



Protectors of the Land

Toward an EA Process that Works
for Aboriginal Communities and Developers

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Executive Summary

Canadians have been hearing a lot about environmental assessments lately, as heated debates continue over major resource projects and their effects on both the ecosystem and on Aboriginal communities. Most people are at least passingly familiar with the epic review process for the proposed Enbridge Northern Gateway project, for example. Yet while the profile of the EA process is growing, so is confusion about what it is intended to achieve.

Environmental assessment is not intended as a forum for airing grievances about a particular resource industry or engaging in a broad-based debate on Aboriginal rights. It is a process at the federal or provincial level, conducted either by the responsible government authority or a review board, intended to identify and evaluate the potential environmental and social impacts

of a particular proposed development, and find ways to mitigate them.

What is becoming increasingly clear is that the EA process is not currently serving the needs of Aboriginal communities or project proponents. For example, when voicing concerns about Pacific Northwest's recently proposed LNG terminal north of Prince Rupert, BC, the Lax Kw'alaams First Nation stated that while they were not opposed to development, "concerns regarding the environmental impact of the PNW project have not been resolved". As for business, the President and CEO of the Canadian Chamber of Commerce has described the Canadian federal environmental regulatory system as "cumbersome" and "one of the top 10 barriers to Canadian competitiveness".

Aboriginal communities are frequently consulted too late in the game. Their participation in EA is not required until well into the assessment process, often when the project's design and planning are already complete. This is creating conflict and unnecessary delay. The Assembly of First Nations has noted that minimizing



the role of First Nations in EA leads “not only to an adversarial environment, but one marked by increased litigation”. Aboriginal communities also frequently lack the resources to analyse and respond to complex proposals, and many are dealing with several requests at once, resulting in inadequate engagement, participant fatigue, or both.

For businesses, the EA process too often degenerates into a broad policy debate about development on traditional lands, or how different types of development may interfere with traditional rights and culture. They also frequently find that the EA process is prolonged and combative, and in the end often does not forestall Aboriginal opposition to developments.

How can environmental assessment work better for Aboriginal peoples and the resource industry? This paper, the first in a three-part series titled Aboriginal People and Environmental Stewardship, makes the following recommendations:

- Governments and industry must invest resources in EA training programs to build educational and technical capacity in Aboriginal communities, and participant funding programs must be complemented by longer-term industry investments in Aboriginal engagement post project approval.
- Environmental assessment legislation must be improved to require more front-end, and culturally appropriate, engagement on behalf of the project proponent – at a point where decisions are being made about the intent to develop, and about the nature, rationale for, and intended design of a project (an excellent example of how this can work was the voluntary, cooperative approach to a 2004 federal-provincial EA process for a sand and gravel mine by Polaris Minerals and the ‘Namgis First Nation on Northern Vancouver Island). Where applicable, the terms of reference for an EA should be developed in collaboration with the potentially affected communities.
- Governments must provide Aboriginal communities with greater clarity regarding who is responsible for consultation and engagement during an EA process, properly set expectations, and explain the intended role of industry.

- When companies engage in negotiated agreements with communities in advance of the EA process, the content of those agreements pertaining to impacts and impact management strategies – but not financial details – needs to be transparent and made publicly available to other affected communities, to review panels, and to decision-makers.
- Strategic issues associated with resource development, such as broader impacts on Aboriginal rights or traditional lands, need to be off-ramped to regional and strategic EA processes.

The current EA process is not serving the needs of Aboriginal communities or project proponents.

Meaningful engagement of Aboriginal communities is unlikely to threaten the efficiency of environmental assessment. However, poor engagement or lack of engagement will invariably cause delays and add costs to projects. The stakes are high. Major resource developments are at risk, and so are the relationships between governments, industries, and Aboriginal communities.

Sommaire

Les Canadiens ont beaucoup entendu parler ces derniers temps d'évaluations environnementales, d'intenses débats se poursuivant sur les grands projets de mise en valeur des ressources et leurs répercussions tant sur l'écosystème que sur les communautés autochtones concernées. La plupart des Canadiens connaissent au moins un peu la saga entourant l'examen du projet Northern Gateway d'Enbridge, par exemple. Pourtant, bien que les processus d'évaluation soient de plus en plus médiatisés, la confusion règne toujours quant aux objectifs attendus.

L'évaluation environnementale n'est pas un forum conçu pour entendre des griefs contre une

industrie de ressources en particulier ou pour engager un vaste débat sur les droits des Autochtones. Il s'agit d'un processus mené à l'échelle fédérale ou provinciale, soit par l'autorité responsable, soit par une commission d'examen, qui vise à identifier et à mesurer préalablement les risques environnementaux et sociaux associés à un projet de mise en valeur et à trouver des moyens de les atténuer.

Il devient de plus en plus évident que le processus d'évaluation environnementale ne répond

pas actuellement aux besoins des communautés autochtones ou des promoteurs de projets. Par exemple, alors qu'elle exprimait ses réserves à l'égard du récent projet de terminal méthanier au nord de Prince-Rupert (Colombie-Britannique), la Première nation Lax Kw'alaams déclarait que bien qu'elle n'ait pas été opposée au projet

de Pacific NorthWest, ses « préoccupations concernant l'impact environnemental n'avaient pas été résolues ». Du côté des entreprises, le président et chef de la direction de la Chambre de Commerce du Canada estime que le système réglementaire fédéral canadien dans le domaine de l'environnement est « lourd » et qu'il constitue « l'un des 10 principaux obstacles à la compétitivité canadienne ».

Les collectivités autochtones sont fréquemment consultées trop tard. Leur participation n'est sollicitée que lorsque le processus d'évaluation environnementale est bien avancé, souvent après la fin des étapes de planification et de conception. Cette situation engendre des conflits et des retards inutiles. L'Assemblée des Premières Nations a noté que leur rôle extrêmement limité dans le processus entraîne « non seulement un climat d'hostilité, mais aussi un accroissement des recours en justice ». Les collectivités autochtones manquent également souvent des ressources nécessaires pour analyser des propositions complexes et y réagir. Elles sont nombreuses à se pencher sur plusieurs demandes à la fois, ce qui nuit à l'efficacité de leur participation, entraîne une lassitude, ou les deux à la fois.

Les entreprises considèrent, elles, que le processus d'évaluation environnementale dégenère trop souvent en grands débats politiques sur les territoires traditionnels ou sur les effets potentiellement négatifs des différents types de projets sur les droits traditionnels et la culture autochtone. Elles estiment que le processus est souvent lourd et belliqueux et, qu'au final, il est peu efficace pour prévenir l'opposition des Autochtones aux projets de mise en valeur.

Comment améliorer l'efficacité du processus d'évaluation environnementale pour mieux répondre aux besoins des peuples autochtones et de l'industrie des ressources? Ce document, le premier d'une série de trois sur la participation des Autochtones à la gestion de l'environnement (Aboriginal People and Environmental Stewardship), formule les recommandations suivantes :

- les gouvernements et l'industrie doivent investir dans l'élaboration et l'administration de programmes de formation en évaluation environnementale pour bâtir la capacité pédagogique et technique des collectivités autochtones, tandis que les fonds d'aide financière aux participants doivent être accompagnés d'investissements à long terme de la part de l'industrie pour appuyer la participation autochtone après l'approbation du projet;
- les lois sur l'évaluation environnementale doivent être améliorées pour qu'on puisse exiger des promoteurs un engagement en amont qui tienne compte des impératifs culturels – au moment où ils confirment leurs intentions de mise en valeur et décident de la nature, du bien-fondé et du plan d'un projet prévu (un excellent exemple de cette façon de faire est l'approche volontaire et collaborative adoptée en 2004 pour l'évaluation environnementale fédérale-provinciale menée pour le projet de carrière de sable et de gravier des copromoteurs Polaris Minerals et la Première nation 'Namgis). Le mandat d'une évaluation environnementale doit être établi en collaboration avec les collectivités potentiellement touchées, le cas échéant;
- les gouvernements doivent indiquer clairement aux collectivités autochtones quelles sont les autorités responsables des activités de consultation et de participation liées au processus d'évaluation environnementale, établir leurs attentes adéquatement et expliquer le rôle prévu de l'industrie;

Les collectivités autochtones sont fréquemment consultées trop tard.

- pour éviter l'enlisement du processus, les gouvernements doivent définir les protocoles pouvant régir des consultations générales parallèles auprès des collectivités autochtones afin de discuter de leurs préoccupations qui ne sont pas visées par le champ d'application du processus d'évaluation environnementale;
- lorsque les entreprises concluent des accords avec les collectivités avant le processus d'évaluation environnementale, les répercussions et les stratégies de gestion des répercussions qu'ils contiennent – mais non pas les détails financiers – doivent être claires et communiquées publiquement aux communautés touchées, aux commissions d'examen et aux décideurs;
- les enjeux stratégiques liés à la mise en valeur des ressources, tels que leurs répercussions sur l'ensemble des droits des Autochtones ou leurs territoires traditionnels, doivent passer par les processus d'évaluation environnementale stratégiques et régionaux.

Une participation importante des collectivités autochtones n'est pas de nature à menacer l'efficacité de l'évaluation environnementale. En revanche, une participation faible ou un manque d'engagement dans les projets entraîneront invariablement des retards et des dépassements de coûts. Les risques sont élevés. Les grands projets de mise en valeur des ressources sont en péril, et il en est de même pour les relations entre les gouvernements, l'industrie et les collectivités autochtones.

Introduction

Environmental assessment (EA) is the preeminent process for assessing and managing the potential impacts of natural resource development projects. Originating in 1969 from the US *National Environmental Policy Act*, 191 of the 193 member nations of the United Nations now have national legislation or have signed some form of international legal instrument supporting EA (Morgan 2012). In Canada, EA was first introduced in 1972 as a federal

policy to screen projects implemented under federal jurisdiction for potential pollution effects. It has evolved considerably over the years. Currently, EA is legislated federally under the *Canadian Environmental Assessment Act, 2012*, and under the laws and regulations of each of the provinces and territories. Across Canada's North, EA is also part of several land claims agreements, including the *Inuvialuit Final Agreement*, *James Bay and Northern Quebec Agreement*, and the *Nunavut Land Claims Agreement*.

Although EA systems and provisions vary across Canada, the fundamental purposes of EAs are to identify and evaluate the potential environmental and social impacts of proposed development projects, to propose strategies for managing those impacts, and to ensure that development proceeds in a manner that is in the public interest.

In the short term, when applied to resource development proposals, EA is intended to ensure that environmental and socioeconomic factors are explicitly addressed in decision-making; to improve the design of a proposed development; to anticipate, avoid, minimize, and offset potentially adverse effects; to ensure a proponent's accountability and compliance with relevant laws and regulations; and to provide a fair, meaningful, and transparent process for public participation in the development process. In doing so, over the long term, EA is one of many public policy instruments that can help protect the productivity and capacity of social and natural systems, increase environmental awareness, and promote sustainable resource use. Leadem (2013), of T. Leadem Law Corporation, states that the result of a properly conducted EA "would be a project that from an economic, social, cultural and environmental perspective is a well thought out design that would deal with the known potential risks to the environment."

Expectations do vary as to what EA can and should deliver. Some view EA as a process based on science, delivering value-free information about the likely impacts of a proposed development. Some

"The environmental assessment process has gotten so long, so difficult, and so complex . . . proponents can't get a yes, can't get a no."
BC PREMIER CHRISTY CLARK

even see EA as a means to empower local communities to make independent decisions about resource development and broader resource policy issues.¹

Environmental assessment is neither of these – rather, it is an information gathering, information assessment, and information provision exercise such that those responsible for making decisions about a particular resource development project can make informed decisions. It is true that environmental assessment is informed by science and technology, but also by the knowledge and insight gained through the participation of affected communities and other experts.

Aboriginal peoples are one of many interests, alongside developers, regulators, environmental groups, and affected non-Aboriginal communities, who play a role in the EA process. The engagement of Aboriginal peoples whose lands and resources are potentially affected by development, however, is a cornerstone of effective EA, and a necessary component of sustainable resource development. Meaningful Aboriginal engagement in EA promotes legitimacy in regulatory decisions and project outcomes, and helps ensure the protection of traditional land uses and cultural values.

In practice, however, EA has been criticized both by Aboriginal communities affected by development and by project proponents seeking development approval. For Aboriginal communities, the concerns are often about a lack of meaningful engagement and their limited influence on decisions about developments on their traditional lands. Voicing concerns about Pacific Northwest's (PNW) recently proposed LNG terminal north of Prince Rupert, British Columbia, for example, the Lax Kw'alaams First Nation note that they are “open to development . . . but not the way the project is currently constituted,” going on to explain that their “concerns regarding the environmental impact of PNW project have not been resolved” (Thomas 2015).

For industry, the concerns are often about reaching timely and cost-efficient decisions about development applications. The President and CEO of the Canadian Chamber of Commerce has described the Canadian federal environmental regulatory system as “cumbersome” and “one of the top ten barriers to Canadian competitiveness”, noting that “added delays and costs imposed by

the overcomplicated process dull our competitive edge in global markets and place Canada's standard of living at risk” (Flaherty 2012).

Neither the economy nor an industry is likely to collapse due to the pressures of EA. Further, it is not that Aboriginal engagement in EA is considered unimportant or unnecessary; rather, the current EA process struggles to facilitate engagement that is meaningful to both the communities affected by resource development and the proponents proposing to undertake development.

These concerns are not unique to federal EA. Last year, announcing a review of British Columbia's EA process, Premier Christy Clark stated that “over the years, the environmental assessment process has gotten so long, so difficult and so complex, that communities, proponents can't get a yes, can't get a no” (quoted in Luk 2014). Meaningful engagement of Aboriginal communities is essential to the integrity of the EA process. A cumbersome and adversarial EA process characterized by poorly scoped debate and legal challenge serves no one.

The premise of this paper is that meaningful Aboriginal engagement in EA is inhibited by a number of fundamental characteristics of the EA process itself – some of which are presented under the guise of innovations in EA or even regulatory process improvements. Tinkering with the current process will not fix all of these enduring challenges to meaningful engagement: in some cases more fundamental changes are needed.

This paper first explains the nature of EA in Canada, and what constitutes meaningful engagement. This is followed by an overview of the evolution of EA, focusing on some of the key drivers of change. Current problems with Aboriginal engagement in EA are then explored, followed by a number of recommended reforms to EA as a starting point to ensuring meaningful engagement without compromising efficiency. The focus of this paper is primarily on EA at the federal level, though the observations are broadly applicable to EA systems across Canada.

The Nature of Environmental Assessment and Meaningful Engagement

In Canada, at the federal level, there are two types of EA under the *Canadian Environmental Assessment Act, 2012* – EA by responsible authority and EA by a review panel. An EA by responsible authority is conducted either by the Canadian Environmental Assessment Agency, the Canadian Nuclear Safety Commission, or the National Energy Board – depending on the project’s designation under the *Act*’s regulations. An EA by review panel is conducted by a panel of individuals, usually independent experts in their field, appointed by the Minister of the Environment and supported by the Canadian Environmental Assessment Agency.

The assessment of the proposed Enbridge Northern Gateway Pipeline project – a joint review panel under both the *National Energy Board Act* and the *Canadian Environmental Assessment Act* – is a notable example. Assessments by review panel are usually reserved for large and complex projects, for which there may be significant public controversy or which have the potential for significant adverse impacts, or when there are opportunities for cooperation with another jurisdiction that may be assessing the project. Review panels assess whether the impact statement prepared by a project proponent is sufficient to proceed to public hearings, where interested parties as defined under the *Act*, including Aboriginal communities, may present evidence and express their concerns about the project.

If an EA application is particularly complex, the National Energy Board may hold similar public hearings. Participants must apply to the Board to be registered, demonstrating that they stand to be directly affected by the proposed project, or have information or expertise that could assist

the Board in better understanding the project and its effects. The Board consists of members from the public and private sector, appointed by the Governor in Council. The Board reads and listens to all evidence filed on the project and makes a recommendation to the Governor in Council for a final decision on whether to approve – and under what conditions (such as an alternate project location or pipeline re-routing, specific mitigation, and monitoring measures) – or deny a project application.

Engagement of the public is required in some form in all EA systems in Canada. One of the stated purposes of the *Canadian Environmental Assessment Act, 2012* is to ensure that opportunities are provided for meaningful public participation. Under the federal *Act* there are also specific references to the importance of Aboriginal consultation and engagement and the acknowledgement of Aboriginal peoples’ knowledge in the EA process.

Included amongst the purposes of the *Act* are “to promote communication and cooperation with Aboriginal peoples with respect to environmental assessments” (sec 1(d)); and “to ensure that opportunities are provided for meaningful public participation during an environmental assessment” (sec 1(e)). Effects to Aboriginal peoples are specifically noted in section 5(c) of the *Act*, with regard to the scope of effects considered under the *Act*, referring to such matters as the implications of development for Aboriginal health and socio-economic conditions and use of lands and resources for traditional purposes.² Section 19(3) of the *Act* further notes that an EA “may take into account community knowledge and Aboriginal traditional knowledge”.

Ensuring *meaningful* participation or engagement in EA does have a particular connotation, based on international standards for EA practice (Andre et al. 2006). According the International Finance Corporation’s (2007) good-practice guidance on stakeholder engagement: “When consultation activities are primarily driven by

Engagement of the public in EA is required in some form in all EA systems in Canada.

rules and requirements, they tend to become a one-time set of public meetings Today, the term ‘stakeholder engagement’ is emerging as a means of describing a broader, more inclusive, and continuous process between a company and those potentially impacted that encompasses a range of activities and approaches, and spans the entire life of a project” (2).

Meaningful engagement in EA, then, is when those potentially affected by development, or who have a vested interest in development, contribute to the planning, assessment, and decision process, thus providing opportunities for the exchange of information, opinions, interests, and values. It also means that those initiating the process of engagement are open to changing a proposed development, and are prepared to work with different interests to alter plans or to amend or even drop existing proposals. Meaningful engagement in EA extends beyond issuing public notice of a planned project, or making project information available and soliciting public feedback. Meaningful engagement implies:

- early notice to those potentially affected by development about the prospects of a development proposal and opportunities for engagement;
- access to complete and accurate information about a proposed development, including information about project’s design, location, and known baseline conditions and impacts;
- early engagement, prior to EA submission, to develop a working relationship with potentially affected communities to identify potential problems and concerns and to work together on developing solutions;
- transparency, whereby development plans, decisions, and decision-making processes are publicly accessible;
- ensuring that affected communities have the necessary resources (financial, technical, human) to engage in the EA process and remain engaged post-EA approval;
- affected communities are willing to engage for the purpose of improving project design, managing impacts, and providing information of relevance to the regulatory decision-making process;

- there is an opportunity for formal, legal challenge or intervention should community concerns not be adequately addressed or due process for engagement not followed;
- proponents and communities have a genuine interest in working together to understand the issues and concerns of both parties and to resolve them; and
- there is an opportunity to influence a project’s design and the outcomes of the regulatory decision-making process.

Meaningful Aboriginal engagement is a necessary undertaking for project proponents to satisfy the requirements of corporate social responsibility. It is also vital to ensuring that development satisfies both the needs of the community and the proponent. The approach to Aboriginal engagement in Canadian EA practice, however, has been widely criticized for being cumbersome, costly, and geared more toward meeting legal requirements for consultation rather than ensuring meaningful input to inform resource development plans and decisions (Baker and McLelland 2003; Salomons and Hoberg 2014).

Participation in Environmental Assessment: Evolution and Key Influences

The following sections provide context to the current problems facing Aboriginal engagement in EA. The evolution of participation and engagement in Canadian EA is highlighted, focusing on some of the key drivers of change from *inside* the formal EA process (such as regulatory or legislative reform) and also from *outside* the EA environment (for instance, privately negotiated agreements and court challenges). These are certainly not the only drivers of change in Canadian EA, but they have shaped



or transformed both non-Aboriginal and Aboriginal people's participation in EA and have had a significant and lasting impact.

The Formative Years

EA was introduced to Canada in 1972 and formally adopted in 1984 as the Environmental Assessment Review Process (EARP) Guidelines Order. The scope of EARP was broad and captured any initiative for which there was a federal decision-making authority – from individual resource development projects to regional resource development strategies. At the time, EARP was the only formal, federal process that provided a window for public debate about the potential impacts that accompanied major resource development proposals. In practice, participation under EARP typically involved only oral or written presentations to a formal project review panel.

There were no provisions for Aboriginal engagement early in the project planning processes, or for the specific consideration of the impacts to Aboriginal traditional lands and culture. EARP provided that the public may be consulted during the development of guidelines for conducting an EA, but early and on-going engagement was not mandatory (Dorcey 1986). There were no guarantees that input from affected communities would be sought until after a project assessment was submitted for regulatory review and decision (Wondolleck 1985).

That said, as EARP was emerging there also emerged, external to the EA system, several major initiatives that would shape expectations about what Aboriginal participation in resource development should look like. Most notable was the Mackenzie Valley pipeline inquiry – the Berger Inquiry – lasting three years and engaging dozens of Aboriginal communities along the Mackenzie River to gauge their concern about the proposed Mackenzie Valley energy pipeline project.

In Justice Berger's final report, *Northern Frontier, Northern Homeland* (1977), emphasis was placed on the importance of working meaningfully with Aboriginal communities to understand the socioeconomic and environmental impacts of development. Berger's concerns were not only about the potential impacts of a pipeline corridor on the environment, especially caribou, but also about

the potential adverse cultural and social impacts of northern industrial development more broadly on Aboriginal communities. Berger argued that the greatest need in the north was not accelerated resource development, but opportunities for Native people in the north to determine their own future – specifically the need to settle land-claim agreements and establish land use plans. He recommended that pipeline development along the Mackenzie Valley be delayed for 10 years, and that land-claims agreements be negotiated and settled prior to any pipeline development. Of course development was delayed for much longer than 10 years, and by the time cabinet had finally approved the revived project in 2011, world energy prices had fallen, making the project uneconomical.

But Berger's report put land-claim settlements across the North on the map, opening up a new chapter in the relationship between Aboriginal peoples, government, and corporations wishing to develop on traditional lands (Anderson, Dana, and Dana 2006). What really made a difference, however, was not Berger's conclusions but rather how he arrived at them. In his report, Berger writes:

“The native people should have an opportunity to speak to the Inquiry in their own villages, in their own language, and in their own way.”

BERGER INQUIRY REPORT 1977

To hear what they [northerners] had to say, I took the Inquiry to 35 communities . . . All those who had something to say – white or native – were given an opportunity to speak . . . The impact of the industrial system upon the native people has been the special concern of the Inquiry, for one thing is certain: the impact of a pipeline will bear especially upon the native people. That is why I have been concerned that the native people should have an opportunity to speak to the Inquiry in their own villages, in their own language, and in their own way. (vii-viii)

Bocking (2007), a professor at Trent University, explains that Berger's process “really shook conventional thinking . . . Berger demonstrated that the best decision requires not just the right information, but the right process. In other words,

better decisions and better projects demand democratic practice, an opening up of information and debates so that everyone can have their say. Ever since, the credibility of an environmental assessment has depended on not just expertise but on transparency and accountability.” Some scholars suggest that the Berger Inquiry set international expectations for the critical and cross-cultural public assessment of natural resource development undertakings (Gibson and Hanna 2009).

Enhanced Legislative Support

From the mid 1980s to the mid 1990s, the importance of Aboriginal peoples’ involvement in EA received increasing attention on the international

scale, due in large part to initiatives such as the World Commission on Environment and Development Summit (1987) and the International Labour Convention on Indigenous and Tribal Peoples in Independent Countries (1989). The Canadian federal response was increased commitment to Aboriginal participation in EA, marked by, among

other things, the establishment of participant or intervenor funding programs to provide financial support to affected communities to participate in the formal EA review of major projects.

It was during this period that Bill C-13, the *Canadian Environmental Assessment Act*, was introduced to replace the EARP Guidelines Order, providing teeth to federal EA and introducing new requirements for “timely and meaningful public participation throughout the environmental assessment process”, including new requirements for issuing public notice of an EA application, and making EA documentation available in a public registry.

The new *Act*, however, was much narrower in scope than EARP. Whilst EARP could be applied to any initiative for which there was a federal decision-making authority, EA under the new *Act* was restricted to a defined list of physical

undertakings, or projects, such as mine developments, hydroelectric facilities, or pipelines. Broader policy issues, such as whether mining or resource development should continue in a region, and the implications for communities, as addressed by the 1977 Bayda Commission Cluff Lake Board of Inquiry regarding uranium mining in northern Saskatchewan, would no longer fall under the guise of EA.

Legal Challenges and the Quest for Meaningful Engagement

Revisions to federal EA in Canada occurred again in 2003, providing for the specific incorporation of Aboriginal traditional knowledge in EA – a provision that, by this time, was included in many provincial and territorial EA systems. However, EA still struggled to deliver on the promise of meaningful participation – at all levels of government. Aboriginal peoples’ participation in EA was often the result of conflict that emerged from an initial failure to meaningfully involve them in decisions that affected their traditional lands and way of life.

Such failures led to recurring court challenges, and an overall dissatisfaction with the EA process. This was evidenced by several legal challenges concerning Aboriginal peoples and resource development, largely focused on the adequacy of consultation and engagement undertaken by governments.

In 2009, for example, the West Moberly First Nations filed a challenge against British Columbia and First Coal Corporation over what they believed to be a failed provincial EA. The First Nation was concerned about the potential impact of the mining operation on critical caribou habitat and the extent to which their concerns had been taken into consideration during the EA process. The Honourable Justice Williamson ruled in favour of the West Moberly First Nations, concluding: “I am satisfied that the Crown recognized that it had a duty to consult and accommodate reasonably, the concerns of West Moberly. I am not satisfied, however, that in the circumstances the Crown consulted meaningfully, nor that the Crown reasonably accommodated West Moberly’s concerns about their traditional seasonal round of hunting caribou” (*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*).

EA initially struggled to deliver on the promise of meaningful participation.

Privatization of Participation and the Emergence of Externally-negotiated Agreements

External to the EA processes, during a time of mounting court challenges concerning Aboriginal rights and increased industry concern about delays to resource development, there emerged a kind of privatized participation in the form of negotiated agreements, or impact and benefit agreements. Such agreements, often in the form of employment commitments or revenue sharing with Aboriginal communities in exchange for their cooperation and support for a project, established formal, often legally binding, relationships between project proponents and affected communities (Sosa and Keenan 2001).

The emergence of negotiated agreements provided Aboriginal communities affected by resource development the opportunity for earlier involvement in project planning, and potentially greater opportunity to influence development activities on their traditional lands than what could be achieved through the public EA process. Included amongst the many agreements now established in Canada are the Ekati, Diavik, and Snap Lake diamond mines in the Northwest Territories, the Voisey's Bay nickel mine in Newfoundland and Labrador, and the Horizon Oil Sands Project in Alberta. All five of these agreements establish goals and mandates that relate to Aboriginal participation in EA; only the Diavik and Snap Lake agreements included government as a signatory.

Regulatory Reform for Fewer Assessments and Improved Efficiency

Over the last decade the efficiency of EA and associated regulatory processes has received considerable attention, specifically the need to reduce the financial cost of EA, ensure shorter timelines to reach a development decision, and greater process certainties for project proponents. Commissioned studies such as the McCrank Report in Canada's north explored opportunities to improve the Canadian regulatory system, addressing among other things regulatory timeliness and greater opportunities for re-

source development (McCrank 2008). In 2012, perceiving inefficiencies in the federal EA process as a hindrance to economic development, the federal government included provisions in its federal budget implementation bill (Bill C-38, the *Jobs, Growth and Long-term Prosperity Act*) to replace the *Canadian Environmental Assessment Act* with the *Canadian Environmental Assessment Act, 2012*. Ensuring an expedited regulatory review process and removing barriers to resource development, such as the highly contested Enbridge Northern Gateway project, were amongst the primary drivers for the new *Act* (Becklumb and Williams 2012; Noble and Hanna 2015).

Cited in the federal government's *Economic Action Plan 2012* were several examples of EA delays, including delays caused by the existence of multiple federal approval processes for any single project application. In the case of the Enbridge pipeline project, for example, several federal departments and agencies did not issue their regulatory approval of the pipeline until almost two years after the National Energy Board had approved it (Flaherty 2012).

Under the new *Act, 2012*, the number of federal authorities responsible for EA was reduced from any federal department or agency potentially involved in issuing permits or authorizations for a project to only three organizations – the Canadian Environmental Assessment Agency, the National Energy Board, and the Canadian Nuclear Safety Commission. Interestingly, however, an independent review by de Kerckhove, Minns, and Shuter of EA approval timelines criticized the government for using exceptions versus the norm to make their case for regulatory change. Published in the *Canadian Journal of Fisheries and Aquatic Sciences*, de Kerckhove, Minns, and Shuter (2013), based on a sample of 122 authorizations under the *Fisheries Act*, conclude: "Notwithstanding larger projects, the review of projects across the last decade has been within the government's preferred timelines and appears to reflect the operation of a reasonably efficient system where regulators have successfully processed files even during periods of higher submission loads" (520). Further changes under the new *Act* also restricted the scope of federal EA to apply to even fewer development actions, meaning that fewer projects affecting Aboriginal lands and traditional resources would potentially be

subject to assessment. Kirchoff, Gardiner, and Tsuji (2013) estimated that more than 95 percent of projects that required EA under the old Act would now be exempt from it.

State of Aboriginal Engagement in Environmental Assessment

Opportunities and provisions for Aboriginal engagement in EA have improved substantially since EA was first introduced to Canada in the early 1970s; however, there remain many challenges. The following list is certainly not comprehensive, but it does capture the enduring problems facing Aboriginal

engagement in EA – notwithstanding the many improvements and provisions for better participation and consultation.

First Nations sometimes lack the financial, organizational, and technical resources needed to effectively participate in the EA process.

Limited Financial and Human Resource Capacity

Kwiatkowski et al. (2009) suggest that two major difficulties faced by Aboriginal commu-

nities engaged in EA processes are presented by “the very size and complexity of the environmental impact assessments carried out (reports of hundreds to thousands of pages are the norm)” (58) and the complexity of the EA regulatory process. Many Aboriginal communities

lack the financial and human resource capacity to become and remain engaged in EA. This includes the resources needed to develop and prepare traditional use studies that demonstrate the impact of development on traditional lands, to review and comment on project applications (such as technical design or the adequacy of impact management measures), and to participate as intervenors in regulatory hearing processes.

The Road to Improvement – The Review of the Regulatory Systems Across the North (the McCrank Report) identifies the limited capacity of Aboriginal organizations as affecting their ability to participate in EA and to document and interpret traditional knowledge to assist in decision-making – a limitation played out in the Victor Diamond Mine EA process in northern Ontario between 2003 and 2005. Affected First Nation communities were unable to adequately participate in the EA due, in part, to the communities’ limited knowledge about the EA process itself, compounded by a lack of resources to acquire the help needed to participate. According to the Deputy Grand Chief of the Nishnawbe Aski Nation, “four of the five communities identified by De Beers to be primarily impacted by the Victor Diamond Project . . . have been shut out of the EA process” (Kooses 2004). Whitelaw, McCarthy, and Tsuji (2009) report that First Nation blockades of the ice road to the mine site in 2009 showed clearly that concerns remain over the lack of community engagement and benefit from the mine.

Similar challenges emerged in Spectra Energy’s EA application for the Westcoast Connector Gas Transmission Project, 2014 – a proposal to transport LNG from northeastern British Columbia to the northwest coast. The proponent’s EA application reports that 17 of the 24 potentially affected First Nations indicated that they lacked the financial, organizational, and technical resources needed to effectively participate in the EA process (Spectra Energy 2014).

Participant Fatigue in Resource Development Intense Regions

The financial and human resource capacity constraints of Aboriginal communities to engage in EA processes are exacerbated in resource development-intense regions where increas-



ing numbers of EA applications mean growing demands for consultation as proponents and governments attempt to meet their obligations. Although capacity to engage varies from one Aboriginal community or First Nation to the next, the 2014 report of the Auditor General on the implementation of the *Canadian Environmental Assessment Act, 2012*, notes that many Aboriginal groups have little capacity “in terms of staff, expertise, and funds to respond within the set timeframes, particularly when asked to respond to several requests at once” (Commissioner of the Environment and Sustainable Development 2014).

The result is inadequate engagement, participant fatigue, or both. The Mackenzie Valley Environmental Impact Review Board (2008), for example, reports that Aboriginal communities in the Mackenzie Valley are concerned about the constant struggle to retain their capacity to participate in EA and the increasing workload of Aboriginal groups to coordinate EAs with land users, elders, and their chief and council. Similar concerns have been reported by the Inuvialuit in Canada’s western Arctic concerning energy development projects (Fidler and Noble 2013), suggesting the need to either enhance Aboriginal community capacity to become engaged in EA, or to unload some of the burdens of participation in project EA in resource development-intensive regions to more regional and strategic EA processes, or both.

Late Timing of Engagement in the Development Cycle

The timing of Aboriginal engagement in EA is often late in the development cycle. As a result, potentially adverse impacts to Aboriginal lands and resources are either missed, or inadequately compensated.

Similar to the EARP system of the 1980s, participation in EA is not required until well into the project planning and assessment process, often when the project’s design and planning are complete and the proponent’s impact statement is submitted for either public review or to a review panel. At this stage, many of the important decisions about the nature and design of a project, including the identification of impacts that may affect Aboriginal lands and resources and the measures to manage those

impacts, have already been made. The result is an adversarial EA process characterized by distrust, where scientific data, traditional knowledge, and the credibility of EA consultants are the subjects of legal argument.

The Assembly of First Nations (2011) notes that minimizing the role of First Nations in resource development leads “not only to an adversarial environment, but one marked by increased litigation.” This was a hard lesson learned by Platinex, a junior mining exploration company in northern Ontario, where the Ontario Ministry of Northern Development and Mines issued, under the pre-2009 *Ontario Mining Act* and without prior consultation, drilling rights to Platinex on land to which the Kitchenuhmaykoosib Inninuwug First Nation claim treaty rights. No EA was required for the exploration activity. No exploration agreement was reached between Platinex and the First Nation. The result was blockades by the First Nation, considerable project delays, expensive litigation, and even the jailing of the First Nation Chief and five community members (Canadian Business Ethics Research Network 2015).

Lack of Clarity About Industry’s Role in Meeting Crown Consultation Requirements through EA Processes

Federal and provincial Crowns will often rely on the EA process to fulfill, at least in part, their “duty to consult”, and may rely on environmental effects mitigation measures identified during the EA process as accommodation for impacts on Aboriginal rights that may result from those effects. Federal and provincial governments will often delegate the procedural aspects of consultation requirements to project proponents, with a template of project-specific guidelines. In doing so, governments hope that proponents and their consultants can provide comprehensive information to communities and capture all aspects of concern related to the proposed project.

There is considerable ambiguity in this process in terms of the relative roles and responsibilities of government and industry to the community. In northern Saskatchewan’s uranium sector, a proponent’s participation efforts and government

consultation requirements “quite often have been blended together and the context and expectations of each are not clearly understood [and] the understanding of these requirements vary quite broadly from proponent to proponent”.³

As a result, neither meaningful engagement nor the legal obligation for consultation is achieved. A recent example is a British Columbia Environmental Appeals Board decision regarding the Fort Nelson First Nation’s challenge to a water extraction licence issued to Nexen, an upstream

oil and gas company, to support hydraulic fracturing operations. The Board found that the province failed to consult the First Nation in good faith, noting that meaningful consultation requires a clear framework or process, that Nexen’s role in consultation was never clearly communicated to the First Nation, and that if the Crown wants a proponent to play

a role in the consultation process then it must make that role clear to the First Nation (British Columbia Environmental Appeal Board 2015).

Neither meaningful engagement nor the legal obligation for consultation is achieved in the absence of clear roles for participants.

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Negotiations Behind Closed Doors

Impact and benefit agreements, community benefit plans, and other forms of negotiated agreements between project proponents and potentially affected Aboriginal communities are almost common practice in the Canadian resource sector (Veiga, Scoble, and McAllister 2001). These agreements, often negotiated in advance of the regulatory EA process and project application, typically establish benefit streams and forms of compensation to a community for project impacts in turn for a community’s support during the EA and licensing process.

Negotiated in confidence, the nature of impacts and mitigation or compensation measures are often unknown to the regulatory decision-maker,

to review panels, or to other communities or interests potentially affected by the project. The lack of transparency means that decisions are made during the EA process, and conditions set, in the absence of complete information about the project’s potential impacts and intended mitigation or compensation measures. Should new concerns arise during the EA process, communities are often legally bound by the agreement to demonstrate their support for, or at least not demonstrate opposition to, the project.

In the case of Nova Gold, the company negotiated an agreement with the Tahltan First Nation, British Columbia, before approaching the province with an application for coal mine development. The agreement assured certain benefits to the Tahltan in return for their public support during the EA process. This agreement was part of a larger negotiating process between the Tahltan Nation Council, developers, and the province; the Council also signed a \$250,000 per year agreement with British Columbia in support for opening the region up to further development, including mining, forestry, and hydroelectricity. Several Elders and other community members expressed concern about how the agreements were formed within the Tahltan Nation, including the agreement with the province, involving only a small negotiating team and in absence of the opportunity for meaningful input from the broader community membership (Noble and Fidler 2011).

The signing of the agreements led to significant fractions within the Tahltan community. The Tahltan Central Council was accused of not acting in the best interest of the community and not respecting the community voice. Several Elders and other supporting community members occupied band offices for months in protest, and blocked industry from entering their traditional territory. McCreary (2005), who analysed carefully the Tahltan situation, reports that “[t]he Elders are emphatic that they do not oppose development per se – only the kind of development that respects neither the voice of the community nor its responsibility to pass on a healthy environment and sustainable economy to future generations.” Agreements can deliver certain benefits to communities that EAs cannot, but they may also be used as a means to limit the opportunity for broader public debate about the merits of a proposed development.

Screening out Small Projects with the Potential to Impact Aboriginal Lands and Resources

Recent legislative and regulatory reforms in Canadian EA mean that fewer projects are now subject to EA, which results in fewer opportunities for Aboriginal communities potentially affected by development to engage in project evaluation, impact management, and decision-making. At the federal level, CEAA 2012 applies only to “designated projects” as determined by the *Regulations Designating Physical Activities*, resulting in many smaller undertakings – such as individual gas wells, for example – often being excluded from federal assessment.

This challenge though is not unique to federal EA – the failure to conduct EAs for small projects with the potential to harm traditional lands and resources has also been reported in British Columbia. In 2012, Holmes Hydro Inc. proposed siting 10 small hydro plants on tributaries of the Holmes River. No comprehensive EA review process was required, thus compromising opportunities for meaningful participation in development assessment, impact management, and decision-making (Campbell 2015).

Similarly, in Saskatchewan’s Great Sand Hills – a 1900 km² region with more than 1500 natural gas wells and over 3000 km of access roads, and also of significant cultural and spiritual importance to Treaty 4 and Treaty 7 First Nations, only three EAs for well programs have been completed; the region has experienced significant biodiversity impacts and restrictions to Aboriginal access to traditional lands.

Expectations and Needs Misaligned with the Scope and Objectives of the EA Process

Environmental assessment is not a mechanism designed to prevent all development that might generate potentially negative effects. If this were the case, few developments would actually take place. Many of those philosophically opposed to resource development, or to the development of certain resource sectors (such as oil and gas), approach EA as a platform for political expression to air their concerns about industry at large.

The result, arguably, is often a controversial and heated process, distracting from the fundamental issue at hand – the potential impacts of the proposed project, the merits of the proponent’s proposed impact mitigation measures, and whether and under what conditions the project should be approved.

For many Aboriginal peoples, however, the issue is much more complex: “I think there are much, much larger issues at the table, that every First Nation grapples with, and there are limited venues for grappling with those issues and so those issues get brought to the table in the environmental assessment . . . Because there is no other outlet for it.” This is the view of an industry EA consultant, interviewed by Booth and Skelton (2011b) in 2010 during their analysis of First Nations engagement in EA in British Columbia. The EA process is not a rights-based process, but Aboriginal communities often approach EA to address rights-based issues and engage in EA with expectations shaped by their treaty rights.

As a result, some of the issues raised during an EA, such as debates about whether development should occur at all in a particular region, or the types of development deemed most appropriate, are policy and land use planning issues that are beyond the control of a project proponent and beyond the scope of project-based decisions.

Understandably, Aboriginal communities expect that potential impacts to their recognized rights be adequately considered during the project review process, but many of the issues raised are not “EA issues” per se; rather, they are much larger policy, legal, and even constitutionally-based issues concerning land title and the rights of Aboriginal peoples. These are not issues that the EA process, historically or in its present form, is equipped to resolve – particularly within the scope of a single resource development project, such as a mining operation or pipeline.

The result, as communicated by the Assembly of First Nations (2011) is that “[i]n too many circumstances, First Nations are forced to resort to litigation because the environmental assessment process does not adequately consider aboriginal and treaty rights. First Nations issues dominate litigation of environmental assessments, yet First Nations are not meaningfully involved in legislative or policy development.”

Environmental Assessment Reform for Meaningful Aboriginal Engagement

Against this backdrop of EA evolution, and in recognition of the enduring challenges to Aboriginal engagement in EA, a number of reforms to the current EA system are proposed in order to ensure meaningful engagement whilst not compromising the efficiency of project approvals and regulatory decision-making processes. Some of these reforms require rethinking the role of EA itself, and what a project-based approach to development decision-making can reasonably achieve. Other changes require greater investment in legislation and partnership building to

Reform requires rethinking the role of EA, and what a project-based approach to development decision-making can reasonably achieve.

ensure that those affected by development have the opportunity and the capacity to become meaningfully engaged.

Investment in Training Programs to Support Aboriginal Education in EA Processes

Governments and industry must invest resources in the development and administration of EA training programs to build educational and technical capacity in Aboriginal communities. Meaningful engagement in EA requires that Aboriginal communities are aware of the nature and intent

of the EA process, and have the necessary technical skills.

Aboriginal communities are often frustrated by the outcomes of EA, arguing that certain rights, interests, or concerns were not given due consideration or were not reflected in the development decision. Some of this frustration can be attributed to poorly conceived participation processes, inexperienced project proponents, or communities that are simply unwilling to cooperate. Much can also be attributed to a community's limited understanding of the EA process, what opportunities there were for engagement, and the lack of technical skills to participate in the review of complex project EA applications.

The professional land management training and certification program established by Aboriginal Affairs and Northern Development Canada (AANDC), in cooperation with the National Aboriginal Lands Managers Association and the University of Saskatchewan, could provide such a venue to deliver EA training to Aboriginal communities.⁴ The current training program, focused on skill development in resource management, law, and economic analysis, must be expanded to ensure that EA, the primary instrument for assessing and management of the impacts of development on Aboriginal lands, is a foundational part of Aboriginal training. This will help ensure an understanding of the regulatory process, developing the technical skills needed to review and comment on project applications and impact statements, and understanding when and how to meaningfully engage in the EA process.

Costs associated with participating in the professional land management training and certification program were initially covered by AANDC. Between 2009 and 2013, the total federal cost of the Professional Land Management Certification Program was only \$2.25 million.⁵ Aboriginal communities are now bearing the majority of the cost of training their staff. Increased government investment, supplemented by industry sponsorship, is needed to ensure that Aboriginal communities have the knowledge and skills to engage in EA processes, thus ensuring more informed engagement and perhaps a more time and cost efficient EA process for industry and government.

Enhanced Financial Capacity for Engagement in EA Activities Pre- and Post-Project Development

Current intervenor or participant funding programs must be complemented by longer-term industry investments in Aboriginal engagement post-project approval, and such investments must be a condition of the regulatory approval of project applications. Both the Canadian Environmental Assessment Agency and the National Energy Board provide intervenor funding, or participant funding, to offer financial support to those communities and interests directly affected by a proposed development, and who may have information that is of relevance to the project's impacts. The intent of the National Energy Board's program, for example, is to help registered intervenors with the costs of their participation in a formal project hearing.

For the public hearing for the Trans Mountain Pipeline expansion project, for example, a pipeline twinning project from Strathcona County, Alberta to Burnaby, British Columbia, a total of \$24 million was requested in intervenor funding from 95 applicants. A total of \$3 million was awarded to 71 applicants. Nearly 80 percent of the funds were awarded to Aboriginal groups, with awards ranging from travel support to attend the project hearing to over \$200,000.⁶ The maximum amount of funding under the new program is currently \$12,000 for individual intervenors, and \$80,000 for eligible groups. An overwhelming allocation and use of participant funding tends to be the funding of legal support for potentially affected Aboriginal interests to review a proponent's project impact statement and appear before a formal review panel to defend their claims about a project's impacts or benefits.

The Fair Mining Collaborative (2015), a British Columbia-based charitable foundation that provides technical and practical assistance to First Nations and communities around the issues and impacts of mining, reports that formal participant funding is "often limited to covering travel and participation expenses and remains insufficient to ensure meaningful participation". What is lacking is support for First Nations to independently assess the potential impacts of a project on their

lands and resources, or to engage in collaborative project planning, impact management, and monitoring activities. Further, intervenor or participant funding programs have done little to ensure the long-term engagement in EA of Aboriginal communities affected by development.

This is not to suggest that participant funding programs are not useful, but the funding is temporary and does not support engagement beyond the EA application review process. Required is longer-term investment in Aboriginal community engagement in project development, underwritten by the profits from resource leasing and development on Aboriginal lands (Booth and Skelton 2011a), and required by governments as a condition of project approvals. This may be financially costly for small proponents, but it must be considered a routine cost of doing business with Aboriginal communities.

There are examples of such investments, including community-based monitoring programs in northern Saskatchewan's uranium industry and cumulative effects management programs in the Elk River Valley of British Columbia.⁷ Funded by Teck Resources, the Elk Valley program was co-created by Teck and the Ktunaxa Nation Council, as a condition of regulatory approval for an EA application for mine expansion.

Legislative Reform to Promote Early, Front-end Engagement

Ensuring meaningful engagement, and avoiding an adversarial EA environment fuelled largely by exclusion from the most important stages of project design, requires a fundamental shift in EA legislation to require more front-end, and culturally appropriate, engagement on behalf of the project proponent – at a point when decisions are being made about the intent to develop, and about the nature, rationale for, and intended design of a project. Currently, Aboriginal engagement is often initiated *after* a proponent commences its impact assessment, or even worse, at the stage of a public hearing process, once a proponent's project impact statement is completed. The Canadian Environmental Assessment Agency's (2012) own *Guide to Preparing a Description of a Designated Project* under the federal Act notes:

Experience has shown that engagement by proponents with Aboriginal groups early in the planning and design phases of a proposed project can benefit all concerned. By learning about Aboriginal interests and concerns and identifying ways to avoid or mitigate potential impacts, proponents can build these considerations into their project design, thereby reducing the potential for future project delays and increased costs. (9)

Earlier, mandatory engagement of Aboriginal communities is needed to ensure meaningful and timely participation. When initiated early, however, the nature of engagement should still be left to the discretion of the proponent. Under Yukon Law, for example, sec. 50(3) of the *Yukon Environmental and Socio-economic Assessment Act* requires:

“Before submitting a proposal to the executive committee, the proponent of a project shall consult any first nation in whose territory, or the residents of any community in which, the project will be located or might have significant environmental or socio-economic effects.” The proponent must submit proof of

such engagement to the Yukon Environmental and Socio-economic Assessment Board *before* the Board will commence the review of an EA application.

One way to support early industry engagement with potentially affected Aboriginal communities, and thus help facilitate more agreeable and efficient EA processes, is to require that the terms of reference for an EA are developed in collaboration with potentially affected Aboriginal communities. The terms of reference for an EA set out the standards and expectations for an assessment, including any proposed Aboriginal engagement strategies.

Typically, the terms of reference for an EA are drafted by the project proponent and submitted to government for formal public consulta-

tion and review, including review by Aboriginal communities. When terms of reference are developed early, and in collaboration with the potentially affected Aboriginal community, expectations are set prior to the EA process and Aboriginal values are integrated into the assessment process from the outset. Though not common practice, it is not unprecedented.

In 2004, for example, Polaris Minerals submitted an EA application for the Orca sand and gravel mine, located in the ‘Namgis First Nation territory, northwest Vancouver Island, British Columbia. The EA was carried out as a harmonized federal-provincial assessment process. Polaris engaged the First Nation in the development of the terms of reference for the EA, and the First Nation had a say in the choice of EA consultants, thus ensuring appropriate engagement and a culturally appropriate EA process.

Although the early engagement in terms of reference setting was a voluntary initiative of the proponent, according to LGL Limited and the BC First Nations Environmental Assessment Technical Working Group, the Orca sand and gravel mine project “set a standard for meaningful participation of a First Nation in an environmental assessment . . . the completion of the EA process was swift and mutually supported” (Plate, Foy, and Krehbiel 2009, B5).

Should a proponent fail to adequately engage an affected Aboriginal community or address their concerns early in the EA process, or if a proponent considers a community’s demands unreasonable, only then should the participation process rest solely in the hands of the formal panel review process. If a proponent meets its obligation to meaningfully engage the community before submitting its EA, it has the certainty that the formal requirements for engagement under the EA process have been satisfied upon submission of the project application (Doelle and Sinclair 2006). Such mandatory, early engagement simply shifts the timing of engagement and does not add an additional burden for proponents, but it may serve to reduce the level of conflict that characterizes engagement too late in the EA process.

Early collaboration means Aboriginal values are integrated into the assessment process from the outset.

Government, not Industry, the First Boots on the Ground

Aboriginal communities need greater clarity regarding who is responsible for consultation and engagement, and governments must be responsible for setting the expectations about, and processes for engagement – including explaining to communities the intended role of industry in consultation processes. In any given EA part of the responsibility for consultation may be discharged to project proponents through the EA process, but recent legal challenges (for instance, *Fort Nelson First Nation v. Government of British Columbia and Nexen Inc.*; see British Columbia Environmental Appeal Board 2015) indicate that the process lacks consistency and clarity, affecting the timing of and opportunities for meaningful engagement of Aboriginal communities. Understanding who is responsible for initiating early participation and consultation processes, and what they are to achieve is often poorly understood.

In any region subject to a potential application for development, and before any particular project is being considered, the responsible government departments or agencies should be the first on the ground, working with local communities to identify needs, opportunities, and to help set expectations about development and EA processes. This should happen before project proponents enter the scene. This is consistent with the 2012 *Ross River Dené Council* decision by the Yukon Court of Appeal, which determined that government must consult potentially affected Aboriginal communities *before* land is opened up for staking and acquisition of mineral title (Cooney 2013). The Major Projects Management Office (2012) of the Government of Canada similarly notes that “[e]xperience has shown that engagement with Aboriginal groups early in the planning and design phases of a proposed project can benefit all concerned. Conversely, there have been instances where failure to participate in a process of early engagement with Aboriginal people has led to avoidable project delays and increased costs to proponents.”

Early engagement by government also provides an opportunity to identify those issues associated with a potential development project that need to be addressed, namely rights-based is-

ues, but that cannot be meaningfully addressed through an EA process. The Fair Mining Collaborative (2015) suggests that such issues are better addressed in a parallel process, specifically “the development of a general consultation protocol between government and leadership of the potentially affected Aboriginal community” and that such a protocol would “set out objectives, principles, standards, best practices and general guidelines for the conduct of talks between the parties and for project-specific consultation processes.” Doing so would help clarify the respective roles of government and the project proponent, and alleviate from the EA process the burden of issues that are not within the scope of the proponent or the EA process.

Disclose Impacts and Impact Management Strategies in Agreements Negotiated In Advance of the EA Process

When companies negotiate agreements with communities in advance of the EA process, the content of those agreements – specifically issues pertaining to impacts and impact management strategies – needs to be transparent and made publically available to other affected communities, to review panels, and to decision-makers.

Agreements do provide greater certainty to companies, and opportunities for early engagement of Aboriginal communities in project impact management strategies. But they also limit the information that is available: to:

- to other potentially affected communities, so as to understand the distribution of impacts and whether impacts and impact management strategies are equitable;
- to review panels who make recommendations about the significance of impacts and appropriateness of management strategies, and who may also commission independent expert reviews to determine the adequacy of impact management strategies;
- and to decision-makers who must weigh all available public, proponent, and expert-based information and make a determination of whether the project is in the public interest.

Arguably, negotiated agreements should:

- form part of the formal requirements for an EA;
- be arranged between the proponents, affected Aboriginal communities, and the relevant government agency;
- and be conducted within the realm of public law.

Details concerning a community's financial gain (such as royalty regimes) established under such agreements may very well remain confidential; however, any commitments regarding the mitigation or offsetting of environmental impacts that may, as noted under the *Canadian Environmental Assessment Act* (sec 5(c)), have an impact on Aboriginal health or socioeconomic conditions, physical and cultural heritage, or the use of lands for traditional purposes, should be disclosed in the project's EA report and available to regulatory decision-makers.

Off-ramping Strategic Issues to Regional and Strategic Environmental Assessment

Aboriginal communities affected by resource development are demanding broad policy debate about whether development on their traditional lands is appropriate.

Strategic issues associated with resource development need to be off-ramped to regional and strategic EA processes. Aboriginal communities affected by resource development are demanding broad policy debate about whether development on their traditional lands is appropriate, and about how different types of development may interfere with traditional rights and culture.

Expressing concerns about the cumulative effects of industrial development in northern British Columbia, for example, Fort Nelson Chief Liz Logan states that government is “basically refusing to look at the big picture of all the developments that are happening in all of our

respective territories” (quoted in Burgmann 2015). The regulatory EA process is far from the best forum to address such strategic issues and concerns. Aboriginal engagement in EA is limited, at best, to influencing decisions about the design of specific, individual development projects that are subject to EA, and to managing their impacts, as opposed to influencing decisions about whether resource development is even appropriate for the region, the cumulative effects of development, or determining the most desirable development future.

There are significant opportunities to be realized through regional and strategic EA, including:

- streamlining participation and project development applications, whereby decisions taken at the regional or strategic level need not be revisited during the regulatory EA process;
- capturing the cumulative impacts to Aboriginal lands of small projects that do not trigger regulatory EA;
- and giving assurance that Aboriginal interests are represented prior to project applications being entertained.

The opportunity for earlier consultation can help avoid strategic issues being raised at the time of project assessment, and reduce the need for multiple consultation and engagement processes in regions subject to multiple project proposals in the same industrial sector (such as multiple mining operations or offshore energy development). The benefit to government and industry is a better understanding of whether resource development projects would be deemed acceptable by those Aboriginal communities potentially affected, and under what conditions.

The need for regional and strategic EA has been well-articulated by Aboriginal communities and other interest groups, including in Canada's Beaufort Sea region for offshore hydrocarbon development (Noble et al. 2013) and, most recently, in northern Ontario's mineral-rich Ring of Fire (Chetkiewicz and Lintner 2014). In order to realize such opportunities, however, current regional and strategic EA systems under the federal Cabinet Directive (Privy Council Office and Canadian Environmental Assessment Agency

2014), and under various provincial policies and land use planning processes, including the Canadian Council of Ministers of the Environment,⁸ need to be strengthened by both legal and policy provisions. A combined law- and policy-based approach is needed. Legislation would set out the core process and requirements to undertake a regional or strategic EA. This would include requirements for engaging Aboriginal communities and implementing the results. But the law should be flexible enough so that sensitivity to specific Aboriginal interests and development contexts can be taken into account by policy-based instruments and negotiation processes.

This approach requires that governments be open to discussions about development when policy and resource plans for an entire region, as opposed to individual projects, are on the table. This requires institutional change and a new way of thinking that prioritizes collaborative planning and decision-making with Aboriginal communities over issuing permits for project development.

Canada could draw on lessons from other jurisdictions, including Norway. The Norwegian *Minerals Act* (2009), for example, created a formalized mechanism for the Sámi Parliament to participate in environmental review processes, including those linked to the government's strategic plans and policies, strengthening the efficacy of the Sámi's involvement in EA and promoting the legitimacy of EA processes.

Conclusion

The meaningful engagement of Aboriginal peoples whose lands and resources are potentially affected by development is essential to informed EA decision-making and for sustainable resource development. Meaningful engagement implies, amongst other things, that communities are enlisted into the project planning, assessment, and decision process, and that they also contribute to the exchange of information, interests, and values. It also means that project proponents are open to the potential need for change in a proposed development, and are prepared to work with the Aboriginal community to develop new plans or to amend or even discard existing ones.

Aboriginal peoples are often dissatisfied with the current nature and level of engagement in EA processes, and with their ability to influence project design and meaningfully contribute to EA decision outcomes. Project proponents are dissatisfied with the increasingly adversarial and often cumbersome EA process, with increasing demands for more participation. These concerns will not be resolved solely by providing more participant funding, hosting more open houses, or negotiating more privatized agreements. Rather, these are challenges for which we must rethink the nature and purpose of engagement in EA, and what can be meaningfully achieved.

Based on what we have observed from practice, and drawing on the international scholarly and policy literature, this paper identified several enduring challenges to the nature and scope of Aboriginal engagement in EA and the much-needed process improvements and reforms:

- Governments and industry must invest resources in the development and administration of EA training programs to build educational and technical capacity in Aboriginal communities.
- Current intervenor or participant funding programs must be complemented by longer-term industry investments in Aboriginal engagement post-project approval, and such investments must be a condition of the regulatory approval of project applications.

- Environmental assessment legislation must be improved to require more front-end, and culturally appropriate, engagement on behalf of the project proponent – at a point when decisions are being made about the intent to develop, and about the nature, rationale for, and intended design of a project.
- Environmental assessment legislation must be improved to require that, where applicable, the terms of reference for an EA are developed in collaboration with the potentially affected Aboriginal communities, ensuring that Aboriginal values are integrated into the assessment process from the outset.
- Governments must provide Aboriginal communities with greater clarity regarding who is responsible for consultation and engagement during an EA process, and governments must be responsible for setting the expectations about, and processes for engagement – including explaining to communities the intended role of industry in consultation processes.
- Governments need to establish parallel, general consultation protocols with Aboriginal communities, setting out objectives, principles, standards, best practices, and general guidelines for project-specific consultation processes to address concerns that are not within the scope of the EA process.
- When companies engage in negotiated agreements with communities in advance of

the EA process, the content of those agreements pertaining to impacts and impact management strategies – but not financial compensation or revenue sharing arrangements – needs to be transparent and made publically available to other affected communities, to review panels, and to decision-makers.

- Strategic issues associated with resource development need to be off-ramped to regional and strategic EA processes. This requires strengthening both legal and policy provisions for current regional and strategic EA systems under the federal Cabinet Directive, and under various provincial policies and land use planning processes, including the Canadian Council of Ministers of the Environment.

Some of these reforms reflect improvements inside the EA process itself; others concern the relationship between projects and processes external to the EA system. Meaningful engagement of Aboriginal communities is unlikely to threaten the efficiency of EA; however, poor engagement or the lack of engagement will invariably cause regulatory delays and add unnecessary costs to project proponents. The stakes are politically, socially, and economically high in EA – major resource development initiatives are at risk, and so are the relationships between governments, industries, and Aboriginal communities.

About the Authors



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Endnotes

- 1 For a discussion of the extant philosophical views about EA, see: Cashmore, 2004, “The Role of Science in Environmental Impact Assessment: Process and procedure versus purpose in the development theory,” *Environmental Impact Assessment Review* 24(4): 403–426.
- 2 See the *Canadian Environmental Assessment Act*, 2012, sec 4(1)(d); 5(1)(c); 19(3); and 105(g).
- 3 Telephone call between EA practitioner in Northern Saskatchewan and author, June 2015.
- 4 For information on the Aboriginal land managers training and certification program, see Aboriginal Affairs and Northern Development Canada (<https://www.aadnc-aandc.gc.ca/eng/1399934895782/1399935046259>), the National Aboriginal Lands Managers Association (<http://www.nalma.ca/certification>), and the University of Saskatchewan (https://agbio.usask.ca/students/undergraduate/undergraduate_certificate.php).
- 5 Between 2009 and 2013, \$19 million has been invested in the Reserve Land Environmental Management Program (RLEMP). This includes \$2.25 million in the Professional Land Management Certification Program, and the remaining \$16.75 million for First Nations to perform land management functions on behalf of AANDC and to enable the National Aboriginal Lands Managers Association to provide land management support and technical expertise to RLEMP First Nations. See <https://www.aadnc-aandc.gc.ca/eng/1357225364409/1357226235936>.
- 6 Based on NEB participant funding program report for the Trans Mountain Expansion Project (National Energy Board 2015).
- 7 For an overview of the Athabasca community-based monitoring program and community vitality monitoring partnership, see <http://www.cameco.com/northernsk>. The Elk Valley Cumulative Effects Management Framework can be found at <http://www.elkvalleycemf.com/>.
- 8 In 2009 the Canadian Council of Ministers of the Environment released a guidance document on regional strategic EA. The document outlines principles and methodological guidance for regional strategic EA. The guidance has been used to inform recent assessment efforts in the Elk Valley of British Columbia and in Alberta’s south Athabasca oil sands region, but formal adoption has been limited. See <http://www.ccme.ca/en/resources/ea.html>.

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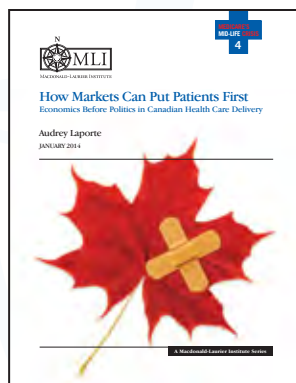
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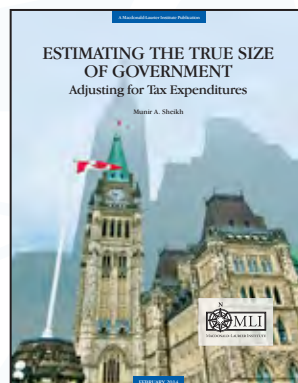
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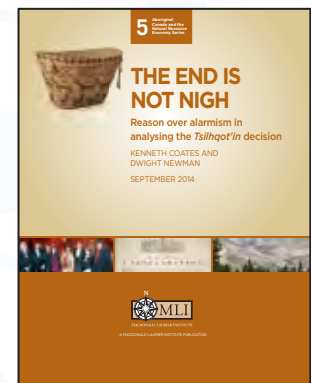
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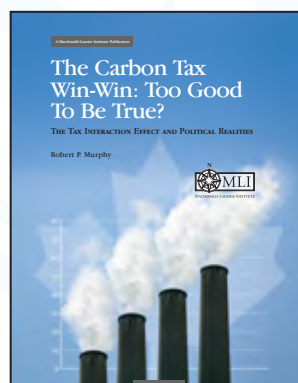
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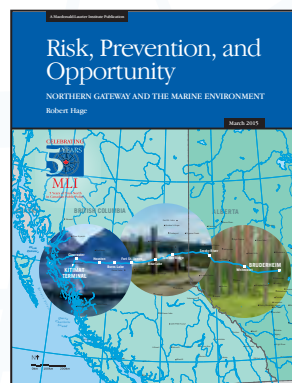
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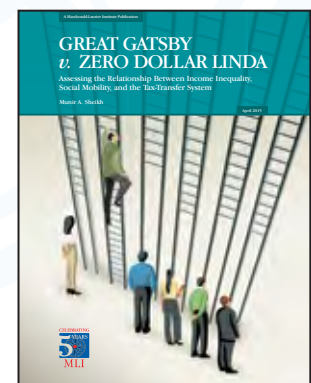
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