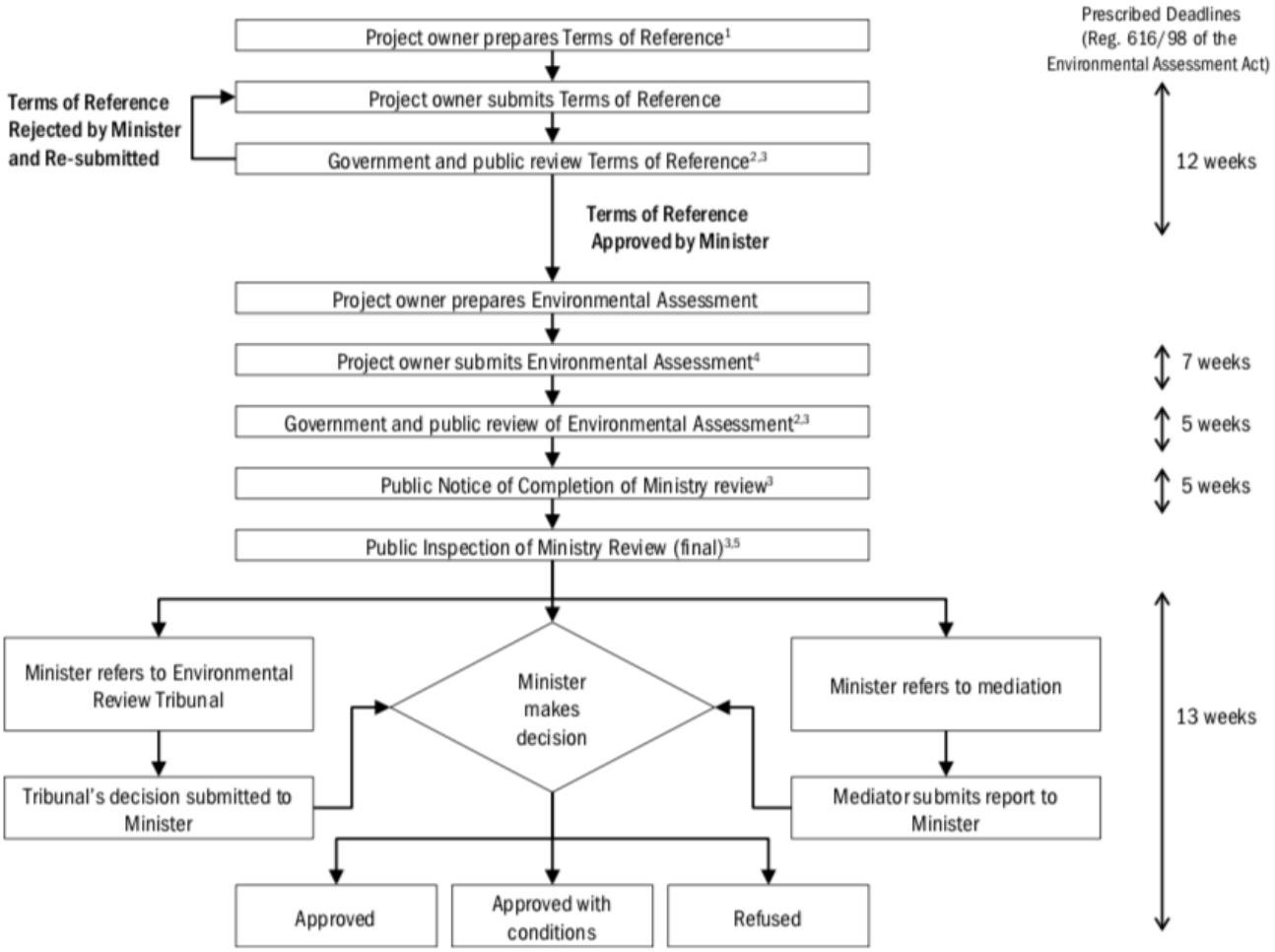
- FACTS: From November 2007 through 2010, Solid Gold staked 103 claims, called the "Legacy Project," which covers land within the Wahgoshig First Nation's (WFN) traditional territory. The Crown advised Solid Gold to contact WFN to consult regarding its intended mineral exploration, and offered to facilitate the process. In the Spring of 2011, Solid Gold began drilling without engaging in any prior consultation. The WFN contacted the company, and tried to consult with them, but Solid Gold did not reciprocate. On November 9, 2011, WFN served a Notice of Claim on Ontario, advising that within 60 days, they would serve a Statement of Claim on Ontario and Solid Gold. Following this, drilling increased, and the WFN sought an injunction restraining Solid Gold from engaging in all activities related to mineral exploration in Treaty 9 lands, as well as an order that Ontario provide an undertaking in damages to Solid Gold or, alternatively, for an order dispensing with the undertaking requirements of R. 40.03 of *Rules of Civil Procedure*.

- DECISION: At first instance, the Judge went through the test for an injunction:
    - Is there a serious issue to be tried? Yes – Aboriginal and treaty rights, and the duty to consult and accommodate.
    - Is there irreparable harm? Yes – Solid Gold has threatened and may have already caused irreparable harm to sites of cultural and spiritual significance, including burial sites.
    - Balance of conveniences – WFN would suffer harms to constitutionally-protected treaty and Aboriginal rights of meaningful consultation and accommodation, while Solid Gold would suffer economic harms. The balance favours WFN in this case.
- The Judge ordered an injunction for a period of 120 days, during which time Solid Gold, the Province, and WFN must enter into a process of meaningful consultation and accommodation regarding future activities on the claims block. If this is not effective, WFN is entitled to seek an extension of the injunction. The Court also held that it was not appropriate to impose and order requiring Ontario provide an undertaking in damages in the circumstances.
- Leave to appeal the order was granted, and subsequently dismissed as moot. Solid Gold has since initiated a claim against the Province seeking substantial damages (> $100-million). The claim is based on the damages suffered by Solid Gold including lost opportunity costs arising from the Crown's negligent misrepresentations related to Solid Gold's Legacy Project.

APPENDIX 3: Submission and Approval Process for Comprehensive EAs

Appendix 4: Submission and Approval Process for Comprehensive Environmental Assessments

Source of data: Ministry of the Environment and Climate Change

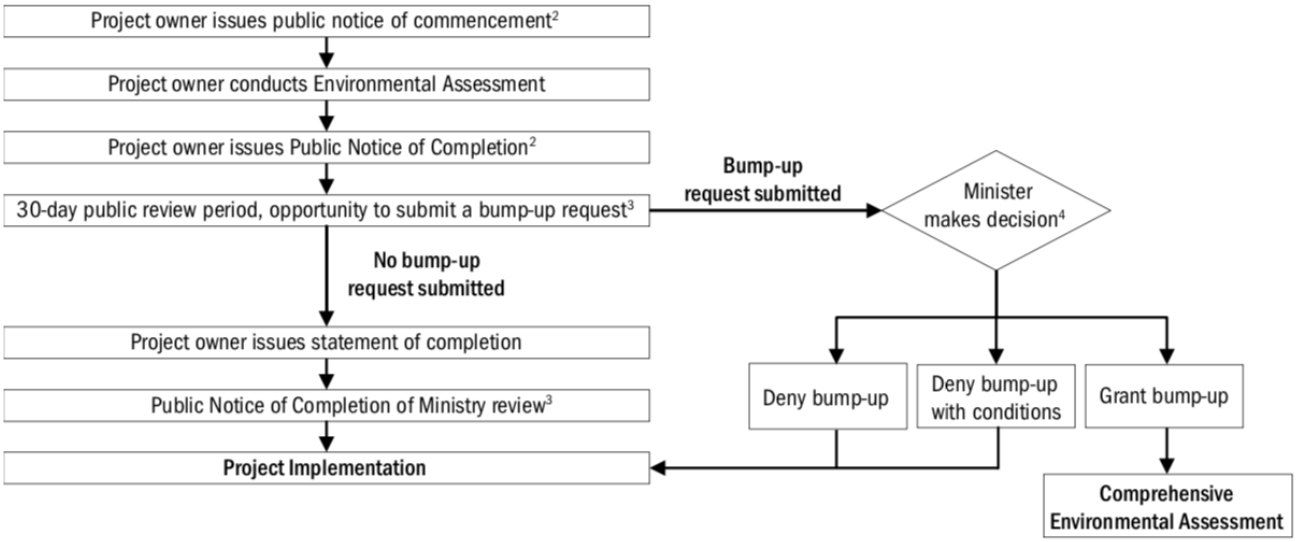


1. The Terms of Reference describe how the project owner will conduct the environmental assessments, and includes: a description of the proposed project; the current conditions in the area where the project is to be located; the alternatives that will be examined; the studies that will be conducted to evaluate the alternatives; and how the public will be consulted.
2. The Terms of Reference and the Environmental Assessment report are reviewed by a Government Review Team that is made up of staff from municipal, provincial and federal government ministries and agencies who provide comments based on their mandated authority and expertise. For example, the Ministry of Natural Resources and Forestry will provide comments regarding the protection of species-at-risk.
3. All public notices are placed in local newspapers, provided to stakeholders who may be directly affected through direct mail, and/or posted on the project owner's website. Notices are also placed on the Ministry's website.
4. The Ministry publishes the results of its review of the Environmental Assessment report, after which the public has an opportunity to provide comments on the Ministry's review.
5. The Environmental Assessment report describes the results of the project owner's assessment (such as the scientific studies, evaluation of alternatives, public consultation, etc.) to support the action it recommends regarding the proposed project.
6. The Ministry attaches legally binding conditions to the approved environmental assessment report that apply to the entire project from design through implementation and operation, and up to the future closure of the project. Such conditions may include conducting ongoing public consultation during construction, or monitoring the quality of groundwater. The Report must be approved by the Minister and Cabinet.

APPENDIX 4: Streamlined EA Process

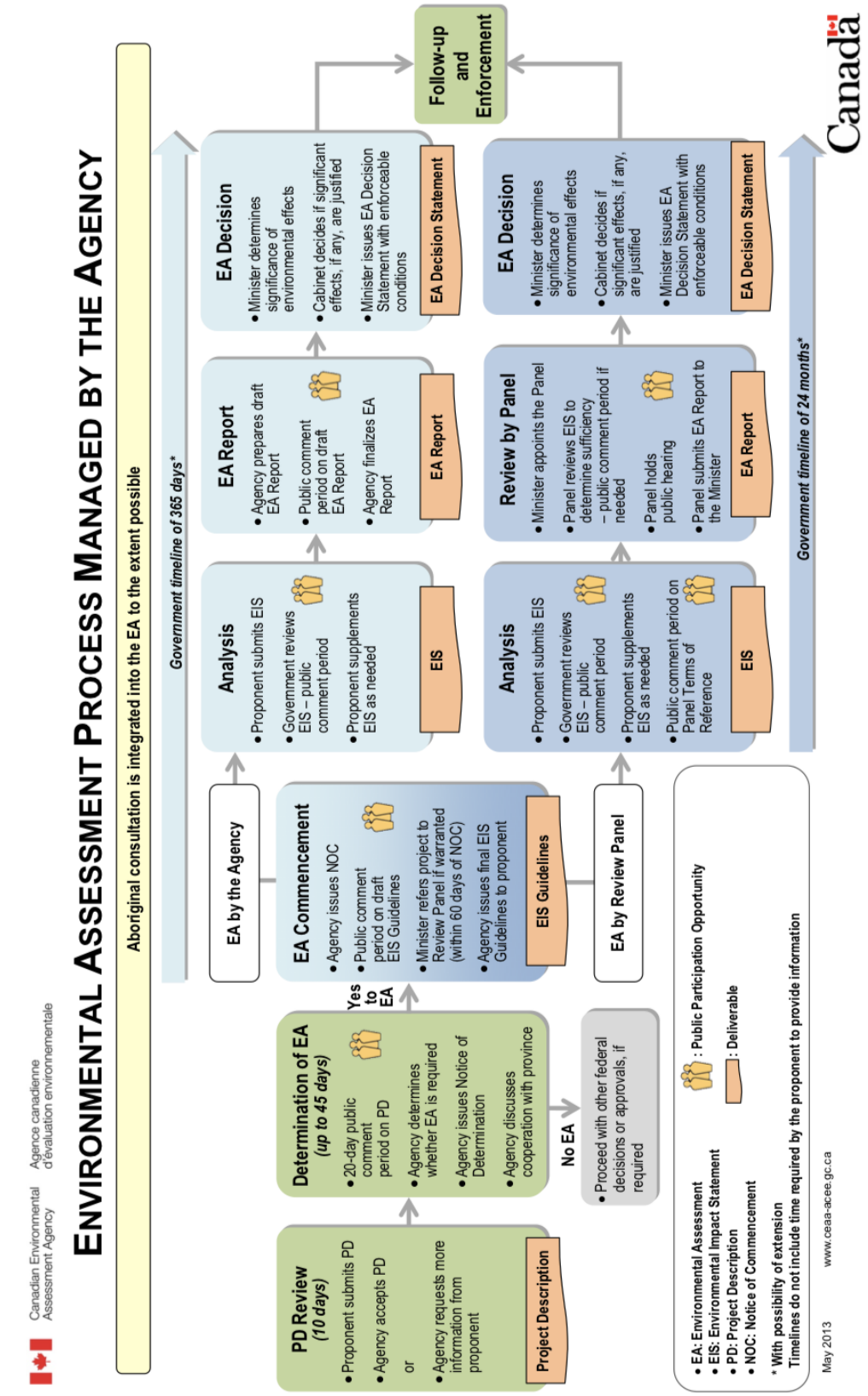
Appendix 6: Streamlined Environmental Assessment Process[1]

Prepared by the Office of the Auditor General of Ontario

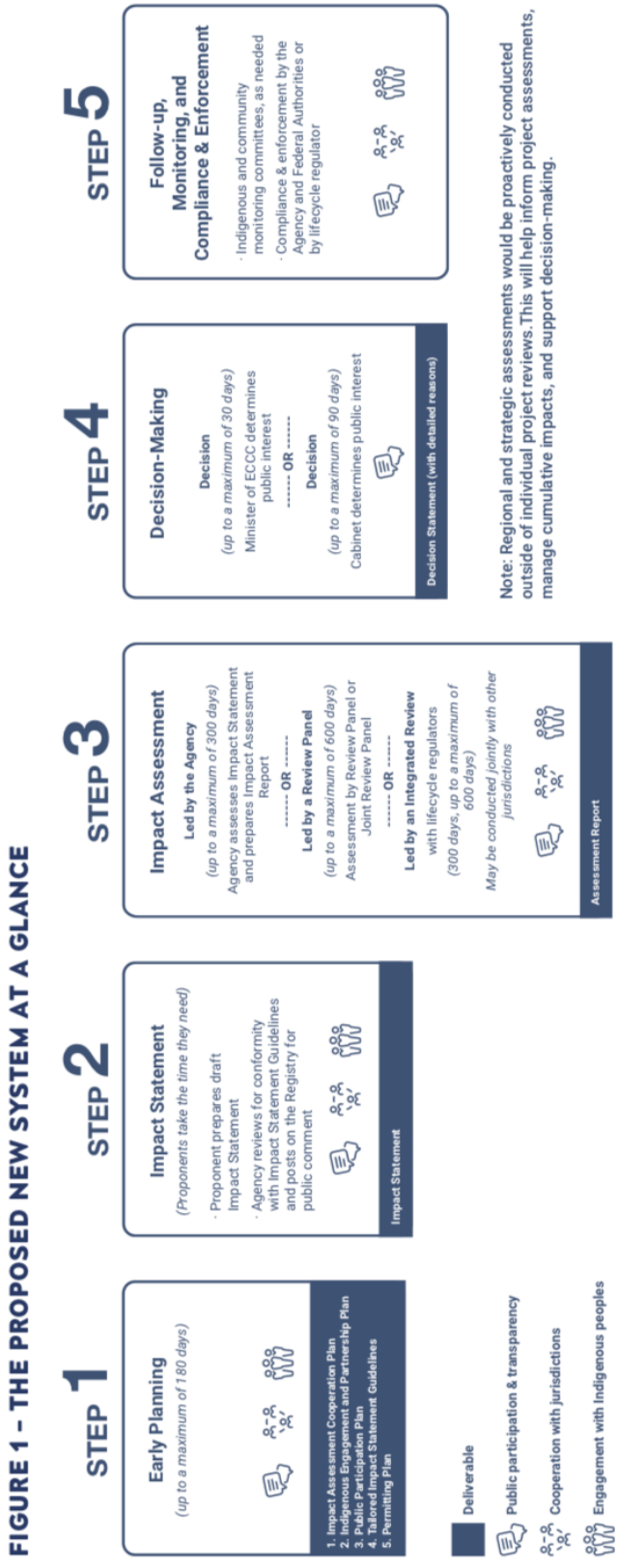


1. The above figure illustrates the general process followed for streamlined environmental assessments. The process—as outlined in the relevant Class Environmental Assessment Policy Document or regulation under the *Environmental Assessment Act*—may vary slightly depending on the type and scale of the project.
2. Project owners must notify relevant government agencies at the start and completion of the environmental assessment. Notices are also made public through local newspapers and/or provided to stakeholders who may be directly affected through direct mail, etc.
3. After the project owner issues the Notice of Completion, members of the public, the Ministry, and other interested parties have the opportunity to review the environmental assessment report and request that the Minister bump up a streamlined project to a comprehensive assessment.
4. Class Environmental Assessment Policy Documents and the regulations under the Environmental Assessment Act prescribe timelines for the Minister's decision.

APPENDIX 5: EA Process Managed by the Agency



APPENDIX 6: Proposed New IA Process



APPENDIX 7: Tsleil-Waututh Nation Rights, Title and Interests

TSLEIL-WAUTUTH TITLE, RIGHTS, *and* INTERESTS

The Tsleil-Waututh Nation has a diverse set of title, rights, and interests. We have Aboriginal title to the water, land, and air in eastern Burrard Inlet and beyond, and exercise Aboriginal rights and interests potentially affected by the TMEX proposal. While not an exhaustive list, **Table 1** summarizes some of the rights that are relevant in assessing the TMEX proposal.

***Table 1**—Tsleil-Waututh Title, Rights, and Interests*

TITLE, RIGHT, OR INTEREST	DESCRIPTION
Archaeological and Cultural Heritage Sites	The right to preserve and protect sensitive sites and to ensure they are kept physically intact
Contemporary Economy	The right to derive benefit from the territory and pursue economic development opportunities in a variety of ways, related or unrelated to natural resources
Cultural or Spiritual Practices and Places	The right to access important places with the assurance that they will be physically and culturally intact, without disturbances of the view, violation of privacy, noise intrusions, polluted water, or contaminated sediment
Cultural Transmission	The right to access sites for activities, such as resource harvest, that foster elder-youth interaction and provide elders with opportunities to share history, knowledge, traditional ways, and skills with youth
Cultural Travel	The right to safe, unobstructed travel throughout Burrard Inlet
Environmental Integrity	The right to an environment that is not significantly degraded and is well within its capacity to sustain a robust subsistence economy and the Tsleil-Waututh people as a nation
Environmental Stewardship	The right and responsibility to manage natural resources and the environment in Burrard Inlet—for example, we are currently taking steps to restore the environmental integrity of Burrard Inlet in accordance with Tsleil-Waututh law, through initiatives like the Marine Stewardship Program and by monitoring and making adjustments for cumulative effects on Tsleil-Waututh territory
Individual and Community Health	The right to conditions conducive to healthy bodies, minds, and spirits—that is, to the intertwined environmental, cultural, spiritual, social, and economic conditions that ensure the well-being of individuals and of the community as a whole
Marine Fish and Wildlife Habitat and Species	The right to a healthy, diverse, and interconnected habitat that supports diverse and abundant species free from contamination
Resource Access and Harvest or Use	The right to access and harvest or use natural resources (especially those listed below) for cultural, ceremonial, spiritual, subsistence, and economic purposes: » shellfish, such as crabs, clams, oysters, shrimp, mussels, and sea urchins » birds, such as ducks, grebes, and grouse, and their eggs » mammals, such as deer, bears, elk, rabbits, squirrels, and seals » fish, such as salmon, trout, cod, flounder, sole, rockfish, and herring, and their eggs » kelp, drift logs, and a variety of other plants and seaweeds
Subsistence Economy	The right to access and use natural resources (especially those listed below) as staple foods for the living community and for our ancestors, and the right to sell or trade these items: » shellfish, such as crabs, clams, oysters, shrimp, mussels, and sea urchins » birds, such as ducks, grebes, and grouse, and their eggs » mammals, such as deer, bears, elk, rabbits, squirrels, and seals » fish, such as salmon, trout, cod, flounder, sole, rockfish, and herring, and their eggs » kelp, drift logs, and a variety of other plants and seaweeds
Title and Governance	The right to possess our territory and exclusively occupy and use it for the benefit of the Tsleil-Waututh Nation, exercising authority and jurisdiction over its water, land, air, and resources in accordance with Tsleil-Waututh law, actively managing it, and deciding on future uses
Tsleil-Waututh Benefit	The right and responsibility to steward the territory for the benefit of past, present, and future generations
Tsleil-Waututh Reserve	The right to environmental, cultural, and socio-economic conditions that pose no harm to our reserve or its infrastructure
Water	The right to clean water, free from pollution, for drinking and for cultural, ceremonial, spiritual, subsistence, and economic purposes

Several of these rights can be grouped together and referred to as "cultural work." They include 1) cultural and spiritual practices, 2) cultural transmission, 3) cultural travel, 4) aspects of individual and community health, and 5) elements of resource access and harvest or use.

APPENDIX 8: Summary of Tsleil-Waututh Nation Title, Rights, and Interests and of Proposed Effects and Consequences

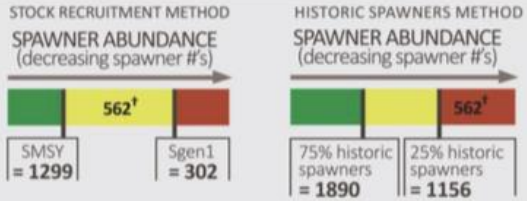
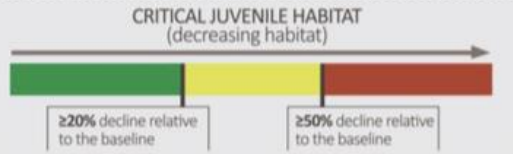
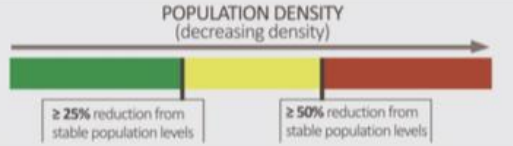
Table 7—Summary of Tsleil-Waututh Title, Rights, and Interests and of Proposal Effects and Consequences

TSLEIL-WAUTUTH TITLE, RIGHTS, AND INTERESTS	MARINE SHIPPING DIRECT EFFECTS	OIL SPILL EFFECTS	CONSEQUENCES
Archaeological and Cultural Heritage Sites	Shoreline erosion	Water and air pollution; sediment contamination; shoreline cleanup damage	Loss, damage, or contamination of important places and archaeological resources; loss of the knowledge and wisdom of the ancestors
Contemporary Economy	On-water hazards; perceived pollution; physical obstruction; disturbances to views	Water and air pollution; sediment contamination	Loss of business or economic opportunities and revenues; drop in property values (including Tsleil-Waututh's commercial real estate development on our reserve)
Cultural or Spiritual Practices and Places	Perceived pollution; physical obstruction; loss of quiet or privacy; shoreline erosion; disturbances to views	Water and air pollution; sediment contamination; shoreline cleanup damage	Loss, damage, or contamination of important places; hindrance of and failure to provide conditions for cultural work; interference with ceremonies for our ancestors; loss of the knowledge and wisdom of the ancestors; loss of connection to our waters and lands; risk to the health and safety of our cultural practitioners
Cultural Transmission	Perceived pollution; physical obstruction; loss of quiet or privacy; disturbances to views	Water and air pollution; sediment contamination	Loss of traditional knowledge; hindrance of and failure to provide conditions for cultural work; loss of language skills; loss of connection to our waters and lands; opportunities for cultural transmission reduced or eliminated
Cultural Travel	On-water hazards; perceived pollution; physical obstruction	Water and air pollution; sediment contamination	Hindrance of and failure to provide conditions for cultural work; loss of connection to our waters and lands; risk to the health and safety of our cultural practitioners
Environmental Integrity and Stewardship Responsibility	Acoustic disturbance; on-water hazards; perceived pollution; physical obstruction; loss of quiet or privacy; shoreline erosion; disturbances to views	Water and air pollution; sediment contamination; loss, harm, or contamination of habitat or species; shoreline cleanup damage	Disruption of biophysical processes and food-web dynamics; loss of connection to our waters and lands
Individual and Community Health	On-water hazards; physical obstruction; loss of quiet or privacy; disturbances to views	Water and air pollution; sediment contamination; loss, harm, or contamination of habitat or species	Dietary change and health effects from lack of resources, including traditional staple foods; hindrance of and failure to provide conditions for cultural work
Marine Fish and Wildlife Habitat and Species; Resource Access and Harvest or Use; Subsistence Economy	Acoustic disturbance; perceived pollution; physical obstruction; shoreline erosion	Water and air pollution; sediment contamination; loss, harm, or contamination of habitat or species; shoreline cleanup damage	Decrease in habitat quality or quantity and in species abundance; local extinction of culturally important species; change in species composition and behaviour; fewer available resources and traditional staple foods, leading to dietary change, health problems, and fewer opportunities to trade or sell harvested resources; forced transition to a wage-based economy; loss of livelihood options; interference with ceremonies for our ancestors; loss of the knowledge and wisdom of the ancestors; loss of connection to our waters and lands
Title, Governance, and Future Benefit	Violation of Tsleil-Waututh law	Violation of Tsleil-Waututh law	If implemented without Tsleil-Waututh consent, the TMEX proposal denies the right of current and future generations to control and benefit from our waters and land
Tsleil-Waututh Reserve	Shoreline erosion, perceived pollution; disturbances to views	Water and air pollution; sediment contamination; shoreline cleanup damage	Damage to infrastructure and to visual quality; loss of land base; loss of business or economic opportunities or revenues
Water	Perceived pollution	Water or air pollution; sediment contamination	Hindrance of and failure to provide proper conditions for cultural work; risk to the health or safety of cultural practitioners

CUMULATIVE EFFECTS	DURATION	EFFECTS ON TSLEIL-WAUTUTH COMMUNITY
More physical damage to sites already harmed by past development; setback to Tsleil-Waututh cultural renaissance	Irreversible, permanent effects of great impact on Tsleil-Waututh community	Disturbance of our ancestors will harm our community cohesion; without the knowledge and wisdom of the ancestors, we cannot recover from the residential school era nor carry out our environmental stewardship responsibilities
Further negative economic impacts on Tsleil-Waututh Nation and its members	Effects for the duration of the project or longer in the case of an oil spill	Diminished ability to participate in the contemporary economy and corresponding adverse impacts on Tsleil-Waututh Nation and its members
More physical damage to sites already harmed by past developments; further interruption of our obligations to our ancestors; setback to Tsleil-Waututh cultural renaissance	Places = irreversible, permanent effects of great impact on Tsleil-Waututh community Practices = effects of great impact on Tsleil-Waututh community for the duration of the project or longer in the case of an oil spill	Without the knowledge and wisdom of the ancestors and the spirit world, we cannot recover from the residential school era nor carry out our environmental stewardship responsibilities; important gains we have achieved in enhancing our culture would be lost or substantially reduced
Further alienation of Tsleil-Waututh youth from Tsleil-Waututh elders and their knowledge of history, traditional ways and skills; setback to Tsleil-Waututh cultural renaissance	Irreversible, permanent effects of great impact on Tsleil-Waututh community	Failure to care for and educate our youth will deny Tsleil-Waututh a healthy and prosperous future; a reduction in the number of family or community gatherings will leave individuals feeling isolated and the community without cohesion
Additional obstacles to free movement throughout Burrard Inlet; reduced access to harvest and cultural sites; reduced connection to our waters and lands	Effects for the duration of the project	Activities such as our canoe races are very important to our community, and having even more tankers parked in the way will seriously detract from our cultural work
Further exceedance of Burrard Inlet's environmental carrying capacity and greater delay in achieving Tsleil-Waututh stewardship objectives; additional impediments to the restoration of our subsistence economy; setback to Tsleil-Waututh culture renaissance	Effects for the duration of the project as well as irreversible, permanent effects of great impact on Tsleil-Waututh	Failure to care for our waters and lands will deny future generations the benefit of our territory and of the wisdom of our ancestors
Additional risk of disease or illness; further reduction in quality of life	Effects for the duration of the project of great impact on Tsleil-Waututh	Diabetes and cancer rates are high in the community and the proposal will only make them worse; the proposal threatens many elements of community health—natural resources, security, community cohesion and well-being, and self-determination
Further delay in achieving Tsleil-Waututh stewardship objectives; additional impediments to restoration of our subsistence economy and to our livelihood options; further interruption of obligations to the ancestors	Effects for the duration of the project as well as irreversible, permanent effects of great impact on Tsleil-Waututh	Failure to care for our waters and lands will deny future generations the benefit of our territory and the wisdom of our ancestors
Further compromises Tsleil-Waututh's ability to uphold our stewardship obligations in Burrard Inlet	Irreversible, permanent effects of great impact on Tsleil-Waututh community	Failure to care for our waters and lands will deny future generations the benefit of our territory and the wisdom of our ancestors
More physical damage to sites already harmed by past development	Effects for the duration of the project as well as irreversible, permanent effects of great impact on Tsleil-Waututh and its community	
More contamination of already polluted water, making it even more hazardous	Effects for the duration of the project (and potentially beyond) of great impact on Tsleil-Waututh	Clean water is the foundation of our community and culture, and we cannot accept a proposal that will make it dirtier

APPENDIX 9: Metlakatla First Nation Values Foundation

*One outcome from CEM will be the identification of management triggers for priority values. Comparison benchmarks are provided in some cases where triggers are yet to be determined. See Management Trigger section in final report for further detail.

METLAKATLA VALUE	INDICATOR - METRIC	COMPARATIVE BENCHMARKS (socio-economic values) PRELIMINARY MANAGEMENT TRIGGERS (biophysical values)*	IMPLEMENTATION PATH	POTENTIAL IMPLEMENTATION PARTNERS
Adequate Housing	**% of Tenants in Core Housing Need** Failure on any one of the following: • Affordability: housing costs > 30% of household income • Adequacy: condition of house • Suitability: # of occupants (Aboriginal population data shown) Directionality: lower is better		Pathway B	Metlakatla (Governing Council) Other Tsimshian First Nations City of Prince Rupert M'akola Housing Society North Coast Transition Society Aboriginal Housing Management Association
Personal Safety	**Crime Severity Index** Crime rates weighted by seriousness (crimes include violent, property, and petty) (Total Population data shown) Directionality: lower is better		Pathway B	Metlakatla (Governing Council) Other Tsimshian First Nations North Coast Victim Support Services - RCMP Victim Services, Prince Rupert Community Enrichment Society
Chinook Salmon	**Spawner abundance** # adults returning to spawn in each CU within Metlakatla territory (Lower Skeena CU Snapshot shown for illustration purposes and possible focus of CEM pilot project)		Pathway A or B	Metlakatla (Stewardship Society) Other Tsimshian First Nations Pacific Salmon Foundation Department of Fisheries and Oceans Simon Fraser University researchers Skeena Estuary Research Centre Bulkley Valley Research Centre WWF-Canada
	Critical juvenile habitat Areal extent of eelgrass beds (ha) (i.e. eelgrass distribution)			
Butter Clams	**Population density** # individuals per m2 (per beach)		Pathway A or B	Metlakatla (Stewardship Society) Other Tsimshian First Nations Simon Fraser University researchers Department of Fisheries and Oceans
FSC Activity	**FSC Participation Rate** Several options: • Youth participation rate • Household participation rate • Effort - # of person-days/year	Will be developed further internally	Pathway A or B	Metlakatla (Stewardship Society) Other Tsimshian First Nations
Ability to Steward	**Stewardship of priority lands** Constructed scale	Will be developed further internally	Pathway A	Metlakatla (Stewardship Society)

† *estimated number of spawners from 2008 to 2012 in the Lower Skeena CU (source: NuSEDS database).*

APPENDIX 10: Saugeen Ojibway Nation Consultation Process

SON CONSULTATION PROCESS

Every consultation process is unique, as every project will have its own specific impacts on the Aboriginal rights and interests of the Saugeen Ojibway Nation (SON). This chart is meant to provide a general understanding of SON's expectations of the steps in a proper Aboriginal consultation process.

PRE-ENGAGEMENT	
Proponent sends project information to SON	To begin to review the scope of consultation required (if any), SON requires an information package from the proponent with the following information: • project type and description • size • location, including maps and land use plan descriptions • anticipated timelines • anticipated permits which will be required • environmental inventories • the proponent's initial analysis of anticipated impacts on SON's territories and rights, and • contact information. Please note the general public consultation notifications and processes may not fulfill this proper notification requirement, particularly for larger projects.
SON identifies initial concerns	After SON has received the proper information from the proponent, SON will conduct an initial analysis to determine the scope of consultation required. Typically, SON looks to see if a project could have impacts in the following areas: • impacts on land claims • impacts on the SON commercial fishery • impacts on traditional harvesting • impacts on the natural environment • impacts on cultural heritage (such as archaeology and burial areas)
SON and proponent staff meet regarding technical information	The SON staff may require an initial meeting with the proponent's representatives to obtain additional information prior to recommending a consultation process to the SON Joint Council. This may include the need for a site visit.
SON provides an initial response	If the SON staff recommend that substantive consultation is required, the SON Chiefs or Joint Council will request a formal meeting at the political or senior management level with the proponent. Typically, SON will ask to discuss a workable consultation process, including timelines, funding and anticipated components of an Agreement to resolve any issues regarding Aboriginal rights impacts.

ENGAGEMENT / PRE-CONSULTATION	
Proponent-SON meeting	At a meeting (or meetings) to discuss the Aboriginal consultation requirements for a particular project, SON and the proponent will typically discuss: • Mutual understanding of the consultation process • Development of a consultation process suitable for the specific project • Anticipated technical reviews to determine the project's impacts on Aboriginal rights • Confirmation of funding (see below) • Project timelines • Information gaps which require further research or information • Contacts in both organizations • An anticipated workplan for the consultation process The result of the meeting(s) will be either: • an agreement to proceed with the project as planned; • an agreement to proceed with the project subject to the conditions and accommodations agreed to by SON and the proponent; • an agreement to postpone or abandon the project, with or without an agreement to conduct further review; or • no agreement (in which case SON will explore its other options for response to the project).
Confirmation of Funding	SON requires proponents to cover consultation costs as part of the cost of assessing the viability of a project. Consultation costs which may need to be covered by the proponent can include: • Technical review by SON experts (see below) • Consultation process costs for meetings including travel costs and per diems for staff, advisers and negotiators • Research and logistical support by SON's environment office staff, where required • Preparation of agreements and other information
Agreement on workplan and funding	If the proponent and SON agree about the anticipated process and timelines for Aboriginal consultation, including the technical required, SON and the proponent can enter into a Memorandum of Understanding (in the form of a confirmation letter or a formal agreement) confirming the workplan and the consultation funding commitments.
Peer Review and Analysis by SON's Technical Experts	Depending on the type of project and anticipated impacts, SON may require peer review by its own independent experts, including SON's: • Fish biologist • Fish habitat and benthic invertebrates expert

	• Natural environment biologist • Archaeologist • Hydrogeologist • Legal counsel These experts will advise SON on the anticipated impacts of the project on SON's rights and interests and how the impacts can be mitigated. This process may require exchange of information between SON's experts and the proponent's experts.
SON – Crown negotiations	Even for projects for which the Crown or an agency of the Crown is not the proponent, SON will be involved in a negotiation process with the Crown agencies to ensure that the Aboriginal consultation obligation is being met, and to exchange technical information where appropriate.
CONSULTATION & ACCOMMODATION	
Internal consultation within SON communities	An important part of the Aboriginal consultation process is SON's internal consultation within the two Aboriginal communities at Chippewas of Nawash and Saugeen First Nation regarding how a specific project may impact community members. SON's environment office and the SON Joint Council coordinate this internal process.
Negotiation of a consultation and accommodation agreement	Once SON has received information from SON's staff and experts regarding anticipated project impacts, SON and the proponent can negotiate a consultation agreement. Each consultation agreement is unique, as each addresses the specific impacts of a particular project and how those impacts will be mitigated or accommodated. An agreement will typically includes terms such as: • Confirmation of SON technical reviews required (if these reviews have not already happened) • Compensation for consultation costs (see *Confirmation of Funding* above) • Specific measures to mitigate particular environmental impacts • A protocol for dealing with archaeology issues • Provision for SON participation in long term environmental monitoring • Measures to ensure that land claims are not impacted (such as a non-prejudice clause, or registration of Certificates of Pending Litigation where appropriate) • Compensation where land claims or environmental impacts cannot be mitigated • Provision for access for Aboriginal harvesters, where appropriate • Employment and training opportunities for SON members, especially youth • Notice of changes or modifications to the project • A dispute resolution mechanism

IMPLEMENTATION	
Participation in long term environmental monitoring	SON often seeks participation in long term environmental monitoring processes for projects which require Aboriginal consultation and accommodation. This may require periodic review, by SON experts, of environmental reports on a project's operations or regular (such as annual) meetings between a proponent and SON's environment office to discuss evolving environmental management plans for the project.
Establishment of long-term advisory bodies if required	Some projects may require the establishment of a long term advisory body to act as the consultation body for the purpose of ongoing consultation on the impacts of a project. For example, a consultation agreement may require the establishment of an environmental monitoring committee or an advisory body on archaeology concerns.
Communications Strategy	In many cases, it will be helpful for SON and a proponent to develop a joint communications strategy to communicate with the public about the consultation process and outcome.

APPENDIX 11: Recommendations to Nations Planning to Develop their own Indigenous-led IA Framework

APPENDIX B

RECOMMENDATIONS TO NATIONS PLANNING TO DEVELOP THEIR OWN INDIGENOUS-LED IMPACT ASSESSMENT FRAMEWORK

CONSIDER YOUR EXTERNAL CONTEXT

- Determine for any project whether to apply your Indigenous-led process or stick with party status in the legislated system. Not every project should necessarily be reviewed by an Indigenous-led impact assessment process.
- Identify gaps in the state-led approach—review the terms of reference or guidelines that set out the key topics for the proponent.
- Take advantage of training opportunities in impact assessment, by the Canadian Environmental Assessment Agency (soon to likely become the Impact Assessment Agency), territorial bodies, and groups like the International Association for Impact Assessment. Learn the basics of impact assessment and then adapt it to your ways.
- Talk to other nations that have conducted Indigenous-led impact assessment in the past, about pros, cons, and their tips and tools.

COMMUNITY CONTEXT

- Consider how your laws, norms, and cultural decision-making processes can inform in a way that makes them relatively easy to use in your decision-making in an impact assessment (this can be kept internal as desired; many nations are reluctant to share in writing their laws, norms, or assessment criteria).
- Conduct some form of "community readiness assessment" to determine whether your nation is ready to take on this type of responsibility and where capacity building may be necessary. Review the enabling factors in this report to consider whether you are ready to mobilize.
- Determine **as early as possible** whether you will work with the proponent, with the Crown, with other Indigenous groups, or on your own.

- Develop a set of steps, including key decisions and who makes them, in advance of starting the process.
    - Determining the appropriate constituency for a decision-making body is critical and should be appropriate to your cultural decision-making processes.
    - Make sure to both map out and communicate well in advance how community members will have an opportunity to engage in the process.
    - Carefully consider engaging the community members themselves on how to structure the process. Community buy-in to the process will be critical to its legitimacy.
- Determine what elements of the assessment you want to focus on—this may include culture, traditional use, rights-based assessment, wildlife, alternative routing, or any number of factors. It is strongly suggested that not all topics be chosen for review, and that not every area is technically reviewed by the nation.
- Define a core internal team, with a mixture of technical (e.g., lands department) and leadership (e.g., a councillor) capacity and legal advisors, to identify the most appropriate approach.
- The development of a terms of reference is critical; the process should not be run in an ad hoc fashion. Consider the questions in Appendix A when developing terms of reference for the process.
- Determine whether and what type of external technical capacity you will need, what it will cost (include in your budgeting), and when to engage it.
- Scope your level of effort to realistically available funding for this exercise, and focus on capturing those funds as early as possible. Every case mixes funds from the proponent, Crown, and from the nation itself.

GOVERNMENT AND COMPANY CONTEXT

- Communicate your plans to the proponent and to the Crown impact assessment agency, and seek their support (it is not mandatory to get it) and try to mesh the processes together. Recent federal recognition of the legitimacy of the Indigenous-led assessment approach will make this easier to accomplish.
- Determine how you will engage in/shadow the legislated impact assessment process.
- Consider the likelihood the process will be accepted by outside parties, including the outcomes.
- Consider how outside funding can be accessed and what amounts, when framing your level of involvement.