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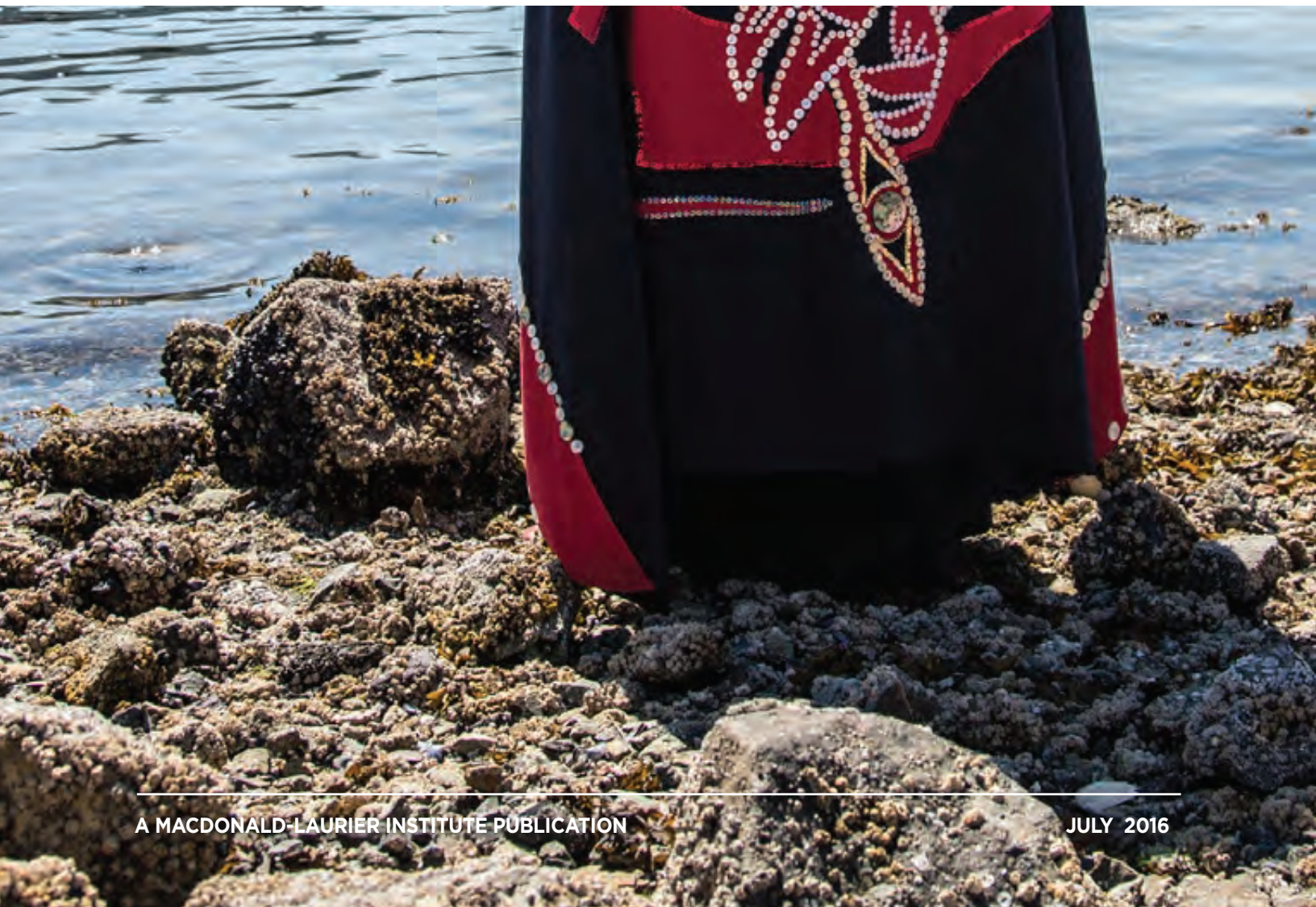
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Aboriginal People
and Environmental
Stewardship

Learning to Listen:

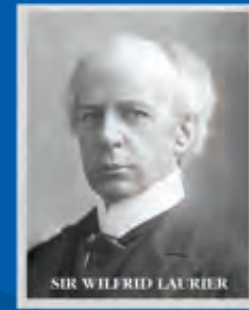
Snapshots of Aboriginal Participation in Environmental Assessment

Bram Noble





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Canadian public policy



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Executive Summary

What most Canadians hear about Indigenous engagement with Environmental Assessment (EA) in Canada is with regard to a few large, controversial pipeline projects that dominate the national media, such as the Kinder Morgan Trans Mountain pipeline expansion project, conditionally approved by the National Energy Board (NEB) in May 2016. In June 2016, the Squamish First Nation launched a court challenge to overturn the NEB's ruling. Chief Ian Campbell spoke out clearly on the issue, stating that "Ottawa needs to hear loud and clear that they can't just run roughshod over Aboriginal rights and title. That era has come and gone."

Environmental Assessment has become more than a technical tool for predicting and mitigating a project's impacts. It is now on the front lines of conflict and reconciliation between Aboriginal peoples, governments, and resource developers. Canada needs to do more to get the process right. There is a great opportunity for it to do so with the federal government announcing in June 2016 that it will strike panels to review the NEB and the environmental assessment process.

While the more prominent current cases are indeed important, there is much to be learned from the diversity of EA experiences and processes in projects across the country. It might surprise many to know that as of June 2016, there were approximately 79 federal EAs in progress across the country. This paper presents a series of eight case studies that explore how Indigenous communities were engaged. While very few EAs satisfy all parties, some proponents and EA processes have done a much better job than others of including Indigenous communities, integrating their traditional knowledge, and responding to their concerns. We can learn from these experiences.

These cases capture EAs completed under the current and former federal EA acts, and EAs under provincial, territorial, and joint federal-provincial EA processes:

Orca Sand and Gravel Mine, Vancouver Island: Early engagement by the proponent with the 'Namgis First Nation resulted in the integration of Aboriginal values in the terms of reference for the EA, a project design that was considered appropriate by the Aboriginal community, and a working relationship that was maintained post-EA through ongoing impact monitoring programs.

Sisson Tungsten and Molybdenum Mine, New Brunswick: Northcliff Resources Ltd. provided funding and in-kind support to New Brunswick First Nations to ensure the availability of technical capacity for Aboriginal communities to conduct their own, independent assessments and help ensure that Aboriginal values were integrated in the EA process. But the project remains controversial.

Keeyask Hydroelectric Generating Project, Manitoba: Manitoba Hydro worked with the Tataskweyak Cree Nation, War Lake First Nation, York Factory First Nation, and Fox Lake First Nation, which together will have up to a 25 percent equity stake in the project. The Keeyask case demonstrates that traditional knowledge can be meaningfully integrated in EA.

Voisey's Bay Nickel Mine, Labrador: Following years of conflict and legal challenge, in 1997, a memorandum of understanding was signed between representatives of the Innu, Inuit, and provincial and federal governments to establish a joint EA process for the Voisey's Bay project,



the first of its kind. Negotiated accommodations included the adjustment of shipping to avoid disrupting sea ice used for hunting and travel.

Kemess North Copper/Gold Mine, British Columbia: The joint review panel established to examine environmental concerns about the project raised by the Kwadacha First Nation, Takla Lake First Nation, and Tsay Keh Dene recommended to the federal and provincial governments that the project not be approved. It was the first EA review panel in Canada to recommend outright rejection of a mining project.

Screech Lake Uranium Exploration Project, Northwest Territories: A review board concluded that the potential for industrial development of the area is not compatible with the Aboriginal values of the cultural landscape. The Thelon River is of significant hunting, harvesting, and spiritual value to Aboriginal peoples, including the Łutsël K'e. This case contradicts the assumption that all EAs lead to project approval and that Aboriginal concerns have limited influence.

Woodfibre LNG Facility, British Columbia: The Squamish Nation EA process, the first by a First Nation in British Columbia, operated independently of, and parallel to, the provincial and federal EA processes for this project. It resulted in an improved project design and, arguably, facilitated provincial and federal EA approvals.

Great Sand Hills Regional Assessment, Saskatchewan: A regional assessment was conducted to identify impacts from natural gas development. By working closely with Treaty 4 First Nations, it was made clear to the assessment team that while the Great Sand Hills area had not been used for traditional purposes for generations, it remained of significant cultural and spiritual value. This case demonstrated that Aboriginal participation in EA can occur at a more strategic level than individual projects.

This case demonstrated that Aboriginal participation in EA can occur at a more strategic level than individual projects.

The benefits of Aboriginal participation in EA are numerous, including improvements in project design, the integration of new knowledge about potential impacts, discovering new ways to mitigate environmental damage or social impacts on communities, the potential for greater collaboration, and increased legitimacy of development undertakings. There is no magic bullet that will assure better practice in all project and decision-making contexts, but more collaborative EA processes that empower Aboriginal peoples are more likely to result in better outcomes for both the project proponent and the Aboriginal community.

Sommaire

La plupart des Canadiens n'entendent parler de l'implication des Autochtones dans les évaluations environnementales au Canada qu'en rapport avec un petit nombre de grands projets controversés de pipelines très médiatisés comme le projet d'expansion du réseau de pipelines Trans Mountain de la pétrolière Kinder Morgan. L'Office national de l'énergie a approuvé ce projet en mai 2016 sous réserve de certaines conditions. Puis, la Première nation de Squamish s'est adressée aux tribunaux le mois suivant pour contester la décision. Le Chef Ian Campbell a été tout à fait clair lorsqu'il a déclaré qu'Ottawa doit entendre haut et fort qu'on ne peut plus piétiner impunément les droits et les titres autochtones, cette ère étant bien révolue.

L'évaluation environnementale n'est plus qu'un simple outil technique permettant de prévoir et d'atténuer les incidences d'un projet. Elle se retrouve actuellement à une croisée de chemins : conflit ou réconciliation entre les peuples autochtones, les gouvernements et les exploitants de ressources naturelles. Le Canada doit déployer plus d'efforts pour arriver à bon port. Or, une formidable occasion se présente : le gouvernement fédéral a annoncé en juin 2016 l'établissement prochain de groupes d'experts qui se pencheront sur le mandat de l'Office national de l'énergie et le processus d'évaluation environnementale.

Certes, les cas actuels d'évaluation environnementale les plus visibles sont très importants. Toutefois, les expériences et les processus en lien avec les projets proposés à la grandeur du pays sont, en raison de leur grande diversité, riches en enseignement. De nombreuses personnes seraient étonnées d'apprendre qu'en juin 2016, environ 79 évaluations environnementales (EE) fédérales étaient en cours de réalisation. On présente ici une série de huit études de cas qui explorent la nature de la participation autochtone. Bien que très peu d'évaluations environnementales satisfassent toutes les parties, un certain nombre de promoteurs et de processus ont mieux réussi que d'autres à intégrer les communautés autochtones et à tenir compte de leurs connaissances traditionnelles et de leurs préoccupations. Nous pouvons apprendre de ces expériences.

Ces études de cas englobent les EE réalisées en application de la loi fédérale passée ou actuelle ainsi qu'en application des processus provinciaux, territoriaux ou conjoints (fédéraux-provinciaux) :

Le projet de sable et de gravier d'Orca sur l'Île de Vancouver : le promoteur a collaboré rapidement avec la Première nation 'Namgis, ce qui a permis d'intégrer les valeurs autochtones dans le mandat de l'évaluation environnementale, de concevoir un projet acceptable pour les populations autochtones et de maintenir les liens après l'EE grâce aux programmes permanents relatifs au suivi des impacts.

La mine de tungstène et de molybdène Sisson au Nouveau Brunswick : la société Northcliff Resources Ltd a fourni du financement et un soutien en nature aux Premières nations du Nouveau-Brunswick afin qu'elles puissent disposer de la capacité technique requise pour mener à bien leurs propres évaluations indépendantes et pour veiller à l'intégration des valeurs autochtones dans le processus d'EE. Toutefois, le projet est demeuré controversé.

Le projet de centrale hydroélectrique Keeyask au Manitoba : le projet est une collaboration entre Manitoba Hydro, la Nation crie Tātaskweyak et les Premières nations du lac War, de York Factory et du lac Fox. Les partenaires autochtones auront le droit de détenir conjointement jusqu'à 25 pour cent des capitaux. Le projet Keeyask montre que les connaissances traditionnelles peuvent être utilement incorporées dans les EE.



La mine de nickel de la baie Voisey au Labrador : après des années de conflits et de contestations judiciaires, les représentants des gouvernements fédéral et provincial, des Innus et des Inuits ont signé en 1997 un protocole d'entente visant à établir un processus d'évaluation environnementale conjoint pour le projet de la Baie Voisey, le premier du genre. Les accommodements négociés comprennent des ajustements en matière de transport maritime visant à ne pas perturber les passages sur glace de mer utilisés pour la chasse et les déplacements.

Le projet minier de cuivre et d'or Kemess North en Colombie-Britannique : la Commission d'examen conjoint mise sur pied pour examiner les préoccupations environnementales soulevées par la Première nation Kwadacha, la Première nation du lac Takla et la Nation Tsay Keh Dene a recommandé aux gouvernements fédéral et provincial de rejeter le projet. Pour la première fois au Canada, une Commission d'examen conjoint d'EE recommandait le rejet catégorique d'un projet minier.

Le projet de prospection d'uranium du lac Screech dans les Territoires du Nord-Ouest : une commission d'examen a conclu que le potentiel de développement industriel de la région n'était pas conciliable avec les valeurs liées à l'environnement culturel autochtone. La rivière Thelon est importante pour la chasse, les activités de cueillette et le développement spirituel des peuples autochtones provenant notamment de Łutsël K'e. Ce cas réfute l'hypothèse selon laquelle toutes les EE permettent d'approuver un projet, les préoccupations des Autochtones n'ayant qu'une influence limitée.

Le projet de gaz naturel liquéfié (GNL) Woodfibre en Colombie-Britannique : le processus d'EE mené par la Première nation de Squamish, le premier réalisé par une Première nation en Colombie-Britannique, s'est déroulé de façon indépendante et parallèlement aux processus d'EE provinciale et fédérale portant sur ce projet. Il a donné lieu à un projet mieux conçu, ce qui a, sans doute, facilité les approbations provinciale et fédérale de l'EE.

L'évaluation menée dans la région des Great Sand Hills en Saskatchewan : l'évaluation régionale visait à cerner les répercussions de la mise en valeur du gaz naturel. En travaillant en étroite collaboration avec les Premières nations du Traité n° 4, l'équipe d'évaluation a bien compris que même si la région des Great Sand Hills n'avait pas été exploitée à des fins traditionnelles depuis des générations, elle avait conservé son importance culturelle et spirituelle. Ce cas a pu démontrer que les Autochtones peuvent s'impliquer dans les évaluations environnementales à un niveau plus stratégique que celui associé aux projets individuels.

La participation des Autochtones dans les évaluations environnementales est bénéfique à de nombreux points de vue.

La participation des Autochtones dans les évaluations environnementales est bénéfique à de nombreux points de vue, car elle permet notamment de mieux concevoir les projets, d'assimiler les nouvelles connaissances sur les impacts potentiels, de découvrir de nouvelles façons d'atténuer les répercussions environnementales et sociales négatives sur les populations, de créer des occasions de collaboration et de légitimer les projets de mise en valeur des entreprises. Il n'y a pas de formule magique permettant d'instaurer de meilleures pratiques dans tous les contextes de prise de décision et de développement des projets. Toutefois, les processus d'EE concertés qui autonomisent les peuples autochtones sont plus susceptibles de donner de meilleurs résultats tant pour les promoteurs des projets que pour les communautés autochtones.

Introduction

In today's political environment, which is characterized by Canadian and international commitments to ensure more meaningful engagement of Aboriginal peoples in decisions about resource development, coupled with successful court challenges over the Crown's failure to meet consultation requirements with Aboriginal peoples, Environmental Assessment has become more than a technical tool for predicting and mitigating a project's impacts. Environmental Assessment is now on the front lines of conflict and reconciliation between Aboriginal peoples, governments, and resource developers. Project proponents, governments, and Aboriginal communities need to do more to get that assessment right.

Environmental Assessment (EA) is the primary instrument in Canada and internationally for assessing the potential impacts of proposed natural resource development and infrastructure projects such as mines, hydroelectric facilities, pipelines, and oil and gas projects (Morgan 2012). Environmental assessment is broadly defined as the process of identifying, predicting, evaluating, and mitigating the environmental, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made (IAIA 1999). In doing so, EA is one means of ensuring that at least some forethought and foresight are given to proposed development projects before they become a reality.

Foundational to the efficacy and credibility of EA is the engagement of those communities and interests potentially affected by development and, in particular, the engagement of Aboriginal peoples whose lands, rights, values, or interests may also be affected (Noble and Udofia 2015). Internationally, the United Nations *Declaration on the Rights of Indigenous Peoples*, which Canada's government has committed to implementing, recognizes the rights of Indigenous peoples to the conservation and protection of the productive capacity of their lands (Article 29), the right to participate in decision making on matters that would affect their rights (Article 18), and that states shall consult and cooperate in good faith with Indigenous peoples in order to obtain their free and informed consent prior to the approval of projects affecting their lands and resources (Article 32). The International Association for Impact Assessments' (IAIA 2012) best practice principles for respecting Indigenous peoples in EA similarly promote the importance of giving potentially affected Indigenous groups the opportunity to meaningfully take part in EA and development proceedings.

The case studies demonstrate that avenues for Aboriginal participation in EA can take on many different forms and result in a range of different outcomes.

The benefits of Aboriginal participation in EA are numerous, including improvements in project design, the integration of new knowledge about potential impacts, discovering new ways to mitigate environmental damage or social impacts on communities, the potential for greater collaboration, and increased legitimacy of development undertakings (Johnson and Dagg 2003; Noble and Udofia 2012; Prno and Slocombe 2012; Rozema et al. 2012). Isaac and Knox (2003) suggest that the meaningful and fair engagement of Aboriginal peoples in EA and resource development is not only the most efficient action to take but also the wisest one – it is relatively inexpensive when compared to the costs of litigation (Chrétien and Murphy 2009).

But Canada's EA process has often not succeeded at being meaningful and fair. Much has been said about the shortcomings, and even failures, of EA to provide meaningful opportunities to engage, and accommodate the interests of, Aboriginal peoples. This has certainly been reflected by a growing number of court challenges (Assembly of First Nations 2011; Udofia, Noble, and Poelzer 2016).



The Centre for Indigenous Environmental Resources (CIER) suggests that EA “has not met the needs or expectations of Aboriginal peoples for an inclusive process that respects their unique place within the legal and political fabric of Canada” (2009, 3). Land describes the current situation as an “escalating drift ... towards more litigation arising from conflicts over Aboriginal consultation ... and this will inevitably lead to more project delays and more economic risks and losses for the Crown, industry and Aboriginal groups” (2014, 22).

Part of the challenge is that EA can vary considerably from one project or political context to the next, and what is considered meaningful or effective participation in one project context and for one Aboriginal community may not necessarily be considered so by another. Expectations about the outcomes of participation in the EA process may also vary. In some instances, for example, participation might be considered meaningful only if the project is rejected; in other cases it might be considered meaningful if it is characterized by limited conflict, results in clear economic benefits to the affected community, or leads to changes in the project’s design.

Surely, though, despite the struggles, in the 40 years of EA experience in Canada there must be some good-practice examples where EA has provided an opportunity for Aboriginal participation that has either positively influenced the assessment process, or the project’s outcome, or both?

As of June 2016, there were 79 federal EAs in progress across the country – from BURNCO’s proposed sand and gravel mine project in British Columbia’s McNab Valley, to BP Canada Energy Group’s proposed oil exploration drilling program on offshore Nova Scotia.¹ Canadians never hear about the majority of EAs. What most Canadians do hear about are the few large, typically controversial, pipeline projects that dominate the national media – such as the 1,196 km-long Mackenzie Valley pipeline to transport natural gas from the Beaufort Sea through the Northwest Territories and into northern Alberta; or the more recent Kinder Morgan Trans Mountain pipeline expansion to create a twinned pipeline system to ship almost 900,000 barrels of oil per day from Strathcona County, Alberta, to Burnaby, British Columbia.

Perceptions about EA and, in particular, the engagement of Indigenous peoples are often shaped by media coverage of these large and controversial projects – projects where EA is at the front-lines of much larger issues concerning Indigenous rights, and where national policies are often the central focus of debate. The practice of EA and the engagement of Indigenous peoples is much more diverse than this. Although projects such as the Mackenzie Valley and Trans Mountain pipelines present many important learning opportunities, and test the limits of EA, there is much to be learned from the relatively lesser-known EAs – those where EA has created an opportunity for Aboriginal communities to meaningfully influence projects, the scope of the assessment and, in some cases, the project’s outcome.

This paper presents a series of case studies of Aboriginal participation in EA. The case studies demonstrate that avenues for Aboriginal participation in EA can take on many different forms and result in a range of different outcomes. Critiques of the current state of Aboriginal engagement in EA are valuable; however, the focus of this paper is on learning from processes and practices that have worked – sometimes for all parties involved, sometimes only for the Aboriginal community.

Reflecting on recent practice and experience is timely as Canada looks to strengthen its EA system and, in particular, the engagement of Aboriginal peoples. In the Speech from the Throne in December, the federal government committed to reviewing the current EA process to help restore public trust in EA and enhance Indigenous participation. The government made a commitment to ensure that EA decisions are “informed by scientific evidence” and that Indigenous people are “more fully engaged in reviewing and monitoring major resource development projects” (Canada 2016). In

June 2016, the federal government announced that it would strike panels to review environmental and regulatory processes in Canada, including the NEB, the environmental assessment process, and the *Fisheries Act* and *Navigation Protection Act* (Cheadle 2016, June 20).²

The focus of this report is on participation – a much broader concept than the legal “duty to consult and accommodate.” Each of these concepts, and the relationship between them, is briefly defined in the next section, followed by a series of short case studies and a discussion of the lessons and opportunities emerging for better practice.

Aboriginal participation in environmental assessment

EA is legislated federally under the *Canadian Environmental Assessment Act, 2012*, under the laws and regulations of each of the provinces and territories, and is also part of several Aboriginal land claims agreements. There are two types of federal EAs – 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.

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. 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.

EA systems vary across Canada, but generally speaking, the EA process consists of a number of basic steps that are practised under more or less all EA systems internationally:

- i) the project proponent submits a detailed description of a proposed project, indicating its intent to develop;
- ii) the designated government agency conducts a review to determine whether an EA is required;

If an EA is required,

- iii) the proponent conducts a technical assessment of the project’s potential impacts and identifies proposed impact management strategies – ideally, in cooperation with potentially affected communities;
- iv) a technical and public review of the proponent’s impact statement is conducted;
- v) a decision is made by the responsible authority as to whether the project should proceed and, if so, under what conditions;



And, if the project is approved,

vi) monitoring and managing programs are implemented.

Participation is “well established in both practice and the literature as foundational to effective, efficient and fair environmental assessment” (Sinclair and Diduck 2016, 1). Participation in EA ensures that those who have a vested interest in a project, or those Aboriginal communities whose lands, rights, and values are potentially affected by a project, have an opportunity to contribute to the planning, impact assessment, and decision-making process, thus facilitating the exchange of knowledge, values, and information (Noble and Udofia 2015). The meaningful participation of Aboriginal peoples in EA is necessary for project proponents to satisfy corporate social responsibility (Prno and Slocombe 2012). Such participation also promotes legitimacy in project outcomes and regulatory decisions (Nakamura 2013), and is important to ensuring that the EA process addresses both the needs and values of the proponent and the community (Voutier et al. 2008; Booth and Skelton 2011).

The participation of Aboriginal peoples in EA is a much broader concept than the legal duty to consult and accommodate, which is owed to Aboriginal communities by governments, whereby governments must consult with Aboriginal communities, typically through their legal representatives, and do so prior to decisions that might affect known or asserted Aboriginal or treaty rights (Newman 2014). How governments put into practice their duty to consult has been established through various court judgments, most notably *Haida Nation v. British Columbia (2004)*, *Mikisew Cree First Nation v. Canada (2005)*, and more recently, the *Tsilhqot'in Nation v. British Columbia (2014)* (Bains and Ishkanian 2016). Newman (2014) explains that this duty does not give Aboriginal communities veto power over development; rather, it is aimed at determining whether there is an adverse impact on established or asserted Aboriginal or treaty rights and, if so, how such impacts can be mitigated or, in rare cases, the project or initiative modified or abandoned.

The participation of Aboriginal peoples in EA and government's legal duty to consult and accommodate are not always necessarily mutually exclusive (Craik 2016). The Crown holds the duty to consult with Aboriginal peoples, and cannot wholly delegate this duty to third parties, such as industry (Chrétien and Murphy 2009). However, in resource or industrial development situations, the Crown often downloads many of the substantive elements of its duty to consult onto industry proponents to be carried out through the proponent's EA participation processes (Chrétien and Murphy 2009; Land 2014). EA deals with the technical aspects of projects, which are important to understanding potential impacts and benefits to Aboriginal lands and rights. Proponents are most often the best situated to find ways to minimize or avoid those effects, or to accommodate any adverse impacts that cannot be avoided (Land 2014). “There is a significant practical overlap in the process of an EA on the one hand, and review of Aboriginal and treaty rights impacts on the other hand ... a fulsome assessment of environmental impacts will inevitably go a great distance to assessing impacts of a project on Aboriginal and treaty rights as well” (Land 2014, 20).

The assumption underlying both Aboriginal participation in EA and the duty to consult is that the values, rights, and interests of Aboriginal peoples will be better accounted for and reflected in project developments; however, the function and underlying objectives of Aboriginal participation in EA and the duty to consult are quite different processes. Craik (2016, 1–2) explains that participation in EA is a means to seek balance among competing social goals and values, and to facilitate reconciliation between the environment and development. In principle, the duty to consult seeks to achieve the reconciliation of the pre-existence of Aboriginal peoples and their rights with the

The participation of Aboriginal peoples in EA and government's legal duty to consult and accommodate are not always necessarily mutually exclusive.

sovereignty of the Crown. As such, the intent of participation in the EA process is to bring values and influence to bear on project decisions, including the interpretation of a project's impacts and how best to manage them. Although particular attention is often given to Aboriginal participation, the interests addressed are primarily the shared interests of society regarding the maintenance of an acceptable level of environmental quality, which may, at times, be traded off against social or economic gain (Craik 2016). The interests served by the duty to consult, in contrast, are the interests and rights held by a particular, identifiable group, and based often on the strength of a legal claim or title, or on the potential existence of a future claim or right (Craik 2016).

The EA process often serves as a vehicle for discharging the duty to consult, but the focus of Aboriginal participation in EA, the obligations regarding participation, and the means provided through EA by which participation occurs, may not necessarily satisfy the Crown's duty to consult. The focus of this paper is on Aboriginal participation in EA; not whether such participation satisfies consultation obligations.

Snapshots from practice

The sections below present a series of short case studies (summarized in Box 1) that highlight different aspects of, and approaches to, Aboriginal participation in EA practice. The case studies are snapshots of EA in Canada and illustrate the diversity of Aboriginal engagement. In some instances, the cases reflect on the processes leading up to EA approval (or rejection); in other cases, emphasis is placed on the opportunities that emerged post-EA because of the EA process.

Some cases were selected to highlight engagement by way of injection of constructive conflict, the means for which was provided by the formal EA process; others were selected to depict examples of strong relationship building from the outset of the EA process, resulting in development partnerships. The cases were also selected to capture EAs under the current and former federal EA acts, and EAs under provincial, territorial, and joint federal-provincial EA processes.

The case studies are not meant to be comprehensive of the range of EA practice, nor representative of all Aboriginal participation experiences. There is also no suggestion that any one of these cases depicts a model approach to engaging Aboriginal communities in the EA process. Almost all of these cases show considerable room for improvement; some even result in less than desirable outcomes. But each case also demonstrates how, through the EA process, Aboriginal communities have been able to

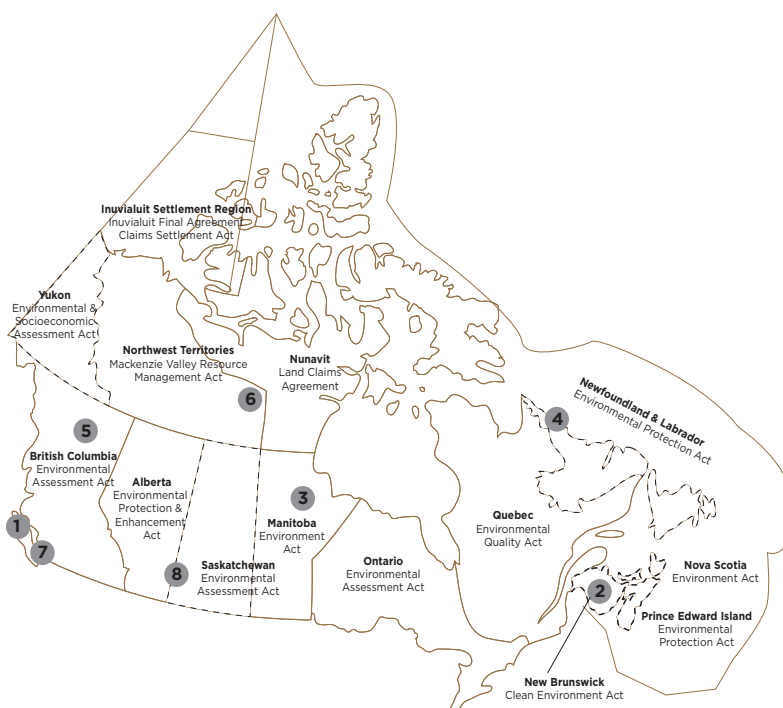
meaningfully influence the project, the scope of the assessment and, in some cases, the project's outcome.

Almost all of these cases show considerable room for improvement;



BOX 1: CASE STUDIES OF ABORIGINAL PARTICIPATION IN EA

PROJECT	LOCATION	PROPONENT	ABORIGINAL INTEREST	EA START / SUBMISSION	CURRENT STATUS
1. Orca Sand and Gravel Mine	Vancouver Island, BC	Polaris Materials Corporation	'Namgis First Nation	2004	Approved
2. Sisson Tungsten and Molybdenum Mine	Napadogan, NB	Northcliff Resources Ltd	St. Mary's, Woodstock and the Assembly of First Nations Chiefs in New Brunswick	2013	Approved (provincial) Under review (federal)
3. Keeyask Hydroelectric Generation Project	Nelson River, Split Lake / Gillam, MB	Manitoba Hydro (Keeyask Hydro Limited Partnership)	Tataskweyak Cree Nation, War Lake First Nation, York Factory First Nation, and Fox Lake First Nation	2012	Approved
4. Voisey's Bay Nickel Mine	Voisey's Bay, Labrador, NL	Voisey's Bay Nickel Company	Innu Nation, Labrador Inuit	1997	Approved
5. Kemess North Copper-Gold Mine	Peace River District, BC	Northgate Minerals Corporation	Kwadacha First Nation; Takla Lake First Nation; Tsay Keh Dene; and the Gitksan House of Nii Kyap	2004	Rejected
6. Screech Lake Uranium Exploration Project	Upper Thelon, NWT	Ur-Energy Inc	Łutsël K'e Dene First Nation	2006	Rejected
7. Woodfibre Liquefied Natural Gas Facility	Squamish, BC	Woodfibre LNG Limited	Squamish First Nation	2013	Approved
8. Great Sand Hills Regional Assessment	Southwest Saskatchewan	Minister of the Environment	Treaty 4, 6 and 7 First Nations; File Hills Qu'Appelle Tribal Council	2005	Approved



Orca Sand and Gravel Mine

The Orca sand and gravel mine is located on northeast Vancouver Island, near Port McNeill. The project involved the construction and operation of a 15,000 to 22,000 tonnes per day processing plant and associated marine shipping terminal.³ The project was subject to a harmonized EA under the *Canadian Environmental Assessment Act* and the *British Columbia Environmental Assessment Act*, pursuant to the Canada-British Columbia Agreement for Environmental Assessment Cooperation. The EA commenced in 2004 and was completed in 2005. Polaris Materials Corporation is the majority owner of the Orca project – a relatively new mining company, in business only since 2000. The mine has an approximate 30-year operating life.

The Orca mine is located in the traditional territory of the Kwakiutl and ‘N̓amgis First Nations. The ‘N̓amgis First Nation is currently negotiating an Agreement in Principle regarding treaty rights. Prior to being approached by Polaris, the ‘N̓amgis had already established a natural resource development planning team, as part of the British Columbia treaty process, and had begun land use studies and the development of maps of their traditional territory – including the identification of areas deemed suitable for economic development (Plate, Foy, and Krehibel 2009).

Polaris approached the ‘N̓amgis in 2001, approximately three years before the EA process commenced and prior to the conceptual design and planning stages of the project, in an effort to develop a working relationship and seek permission to explore on their traditional territory. An exploration and access agreement was subsequently drafted, identifying important traditional use areas and ‘N̓amgis’ values. The agreement gave the ‘N̓amgis power to veto the project up to the conceptual design stages of the mining operation and paved the way for the Orca Sand and Gravel Limited Partnership with the ‘N̓amgis obtaining a 12 percent interest in the project (Natural Resources Canada 2010).

The ‘N̓amgis were also involved in drafting the terms of reference for the EA, which commenced in 2004, hiring the consultants who would ultimately undertake the project’s technical assessment, and in choosing how they would participate and be engaged throughout the EA process. During the EA, the Orca Sand and Gravel Project Working Group was formed, composed of representatives of federal, provincial, and local government agencies and the First Nation, to identify issues and concerns and provide information in support of the EA process. Aboriginal values were incorporated directly into the project EA (CIER 2009).

MacKay (2012) reports that early relationship building and collaboration between Polaris and the ‘N̓amgis, long before the conceptual design stages of the project and commencement of the EA process, resulted in the integration of ‘N̓amgis values in the project design, EA process, and subsequent impact mitigation options. The ‘N̓amgis provided a letter in 2005 in support of the EA, indicating that it had been adequately consulted and accommodated by the proponent and by the respective provincial and federal governments. The project was approved and commenced operations in 2007.

Natural Resources Canada reports that Orca is expected to become Canada’s largest sand and gravel quarry when it reaches full production (Natural Resources Canada 2010). Following EA approval, the ‘N̓amgis continue to be involved in project impact monitoring as established during the EA process. They assess the effects of the mine on abalone and salmon spawning habitat and have the ability to slow or temporarily stop mine production should critical adverse effects be detected (MacKay 2012).

The Polaris mine case is an example where early engagement by the proponent, prior to the conceptualization of the project, resulted in the integration of Aboriginal values in the terms of reference for the EA. The Aboriginal community considered the project design to be appropriate and a working relationship was maintained following the EA in the form of ongoing impact monitoring programs. This example also illustrates the importance of capacity – specifically, the capacity and preparedness of Aboriginal communities to participate in EA. In-house organization of the Aboriginal community, prior to any proposed development, meant that the First Nation entered the EA process prepared to participate – with traditional use studies in hand and a clear articulation of their values. CIER reports that the ‘Namgis “were ready from a capacity perspective ... they indicated that they had a high level of capacity to undertake environmental studies relating to the project at the time the project began ... [and] the opportunity to build capacity was also a key factor in the success experienced by the ‘Namgis First Nation because it enabled them to analyze and control the process rather than have it controlled by outside experts” (2009, 17).

This case was successful because of the efforts of both the proponent and the Aboriginal community.

The proponent’s early engagement, along with the preparedness of the ‘Namgis when the EA commenced, set the stage for all other EA-related activities. This case was successful because of the efforts of *both* the proponent and the Aboriginal community. Based on project interviews with the ‘Namgis, CIER (2009) reports that “the roles of the federal and provincial governments in the EA were minimal and not related to the success of ‘Namgis involvement.” The ‘Namgis report that minimal involvement of the regulatory agencies, flexibility in the EA process between the First Nation and the proponent, and negotiating standards that superseded regulatory standards, resulted in procedural fairness (Plate et al. 2009). First Nations engagement in both EA scoping and developing the terms of reference for the assessment can help make the EA process more culturally sensitive and inclusive (Plate et al. 2009); a well-prepared First Nation will be able to participate in an informed way in the EA process.

Sisson tungsten and molybdenum mine

In 2008, Northcliff Resources Ltd. notified the province of New Brunswick of its intent to develop the Sisson tungsten-molybdenum project, an open pit mining operation, mineral processing facility, and water treatment plant, located near Napadogan, approximately 60 kilometres northwest of Fredericton.

The proposed mining operation would extract an average of 30,000 tonnes per day of tungsten- and molybdenum-containing ore for on-site processing. The mine and ore processing plant would have a lifespan of approximately 27 years, creating up to 500 direct jobs during the construction phase, and up to 300 direct full-time jobs over its operating lifespan (Sisson Partnership 2015). The project was subject to an independent panel review under New Brunswick’s Environmental Impact Assessment Regulations and a comprehensive study under the *Canadian Environmental Assessment Act*. Northcliff submitted its impact statement to both governments in 2013 in a harmonized EA review process (New Brunswick, Department of Environment and Local Government 2016).

The proposed mine is on the traditional territory of the Maliseet First Nations. The area is considered to be historically significant to the Maliseet, and is used for hunting, fishing, and gathering of medicinal and ceremonial plants. The proposed project would result in the loss of, or reduced access to, approximately 1,500 hectares of land currently used for traditional purposes (The Sisson Partnership 2015). The closest First Nations communities are the Woodstock, St. Mary’s, and Kingsclear First Nations. Amongst the key concerns expressed by the First Nations communities

were potential impacts to land and resources used for traditional purposes, and impacts to archaeological resources. Concerns were also expressed about the lack of capacity, including funding, to adequately participate in the EA process and to participate post-EA in project impact management activities (The Sisson Partnership 2015).

In June 2013, Northcliff signed an EA and capacity funding agreement with the St. Mary's First Nation, Woodstock First Nation, and the Assembly of First Nations Chiefs of New Brunswick, which at the time collectively represented all First Nations in New Brunswick, to support their participation in the EA process. The EA capacity agreement provided a framework for Northcliff to offer funding and in-kind support to all New Brunswick First Nations. The funding was intended to assist the First Nations where they feel they need additional resources to review technical materials, and to assist community members in understanding technical aspects of the project. Northcliff's support was in addition to funding the First Nations received under the Canadian Environmental Assessment Agency's participant funding program.⁴

By way of the EA capacity funding arrangement, St. Mary's, Woodstock, and the Assembly of First Nations Chiefs in New Brunswick agreed to collaborate and jointly retain their own technical experts to assist them in reviewing the project and assess potential impacts to traditional lands and resources. As of mid-2016, the Sisson project EA was still under review by the Canadian Environmental Assessment Agency. The EA was approved by New Brunswick's Minister of Environment and Local Government in December 2015, subject to 40 conditions. One of these conditions included an environmental and socioeconomic effects monitoring program, and that the proponent provide the First Nations with ongoing capacity funding to participate in the development, planning, and implementation of the program.⁵

Many Aboriginal communities lack the financial, human, and organizational capacity to fully participate in EA processes, even with the limited funding made available through federal EA participant funding programs (Noble and Udofia 2015). The Sisson project demonstrates that funds provided by the proponent can: facilitate cooperation between Aboriginal communities for the purpose of project reviews; ensure the availability of technical capacity for Aboriginal communities to conduct their own, independent assessments; help ensure that Aboriginal values are integrated in the EA process; and facilitate longer-term participation in project management post-EA – in this case, socioeconomic and environmental effects monitoring.

The Sisson EA capacity funding arrangement was described by the Chief of the Woodstock First Nation as an important step in “creating an environment with the capacity to meaningfully participate in consultation....”⁶ But such arrangements are no guarantee of the success of a project, or lasting support. In the spring of 2016, the Mi'kmaq Chiefs of New Brunswick declared their opposition to the Sisson mine (CTV Atlantic 2016, May 17). And a lawyer representing five Maliseet First Nations, including St. Mary's, released a statement calling on the federal government to reject the project, following a federal study that concluded the mine would have a “significant” impact on some communities. The Maliseet statement declared that “Maliseet Aboriginal and treaty rights are already seriously compromised in New Brunswick due to centuries of colonization, including overharvesting of key Maliseet resources and extensive development and privatization of provincial Crown land” (CBC New Brunswick 2016, April 21).

Keeyask hydroelectric generation project

The Keeyask Generation Project is a 696 megawatt hydroelectric facility proposed for the lower Nelson River, northern Manitoba. Keeyask would be Manitoba's fourth largest generating station. The proposed site is approximately 725 kilometres northeast of Winnipeg, less than 60 kilometres

from the communities of Split Lake and Gillam, and 35 kilometres upstream of the existing Kettle Generating Station.

The project is expected to result in a flooded area of approximately 45 square kilometres, with a total reservoir of 93 square kilometres (KHLP 2012). The lower Nelson has a long history of hydroelectric development, with construction of the Kelsey station in the mid-1950s, followed by the Kettle, Long Spruce, and Limestone projects. Feasibility studies or pre-assessment work have either been initiated or planned for other future projects, including the Conawapa – the largest hydro facility in northern Manitoba.

The Keeyask project was subject to an EA under *The Environment Act (Manitoba)*, and to a comprehensive study under the *Canadian Environmental Assessment Act*. Manitoba Hydro submitted its environmental impact statement for review and approval in 2012, with an anticipated construction completion date of 2022. The Keeyask project is a collaborative effort between Manitoba Hydro, a provincial Crown corporation, and four Manitoba Treaty 5 First Nations – Tataskweyak Cree Nation, War Lake First Nation, York Factory First Nation, and Fox Lake First Nation, collectively referred to as the Keeyask Cree Nations – working together with Manitoba Hydro as the Keeyask Hydropower Limited Partnership (KHLP). An agreement, the Joint Keeyask Development Agreement, was signed between Manitoba Hydro and the Cree Nation partners to govern how the project would be developed. Manitoba Hydro will own at least 75 percent of the equity of the partnership; the four First Nations, together, have the right to own up to 25 percent of the partnership. The First Nations spoke of this partnership as being “part of a reconciliation process with Manitoba Hydro for the years of development which did not involve them” (Manitoba Clean Environment Commission 2014, xii).

Traditional knowledge was a key component of the EA process.

Traditional knowledge was a key component of the EA process and was included in the project’s final impact statement as a separate, independent analysis. Each of the First Nation partners led their own community consultations with their own members, and prepared their own EAs that incorporated their traditional values and worldviews. To do so, each of the First Nation partners, with Manitoba Hydro’s support, engaged independent professional and technical expertise. The Manitoba Clean Environment Commission reports: “A new twist to the Keeyask process was that the First Nations produced their own environmental assessments, based on their own Cree worldview – not on western science” (2014, xii). The final impact statement contained not only the usual technical analyses, but also three self-contained reports presenting the assessments of the First Nation partners.

Many EAs claim to integrate traditional knowledge, but it is often treated narrowly as another form of technical assessment (Wiles, McEwan, and Sadar 1999), or applied outside of its cultural and spiritual context (O’Faircheallaigh 2007). The Keeyask EA is an example where traditional knowledge is presented through an independent assessment process that, at times, even conflicts with the western science presented by the proponent. For example, the proponent’s assessment concludes that elevated levels of suspended sediment in the project’s hydraulic zone of influence are unlikely to have any measurable effect on fish and wildlife in the lower Nelson (KHLP 2012). However, the traditional knowledge assessment undertaken by the First Nations suggests higher levels and longer term effects from these levels of suspended sediment than identified by the technical studies. The technical analysis goes on to suggest that “... there are no adverse effects of the project on fish populations” (KHLP 2012, 7 - 23), but the conclusions of many of the First Nations was “a larger spatial and temporal extent of effects than indicated in the technical analysis” (p. 7 - 23) and a decline in fish populations. Similarly, with regard to the project’s impact to caribou, the technical analysis indicates negligible to small impacts for both resident and migratory caribou from inunda-

tion, whereas the First Nations' assessments conclude that caribou will likely disappear from the area again and not return for a long time.

The Keeyask project received federal and provincial approval in mid-2014. Manitoba issued an Environmental Act Licence for the project, which incorporated a number of non-licensing conditions for impact management and follow-up studies.

The Keeyask EA is an example of how an impact statement can openly present both traditional and western knowledge and understandings of project impacts, without constraining traditional knowledge to a "science." Each First Nation partner that was engaged in the project was provided the resources it needed to conduct its own independent assessment, based on their own traditional values and worldviews, which was incorporated as a stand-alone analysis of the project in the final impact statement.

The Keeyask case demonstrates that traditional knowledge *can* be meaningfully integrated in EA, giving the affected communities and, in this case, communities with a vested interest in the project, a clear voice. That said, the provincial panel commissioned to review the assessment noted that the Cree world view approach to the EA did present a challenge to the panel itself, since only one of five panel members was Aboriginal (Manitoba Clean Environment Commission 2014).

Voisey's Bay nickel mine

In 1993, Archean Resources, a contracted prospecting company, discovered a large nickel-copper-cobalt deposit near Voisey's Bay in northern Labrador – a deposit that would eventually be confirmed to be one of the world's richest nickel deposits. In 1995, the Voisey's Bay Nickel Company (VBNC) was formed by Diamond Fields Resources to oversee the development of a nickel-copper-cobalt mine and mill.

The proposed mine and mill would be located in the traditional territory of the Innu and Inuit people, approximately 80 kilometres northwest of Utshimassits and 35 kilometres southwest of Nain. The mineral resource is an estimated 150 million tonnes. The proposed project would consist of an open pit mine and mill operation, producing 20,000 tonnes of ore per day, and the development of a deep port facility for shipping (Voisey's Bay Environmental Assessment Panel 1999).

The proposal to develop mineral resources at Voisey's Bay, known as Emish by the Innu and Tasiujatsoak by the Inuit, raised significant concerns about negative environmental, social, and economic impacts. The Labrador Inuit Association represents both Inuit and Kablunangajuit, with a membership of approximately 5,000, residing primarily in seven different communities or regions, including Nain, Northwest River, and Upper Lake Melville. The Innu Nation represents approximately 1,500 Innu, primarily residing in the communities of Utshimassits (Davis Inlet, since relocated to Natuashish) and Sheshatshiu (Voisey's Bay Environmental Assessment Panel 1999). At the time the Voisey's Bay discovery was announced, no land claims had been settled in the region. (The Labrador Inuit Land Claims Agreement was since signed between Newfoundland and Labrador, Canada, and the Nunatsiavut Government in 2005.) Land claim negotiations for the Innu Nation are still under negotiation.

In 1997, a memorandum of understanding (MOU) was signed between the Innu Nation, Labrador Inuit Association (the precursor of the Nunatsiavut Government), and the federal and provincial governments to establish a joint EA process for the Voisey's Bay project. The project would be subject to a joint panel review under the *Newfoundland and Labrador Environmental Assessment Act*

and the *Canadian Environmental Assessment Act*. The MOU set out how the EA would be undertaken, which involved scoping sessions in several communities to identify the types and range of issues that they thought should be included in the project's review.

Cox and Mills (2015) report that the MOU allowed for a single EA process, with provisions for comprehensive public involvement. In particular, the MOU instructed the panel to “give full consideration to traditional ecological knowledge whether presented orally or in writing.” The guidelines prepared for the panel indicated that Aboriginal knowledge relating to such matters as ecosystem function, resource distribution, resource quality and abundance, land use, and social and economic well-being would be essential to developing baselines, predicting impacts, and determining the significance of the project's effects (Voisey's Bay Environmental Assessment Panel 1999). Dyck (2013) reports that the MOU was the first of its kind in Canada, bringing together four parties with a history of conflict (Gibson 2005) and recognizing the Innu and Inuit as decision-makers in the EA process even in the absence of settled land claims.

Signing of the MOU meant that the Innu and Inuit were part owners of the EA process, helping to reduce conflict about the project and the EA process, and helping shift the conversation toward a shared discussion on how the project could best be carried out (Dyck 2013).

The panel held hearings in Nain, Utshimassits, Sheshatshiu, Hopedale, Rigolet, Postville, and Makkovik, and in the more urban centres of Goose Bay, Labrador City, and St. John's. Many issues were presented by the Innu and Inuit participants during the project hearings, including, in the case of the Innu Nation, a video showing current Innu family and community conditions and describing personal perspectives on the Innu future (Voisey's Bay Environmental Assessment Panel 1999). Of particular concern was winter shipping and its impact on Innu and Inuit use of sea ice for travel and hunting. Pain and Paddon (2008) indicate that the Inuit would not support the project if it disrupted sea ice and over-ice travel and hunting activities.

Through a negotiated process, the proponent identified options to avoid winter shipping during certain periods, thus minimizing disruption to sea ice formation to ensure safe use for travel and hunting. A shipping agreement was subsequently established between the proponent and the Inuit, based on a recommendation of the review panel. Dyck (2013) reports that how the review panel addressed concerns and solutions regarding winter shipping was illustrative of a high level of engagement of all four parties represented in the EA process – and helped lead to a successful outcome.

In 1999, the panel completed its assessment report and recommended that the project proceed, but that, among other things, an Environmental Management Board be established for the four parties to monitor the project and advise on mitigation actions. The board was established in 2002, to provide advice on the environmental management of the mine's operations, and has provided both the Innu and Inuit continued opportunity for involvement in the mine's management beyond the EA process (Dyck 2013). The EA panel also recommended that the project not be authorized until the proponent had signed impact benefit agreements with both the Innu Nation and the Labrador Inuit Association.

The early years of the Voisey's Bay project were marred by protest, conflict, and legal challenge by the Innu and Inuit about exploration and site development activities proceeding in absence of proper negotiations, and without a proper assessment.⁷ When the MOU was signed, however, it

Through a negotiated process, the proponent identified options to avoid winter shipping during certain periods.

brought the Innu and Inuit to the table as legitimate decision-makers, even in the absence of settled land claims. It demonstrated how a collaborative EA process can lead to improved project design and how a negotiated approach can successfully manage project impacts.

Resolution of winter shipping concerns, and the modification of the project's design as a result of those concerns, demonstrated how collaborative processes, in which the parties engaged are equal players at the table, can lead to collaborative solutions. Dyck (2013) describes the MOU as the main mechanism for establishing a power balance in the EA process, ensuring that the federal and provincial governments, the Innu Nation, and the Labrador Inuit Association worked together, thus giving the Innu and Inuit a strong voice in the EA and decision process that they would not otherwise have had. Notwithstanding the MOU, however, perhaps one of the panel's most important recommendations – that the project not proceed until *after* land claims were settled – was not adopted by the governments (Gibson 2005).

Kemess North copper-gold mine

In late 2003, Northgate Minerals Corporation submitted a pre-application notice to the province of British Columbia regarding its intent to develop the Kemess North copper-gold mine. The proposed mine would be located in the Peace River Regional District, approximately 250 kilometres northeast of Smithers, and 450 kilometres northwest of Prince George.

The project was to be an expansion of the existing Kemess South mine, and would include the development of a new open pit operation and modification to the existing mill. An estimated 397 million tonnes of tailings and 325 million tonnes of waste rock would be generated over the life of the project, the majority of which would be disposed of at Duncan (Amazay) Lake (Kemess North Joint Review Panel 2007). The proposed project was within the traditional use areas of the Kwadacha First Nation; Takla Lake First Nation; Tsay Keh Dene; and the Gitxsan House of Nii Kyap. The first three groups became the focus of Aboriginal participation, and were collectively referred to as the Tsay Keh Nay.

An EA application, outlining the project and its potential impacts and mitigation plans, was submitted in 2004 to the British Columbia Environmental Assessment Office and the Canadian Environmental Assessment Agency. The Tsay Keh Nay were a primary source of opposition to the proposed project. They did not agree with the federal and provincial government's overall approach to accommodation and consultation, expressed concerns about infringement upon Aboriginal rights and title, and identified inadequate funding to participate in the EA process. One of the First Nations most affected by the proposed mining operation reports that it was never invited to meet with either the province or the proponent to submit their concerns during the pre-application phase.

The EA was eventually referred by the federal Minister of the Environment to a joint federal-provincial review panel, due to concerns about potential adverse environmental effects, including impacts to the Amazay Lake ecosystem.⁸ However, as a result of being marginalized from the pre-project planning and EA application, the Tsay Keh Nay participated only intermittently, and under protest, in the review panel process (Plate et al. 2009). The review panel held public hearings in Prince George, Smithers, and Kwadacha (Fort Ware), including additional meetings specifically to hear information on traditional land use and socio-economic concerns. Among the Tsay Keh Nay's key concerns about the project were the potential impacts to Amazay. The Amazay Lake region was identified by Tsay Keh Nay as a sacred environment and important for hunting, fishing, and passing on their culture and way of life to younger generations (Kemess North Joint Review Panel 2007). The Tsay Keh Nay's concerns were supported by the Carrier Sekani Tribal Council and by the British Columbia Assembly of First Nations.

The review panel adopted a “sustainability-based” approach, reviewing the proponent’s application based on five sustainability pillars: environmental stewardship, economic benefits and costs, social and cultural benefits and costs, fairness in the distribution of benefits and costs, and present versus future generations (Kemess North Joint Review Panel 2007). Regarding the social and cultural benefits and costs of the mine, the panel determined:

... the project would continue to make a significant contribution to social wellbeing and community stability in communities where workers live and service suppliers operate ... However, the panel considers the socio-cultural implications of the project for Aboriginal people, and the obstacles to their participation in the project benefits, to be a significant drawback ... Aboriginal communities appear unlikely to embrace either the project or the financial compensation and other potential benefits offered to them by the proponent. To do so would entail accepting the loss of the spiritual values of Duncan (Amazay) Lake, and Aboriginal groups have said that these values are beyond price. (Kemess North Mine Joint Review Panel 2007, 16)

The panel delivered its report in 2007, recommending to the federal and provincial governments that the project not be approved. The panel concluded that the economic and social benefits of the Kemess North project are outweighed by the risks of adverse environmental, social, and cultural effects – some of which may not emerge until many years after mine closure. Kemess North was the first EA review panel in Canada to recommend outright rejection of a mining project (Fonseca and Gibson 2008). The federal and provincial ministers accepted the panel’s recommendation, and in 2008 issued a decision that the project would be rejected.

Plate, Foy, and Krehibel(2009) describe the Kemess EA as an illustration that cultural perceptions of risk must be taken seriously; positive economic effects must always be weighed against potentially adverse effects to First Nations; and panel reviews that engage First Nations members can help make EA, and the results of the process, culturally sensitive. Part of the purpose of the EA process is to provide an opportunity for meaningful public debate about a proposed project. In the Kemess case, such opportunity was not provided for by either the proponent or the provincial or federal Crowns in the project’s pre-application process, though an opportunity was provided during the panel review process.

The First Nations participated as an act of constructive conflict (Maclean, Robinson, and Natcher 2015) – engagement by protest – but the recommendation of the review panel demonstrates that First Nations’ concerns were heard and, through a sustainability-based approach to project review, played a significant role in balancing the benefits and costs of the project. Constructive conflict is an important part of the EA process for Aboriginal peoples’ participation, and it can have a meaningful impact.

The Tsay Keh Nay supported the final decision, but were careful to note that their support does not mean that they endorsed the EA process by which the decision was reached (Takla Lake First Nation 2009). Fonseca and Gibson (2008) report that the EA process is often presented as a means of contributing to sustainability, but the tradition has been to focus only on how to make adverse effects less severe. However, in the Kemess North EA, the review panel “took the sustainability requirement seriously” (p. 10), and examined whether the project would leave a positive legacy overall.

The Kemess North project was revived in 2011 when AuRico Gold purchased Northgate and acquired the Kemess property. AuRico’s proposal is to develop an underground mine, as opposed to

Kemess North was the first EA review panel in Canada to recommend outright rejection of a mining project.

Northgate's open-pit project design. AuRico filed its project description with the British Columbia Environmental Assessment Office and the Canadian Environmental Assessment Agency in 2014. In May 2016, the Minister of Environment and Climate Change approved the substitution of the federal EA process by that of the government of British Columbia. AuRico's application is still under provincial EA review.

In 2014, Gordon Pierre, grand chief of the Tsay Keh Nay, told the *Prince George Citizen*, "We are not against development in our territories.... This is not just about protecting this lake for First Nations people; this is about protecting all lakes for all Canadians" (Peebles, 2014, Feb.11).

Ur-Energy Inc. Screech Lake uranium exploration project

In 2006, Ur-Energy Inc. submitted an application for uranium exploration in the Upper Thelon watershed, near Screech Lake in the Northwest Territories. The project consisted of up to 20 drill holes, 1.5 to 20 kilometres from the Upper Thelon, and the construction of a temporary work camp approximately 300 kilometres east of Łutsël K'e Dene First Nation (Ehrlich 2010). The Łutsël K'e Dene First Nation is in the Akaitcho region – one of only two regions in the Northwest Territories without a settled land claim. The Thelon River is a designated Canadian Heritage River, one of North America's largest remaining wilderness areas, and of significant hunting, harvesting, and spiritual value to Aboriginal peoples (MVEIRB 2007), including the Łutsël K'e.

Following a preliminary screening by the Mackenzie Valley Land and Water Board, the project was referred to the Mackenzie Valley Environmental Impact Review Board (MVEIRB) for an EA under the *Mackenzie Valley Resource Management Act*. The EA was undertaken by the MVEIRB. A public hearing was held in 2007 in Łutsël K'e, to allow potentially affected interests to discuss any concerns about the project that had not been resolved as part of the proponent's assessment. The board reports that many cultural and social concerns were raised during the hearing, due to the long history of Aboriginal land use in the region, its importance for wildlife, and its spiritual significance. "The people of Łutsël K'e described their distress at the prospect of industrial development of an area they wish to pass on to their children as they inherited it from previous generations. Parties to the environmental assessment also expressed concern that development was happening in the Upper Thelon before land use planning has taken place" (MVEIRB 2007, 1).

Concerns were also raised about potential harvesting impacts, the cultural significance of the area, the potential to open up the Akaitcho region to future development and cumulative impacts, impacts to tourism, and conflicts with proposed protected areas and land use planning efforts in the region. The information presented by the project proponent indicated that the project's impacts would be localized, of a short duration, and generate only minor negative effects to wildlife and traditional land use. The proponent also suggested that employing a local labour force and purchasing local goods and services would even result in positive impacts to communities (MVEIRB 2007).

In 2007, the MVEIRB issued its decision, concluding that the project "in combination with the cumulative effects of other present and reasonably foreseeable future developments in the Upper Thelon Basin, will cause adverse cultural impacts of a cumulative nature to areas of very high spiritual importance to aboriginal peoples" (MVEIRB 2007, ii). The project application was rejected, and the decision accepted by the Minister of what was then Indian and Northern Affairs. The Ur-Energy project was one of four developments rejected by the MVEIRB in 2007, largely on cultural grounds (Ehrlich 2010).

The MVEIRB reported that although impacts to caribou and tourism would have been significant, the potential cultural impacts were the ultimate reason for rejecting the proposed development.

The board concluded that the potential for industrial development of the area is not compatible with the Aboriginal values of the cultural landscape:

The Review Board considered the evidence of cultural impacts from the people of Łutsël K'e and other aboriginal groups. This included traditional knowledge shared by the Elders. In the view of the Review Board, the Upper Thelon area is of high spiritual and cultural importance to the Akaitcho and other aboriginal peoples. They see industrial development, including this proposed development and others, as a desecration of a spiritual area of intrinsic value. The Review Board is of the view that although the proposed development is physically small, the potential cultural impacts are not. (MVEIRB 2007, 1)

Ehrlich (2010) reports several important lessons from the case, including that project EA can drive broader land use planning. First, concerns raised about potential development during the EA process resulted in accelerated planning efforts in the Upper Thelon area. Second, the case demonstrates that EAs can go far beyond “bones and stones” (p. 284), and incorporate non-tangible cultural concerns. Third, what matters in EA is the “scale of the issues, not the scale of the development” (p. 285), indicating that EA can uncover potentially complex and significant effects associated with small, simple developments. This case shows that Aboriginal knowledge was weighted heavier than the proponent’s evidence, and goes against many of the criticisms often raised about EA – that all EAs lead to project approval and that Aboriginal concerns have limited influence on project outcomes.

Woodfibre liquefied natural gas facility

In 2013, Woodfibre LNG Limited, a subsidiary of Royal Golden Eagle, submitted an application to the province of British Columbia to construct and operate a liquefied natural gas export facility. The proposed project would be located on the previous Woodfibre Pulp and Paper Mill site, located approximately seven kilometres from Squamish.

The project would include the development of a natural gas liquefaction facility and an LNG transfer facility, where product would be shipped to markets by marine vessels through Howe Sound and the Gulf Islands, and into Juan de Fuca Strait and the Pacific Ocean. The facility would have a storage capacity of 250,000 cubic metres and would produce up to 2.1 million tonnes per year of liquefied natural gas, with an expected project lifespan of approximately 25 years. Total construction expenditures are estimated at over \$600 million, and the project is expected to generate over 100 full-time jobs in the region (Woodfibre LNG Limited 2015).

The Woodfibre LNG site is located on the traditional territory of the Squamish Nation, in the Lower Mainland region. The Squamish traditional territory encompasses approximately 6,732 square kilometres. The Squamish are Coast Salish people with approximately 3,600 members of which more than 60 percent live on Squamish First Nation urban reserves in the Vancouver area and in the municipality of Squamish. The Squamish initiated treaty negotiations with the province in 1993. No framework agreement has yet been established. In 2001, the Squamish Nation developed the Xay Temíxw land use plan, identifying forest stewardship, sensitive areas, restoration areas, and wild spirit places land use zones.⁹

In the Great Sand Hills the land had not been used for traditional purposes for generations, yet it remains of significant cultural and spiritual value.

The Woodfibre LNG project was subject to EA under both the *British Columbia Environmental Assessment Act* and the *Canadian Environmental Assessment Act, 2012*. The proponent began engaging with Aboriginal interests in 2013, including the Tsleil-Waututh First Nation, the Musqueam First Nation, and the Squamish First Nation. The Squamish Nation passed a resolution to conduct its own Squamish Nation-led EA process, expressing that the Squamish Nation would not negotiate economic benefits from the project until all potential environmental and cultural impacts had been addressed to their satisfaction (Squamish Nation 2015).

Commencing in May 2013, the Squamish Nation EA process operated independently of, and parallel to, the provincial and federal EA processes – the first by a First Nation in British Columbia (Squamish Nation 2015). The Squamish EA process involved a public education campaign about the project, various community meetings to hear residents’ concerns, and contracting an independent consulting company to undertake a full review of the project’s technical aspects and specific Squamish Nation concerns. The EA report is described by the Squamish as a “science and fact-based ... rigorous investigation of all aspects of the proposal” (Squamish Nation 2015). Woodfibre participated voluntarily in the Squamish Nation EA process.

The Squamish EA report identified 25 conditions for the project.

The Squamish EA report identified 25 conditions for the project, 13 of which applied directly to the proponent, and the remainder to the province and to FortisBC – which will construct the pipeline and compressor station to bring the Woodfibre facility online. Aside from providing its members access through the project’s proposed controlled access zone to allow for the practice of Aboriginal rights, the majority of the EA conditions addressed issues related to the project’s technical design and operations. For example, included amongst the conditions were that the proponent would conduct further studies on its proposed sea-water cooling method

and its impacts on marine life, reroute project activities such that no disturbance occurred in the Skwelwil’em Wildlife Management Area, support a cumulative effects management program for Howe Sound, avoid fuelling tankers with bunker fuel in Squamish territory, work with the Squamish Nation to develop an Emergency Response Plan for the Squamish Valley area in the event of a spill, and relocate the project’s compressor station that was initially proposed near Squamish Nation members. To ensure that all conditions emerging from the Squamish EA were met, the Squamish Nation required that the proponent sign a legally binding Squamish Nation Environmental Certificate.

In October 2015, the Squamish Nation Council approved the EA for the Woodfibre LNG project, subject to the conditions identified.¹⁰ Woodfibre requested, and was granted from the British Columbia Environmental Assessment Office, a suspension of the formal (regulatory) EA process to address the Squamish Nation’s EA report. Woodfibre subsequently accepted the Squamish Nation EA process and conditions, and filed an addendum to its project application, including, among other things, alternative design options to avoid disturbances in the Squamish Estuary and Skwelwil’em Squamish Estuary Wildlife Management Area, and relocation of the proposed compressor station outside of the urban setting in Squamish.¹¹ The project was subsequently approved by the province in late 2015, and received federal approval in early 2016. The Squamish Nation reports that its EA process gave it significant decision-making powers, specifically regarding the proponent’s cooling technology and approval of management plans (Squamish Nation 2015).

The Woodfibre LNG project and EA were not without controversy; few projects result in all interests being satisfied. Environmental groups and local citizens expressed concerns about the project’s impacts, which ranged from increased vessel traffic and spill risks, to concerns about the limited scope

of the EA itself, and its lack of consideration of the broader debate about the industry and climate change issues.¹² The Squamish Nation also saw the regulatory EA processes under the provincial and federal governments as inadequate – not addressing Aboriginal rights and not going beyond identifying impacts to provide solutions to manage those impacts. The Squamish Nation reported that its own nation-led EA not only identified important environmental issues, but also determined how they should be addressed (Squamish Nation 2015).

The Woodfibre LNG case illustrates that Aboriginal communities do see value in the EA process as a means to identify and ultimately manage the potential effects of development initiatives – even if it requires an independent, parallel EA process to better address Aboriginal concerns. The EA process developed and applied by the Squamish Nation was non-binding, in the regulatory sense, but was seen by the proponent to be of equal importance to the provincial and federal EA processes and resulted in an improved project design and, arguably, facilitated provincial and federal EA approvals.

Great Sand Hills regional assessment

The Great Sand Hills area of southern Saskatchewan encompasses approximately 1,900 square kilometres of native prairie landscape, and is home to the largest continuous area of sand dune complexes in southern Canada. The region provides important habitat for mule deer, pronghorn antelope, sharp-tailed grouse, and a variety of other bird species. Subject to long-term cattle ranching, the region is also home to one of Saskatchewan's richest natural gas deposits.

Natural gas development started in the area in the 1950s. Currently, approximately 70 percent of the region is leased for gas development, with proven, probable, and possible reserves estimated at nearly 670 billion cubic feet (GLJ Petroleum Consultants Ltd. 2006). There are over 1,500 gas wells in the region, including associated infrastructure and access wells, owned by 23 different companies (GSH SAC 2007). Only five gas development proposals in the Great Sand Hills have triggered an EA; individual gas wells are typically deemed too small to trigger the assessment process. In 2004, due to growing concerns about the cumulative effects of long-term disturbance in the region and recognizing the need to develop a land use plan to ensure the sustainable development of the region's resources while protecting biodiversity, the province of Saskatchewan commissioned a regional assessment for the Great Sand Hills (Noble 2008).

The Great Sand Hills is of significant historical and cultural importance to Treaty 4, 6, and 7 First Nations. There are over 200 known sites of archaeological significance within the region, most of which have been discovered through disturbances associated with natural gas development (Gauthier and Galenzoski 2006). The majority of the region lies within Treaty 4, particularly within the Qu'Appelle Treaty area, signed in 1874. The region has been described by many First Nations as a transitional area, occupied by different First Nations over time. In more recent times, First Nations have been kept away from the area due to land ownership, specifically, cattle ranches and natural gas sites. Most First Nations do not currently use the area for traditional purposes, but the Great Sand Hills continues to be of spiritual and cultural importance (Peters et al. 2006).

The Great Sand Hills regional assessment was commissioned under the authority of the *Saskatchewan Environmental Assessment Act*, which gives the Minister of the Environment the authority to commission regional studies. The terms of reference directed that the assessment be based on a strategic EA design, and that it be conducted by an independent scientific advisory committee

Natural gas development started in the area in the 1950s.

acting external to government, but appointed by the minister. The assessment was to identify past and present disturbances and impacts in the region, and explore the implications of alternative scenarios of conservation and development over the next 25 years.

Recognizing the historical significance of the Great Sand Hills to First Nations, the assessment process engaged First Nations from Saskatchewan, Alberta, and Manitoba early in the scoping and design phases. Particular emphasis was placed on the engagement of Treaty 4 First Nations. The assessment team carried out a First Nations use and culture assessment under the guidance of the Qu'Appelle Tribal Council and with the assistance of an advisory group of elders. The First Nations use and culture assessment was designed to identify important issues and parameters of First Nations values that should be addressed in the assessment and integrated in the planning of future land uses. Engagement occurred early in the process, through a combination of focus groups with men and women from different First Nations to hear stories about the Great Sand Hills that were passed down from previous generations; cross-cultural interviews to identify current values and uses; and participatory mapping sessions to identify areas of cultural and spiritual significance and to designate preferred conservation and development land use futures.

To set the stage for participatory mapping sessions, a traditional sweat lodge ceremony was held by the advisory group of elders in the Great Sand Hills. Given that First Nations had not used the region for traditional practices in recent generations, the sweat lodge ceremony was a means for the elders to reconnect with the land and to receive spiritual wisdom. Following the ceremony, the advisory group of elders shared their stories, identified areas of spiritual and cultural significance, and collectively mapped areas of preferred future land use designations that would accommodate development but ensure that the spiritual significance of the landscape was protected. This information was used by the assessment team in the analysis and impact assessment of alternative land use conservation and development scenarios.

A traditional sweat lodge ceremony was held by the advisory group of elders in the Great Sand Hills.

The advisory group of First Nations made it clear to the assessment team and to government that current use and occupancy is not a sufficient indication of the significance of a landscape to Aboriginal communities. In the Great Sand Hills the land had not been used for traditional purposes for generations, yet it remains of significant cultural and spiritual value. The Great Sand Hills regional assessment was completed in 2007. The land use plan never did see full implementation, owing largely to recommendations that were beyond the scope of a single government agency to implement and to a change in provincial government leadership shortly after the completion of the assessment (Noble 2008).

However, the Great Sand Hills case demonstrates the value of a regional approach to EA to capture the concerns of Aboriginal peoples, who often approach land use and development holistically – beyond the scope and scale of single project proposals and disturbances.

Lessons and Opportunities

The above case studies demonstrate a range of avenues for Aboriginal participation in EA, and show that participation can come in many forms and result in a range of different outcomes. Each application of EA is context-specific, and the means by which Aboriginal peoples engage in the EA process and the objectives they hope to achieve can vary from one project and Aboriginal community to the next. Notwithstanding the mounting criticisms of EA regarding the inclusion of Aboriginal peoples, there are examples from practice that show how, through the EA process, Aboriginal peoples can meaningfully participate in EA, and even influence project outcomes. These cases and examples are, of course, with reference to the participation of Aboriginal peoples in EA and not the more narrowly and legally defined Crown's duty to consult.

Participation in EA can be meaningful to both the Aboriginal community and the project proponent when the Aboriginal community is prepared to engage

Ideally, Aboriginal communities have land use plans completed and traditional knowledge documented long before the EA process commences (Plate et al. 2009). This was the case for the 'Namgis First Nation, who were already engaged in land use planning, had established their own development planning team, and were well-prepared to engage in discussions about resource development and to participate in the EA when approached by Polaris about the Orca mine. Commencing land use studies and determining development objectives only when approached by a project proponent results in participation in EA that is focused more on information gathering than genuine engagement, and meaningful land use studies are well beyond the scope of what can be achieved through EA participation (Noble and Udofia 2015). A well-prepared Aboriginal community, with land use values and priorities already documented, can go a long way in facilitating meaningful participation in EA.

Participant funding programs, when sufficiently resourced by project proponents, can help ensure that Aboriginal communities have the capacity to meaningfully participate in EA

Participant funding, when available, is typically provided by government agencies. However, the amount of funding is often insufficient to ensure meaningful participation and the funding is typically restricted for engagement only up to the point of EA approval (Noble and Udofia 2015). In the case of the Sisson tungsten and molybdenum mine, the First Nations expressed concerns about the project's impacts to their traditional lands but, unlike the 'Namgis First Nation, did not have the capacity to meaningfully participate in the EA – notwithstanding participant funding from the Canadian Environmental Assessment Agency. By way of an EA capacity funding agreement, Northcliff Resources provided the First Nations with financial resources to jointly hire their own technical experts to review the project. Conditions attached to the project's EA approval required that such engagement continue post-EA, and that the First Nations continue to be funded by the proponent to participate in project impact monitoring programs. Aboriginal communities need to be able to understand, engage with, and challenge the dominant “scientific” discourse of EA (O’Faircheallaigh 2007). Unless financial and technical resources are provided, such participation is unlikely to occur (Kwiatkowski 2009; Udofia et al. 2015).

Traditional knowledge can be successfully integrated in EA through meaningful participation

Traditional knowledge has been successfully mobilized and applied in EA (Usher 2000), but challenges arise when it is collected by a third party (e.g., a proponent's consultants) and then used in the project's assessment (Plate et al. 2009), or applied outside of its cultural and spiritual context (O'Faircheallaigh 2007). There are, however, examples from practice that show how Aboriginal communities are provided the opportunity and resources to collect their own traditional knowledge, engage in their own review processes, and present that information based on their own value systems. The Keeyask project is good example of this, where the Keeyask Cree Nation partners were funded by Manitoba Hydro to conduct their own assessment of the project using their own technical experts and based on their own knowledge system. The results of the First Nations' assessments were included as separate sections in the project impact statement, even though the perspectives often conflicted with the results presented by the proponent. Such an approach illustrates that Aboriginal communities can be engaged in EA without their traditional knowledge being "watered-down" in the project's impact statement or taken out of context.¹³

Aboriginal participation does extend beyond project reviews to ensure that communities continue to play a meaningful role post-EA approval

Partnerships formed during the EA process, and recommendations emerging from EA authorizations, can result in opportunities for meaningful participation in project management beyond the impact assessment process (Plate et al. 2009). Early engagement of the 'N̄amgis in the Orca mine project, prior to the EA proposal, continued post-EA through participation in impact monitoring programs. In this case, the 'N̄amgis were issued the authority to slow or temporarily stop mine production should critical adverse effects be detected (MacKay 2012).

Similarly, for the Voisey's Bay and Sisson mine projects, engagement during the EA process and the conditions placed on the EA approvals ensured the continued participation of the affected Aboriginal communities. In the Voisey's Bay case, the EA review panel recommended that an Environmental Management Board be established to facilitate the joint monitoring of project impacts and the continued participation of the Innu and Inuit beyond the life of the EA process.

Conditions set in the EA approval of the Sisson project stipulated that the First Nations continue to be engaged post-EA in the development and implementation of programs monitoring environmental and socioeconomic effects, and that their participation be funded by the project proponent. Current federal EA participant funding programs do not support Aboriginal participation beyond the regulatory decision making process (Noble and Udofia 2015); yet such continued support is essential for ongoing Ab-

original participation (O'Faircheallaigh 2007), and the continued participation of Aboriginal communities in environmental monitoring is increasingly required as a condition of project approval.

The results of the First Nations' assessments were included as separate sections in the project impact statement.

Aboriginal participation can mean a real and substantive role in EA decision making

In the absence of formal regulatory powers or decision-making ability, the influence of participation offered through EAs can sometimes be difficult to measure (O’Faircheallaigh 2007). However, there are several examples where Aboriginal participation in EA has extended well beyond the provision of information and provided the First Nations in question with real and substantive roles. The ‘Nan̓agis First Nation, for example, was engaged in setting the terms of reference for the Orca mine EA, and eventually became a project partner with the power to veto the project up to a certain point. The ‘Nan̓agis and the proponent were thus able to negotiate standards for the project that superseded regulatory standards (Plate et al. 2009).

In the case of the Keeyask project, three Manitoba First Nation communities joined Manitoba Hydro as project partners and 25 percent owners – part of a reconciliation process stemming from a decade of development that excluded First Nations – and submitted a joint project impact statement. The Voisey’s Bay EA process, through a formal MOU between the Innu Nation, Labrador Inuit, and the federal and provincial governments, granted the Innu and Inuit formal rights in the EA review process, establishing them as equal partners in the EA review process even though no formal land claim-based rights existed.

Perhaps the most interesting case of power through participation, however, is the Squamish Nation’s independent EA of the Woodfibre LNG project. The Squamish Nation’s EA process resulted in a list of conditions that the proponent would need to meet before the Squamish would issue an EA certificate of approval and, thus, their support for the project. The proponent requested a pause in the regulatory processes to address the Squamish Nation’s EA conditions. There are likely few Aboriginal communities with the current capacity to undertake their own, independent EA process; however, this case may be illustrative of what we can expect to see in the future – the desire for Aboriginal communities to carry out their own, independent EA process and issue their own EA certificates of approval.

Constructive conflict can be an influential form of EA participation

There are many examples where Aboriginal communities introduce constructive conflict to the EA process (e.g. protests, roadblocks) (see Whitelaw et al. 2009 – Victor diamond mine, Ontario), as a means to address power relations and more directly influence EA (Maclean et al. 2015). The Kemess North copper-gold mine is an illustrative example. The First Nation felt marginalized during the proponent’s EA and participated in the federal review panel hearings only by way of protest, as a means of expressing their concerns about the impacts of the project on their cultural and spiritual values. The federal review panel listened, and recommended that the project be rejected – the first time this had happened for a mining project in Canada – concluding that approving the project would cause the loss of spiritual values, which cannot be priced.

Though some may see constructive conflict as a delay tactic, disruptive, costly, and unnecessary, the opportunity to introduce conflict is an important part of a public EA process. Conflict is not a negative reflection of EA per se; one of the purposes of EA is to ensure open and public debate about often controversial resource development projects.

Projects are rejected based on the concerns of Aboriginal peoples raised during the EA process

Though rare, there are examples, including the Kemess North project, where Aboriginal participation and expressed concerns over cultural impacts have led to the outright rejection of a proposed project. Ur-Energy Screech Lake's uranium exploration project was one of several projects rejected by the MVEIRB after hearing concerns from the affected Aboriginal communities about impacts to landscapes that had cultural and spiritual significance. The proponent argued that the project would create positive economic and social benefits in the region, including new investment and employment opportunities. The review board, however, placed greater emphasis on the cultural concerns raised by Aboriginal communities during the public hearing process and made its decision to reject the project based on cultural grounds – and based on concerns that opening the door to one project in the region would open the door to many others. This was perhaps one of few EA determinations to consider cumulative cultural impacts.

Aboriginal participation in EA can occur at a more strategic level than individual projects

Aboriginal communities often approach EA as part of a larger process of land use and resource development.

Aboriginal communities often approach EA as part of a larger process of land use and resource development, and hope to address much larger issues than the impacts of a single project (Booth and Skelton 2011). The Great Sand Hills case illustrates how Aboriginal communities can be engaged at more regional and strategic levels of land use policy and regional assessment to influence, or set the context for, subsequent actions and decisions about land use and development. There is a growing interest in regional and strategic assessment frameworks to ensure, in part, more meaningful Aboriginal participation in planning and decision-making processes before development projects are even considered in a region – e.g., in Canada's western Arctic (Noble et al. 2013), the James Bay region of northern Quebec (Lajoie and Bouchard 2006), and Ontario's mineral-rich Ring of Fire (Chetkiewicz and Lintner 2014). Although most jurisdictions across Canada do not have formal provisions for regional and strategic assessment, the Great Sand Hills case demonstrates how Crowns often *do* have the authority to commission participatory regional studies or land use planning exercises (Noble 2008), and use the outcomes of such initiatives to set the context for the nature, pace, and pattern of resource development.

Conclusion

Environmental assessment has been subject to much criticism in recent years for not being an inclusive process that meets the needs and expectations of Aboriginal peoples. The result has been widespread calls for major reforms to EA in Canada, and renewed commitments by governments to restore trust in EA and better engage Canada's Aboriginal peoples. There is considerable room for improvement in EA, and indeed EA has come up short many times in providing opportunities for the meaningful participation of Aboriginal peoples in the planning, assessment, and management of projects that affect traditional lands, resources, and values. However, examples of good practice do exist – examples where EA has provided an opportunity for Aboriginal participation that has either influenced the assessment process or determined the project's outcome.

The case study snapshots presented in this paper, though not comprehensive of practice, show that the avenues for Aboriginal participation in EA can take on many different forms and result in a range of different outcomes. Aboriginal participation in EA is a much broader and more multi-dimensional concept than the legal duty to consult. What is considered meaningful participation in one project context, or by one Aboriginal community, may not be so in the next.

As governments and Aboriginal communities continue to shape more meaningful and participatory EA, it is important to consider the full range of options and opportunities reflected in practice, and to be sensitive to the diversity of expectations about participation and EA outcomes that exist. There is no magic bullet that will ensure better practice in all project and decision making contexts, but more collaborative EA processes that empower Aboriginal peoples are more likely to result in better outcomes for both the project proponent and the Aboriginal community.

Given current legal and political realities, securing Aboriginal concurrence – leaving words like “consent” and “consultation” for the lawyers to debate – is essential in the Canadian resource sector. With Indigenous groups placing top priority on ensuring the ecological integrity of their traditional territories, it is clear that EA is at the forefront of the ongoing discussion between Aboriginal people, resource companies, and governments as they seek to find the right balance between development and environmental protection.

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About the author



Bram Noble is a professor of environmental assessment at the University of Saskatchewan. He has published numerous articles on environmental assessment, including one of Canada's leading environmental assessment books, *Environmental Assessment – A Guide to Principles and Practice*, and has delivered several national and international invited lectures on best practices in environmental assessment. His work in the environmental assessment field is well known; he has been an expert witness for several environmental assessment hearing processes, and is actively engaged in environmental assessment practice. He co-authored the Canadian Council of

Ministers of the Environment guidance on regional strategic environmental assessment, developed Ministerial guidance for environmental assessment decision making under the Nunavut Land Claims Agreement, and was a consultant on the development of federal guidance for cumulative effects under the Canadian Environmental Assessment Act 2012. He also served as expert adviser to the Commissioner of Environment and Sustainable Development, to the Auditor General of British Columbia, and to numerous First Nations and provincial governments. He holds a PhD in geography from Memorial University.

Endnotes

- 1 The Canadian Environmental Assessment Agency maintains a public registry of federal EAs in Canada, available at <http://www.ceaa.gc.ca/050/index-eng.cfm>
- 2 For details on the federal environmental review, and the terms of reference of the panels to be commissioned to undertake the review, see <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews.html>.
- 3 A detailed description can be found in the Canadian Environmental Assessment Agency's Comprehensive Study Report for the Orca project, available on the Agency's Public Registry or at <http://www.ceaa.gc.ca/010/type3index-eng.cfm>.
- 4 The Canadian Environmental Assessment Agency, and the National Energy Board, each manage a participant funding program to provide financial support to Aboriginal interests and other potentially interested or affected parties to help enable them to participate in the EA process. The funding is focused primarily on the "front end" of the EA process, often to respond to a proponent's impact statement or to attend and participate in public hearings. Details on the Canadian Environmental Assessment Agency's participant funding program is available at: <https://www.ceaa-acee.gc.ca/default.asp?lang=En&n=9772442E-1>.
- 5 For details on the Minister of Environment and Local Government's "Conditions of Environmental Impact Assessment Approval – Sisson Mine Project," see: <http://www2.gnb.ca/content/dam/gnb/Departments/env/pdf/EIA-EIE/ConditionsEIASisson.pdf>.
- 6 The Sisson partnership capacity funding agreement release is available at http://www.sissonpartnership.com/s/news-releases.asp?ReportID=659927&_Type=News-Releases&_Title=Northcliff-Signs-Environmental-Assessment-Review-Capacity-Funding-Agreement...
- 7 For a brief overview of the Innu and Inuit legal claims against VNBC and the province of Newfoundland and Labrador regarding exploration activities, see <http://arcticcircle.uconn.edu/SEEJ/voisey/intro.html>.
- 8 The Government of Canada's response to the environmental assessment report of the Joint Review Panel on the Kemess North copper-gold mine project is available at: <http://www.ceaa-acee.gc.ca/052/document-html-eng.cfm?did=25797>.
- 9 For information on the Squamish First Nation, including culture, history, and governance, see <http://www.squamish.net/>.
- 10 For details, see the letter from the Squamish Nation issuing the EA approval, at <http://www.squamish.net/wp-content/uploads/2015/10/October-162015-Notice-to-Members-re-WLNG-Env-Agreement-Approval-Combined-Documents.pdf>
- 11 For information on the project application addendum resulting from the Squamish EA conditions, see http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_406_39347.html.
- 12 Several organizations expressed concerns over the project. See, for example: <http://www.cbc.ca/news/canada/british-columbia/squamish-lng-environmental-approval-1.3500578>; <http://www.watershedsentinel.ca/content/open-letter-environment-minister-re-woodfibre-lng>; <http://www.andrewweavermla.ca/2016/03/21/reacting-woodfibre-lng-approval-pacific-northwest-lng/>.
- 13 See, for example, concerns of the Métis Nation of British Columbia regarding traditional knowledge, engagement, and the Robert Banks Terminal 2 Project. <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=97738>.

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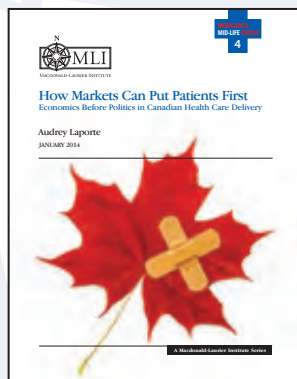


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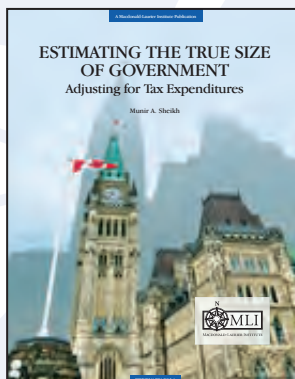
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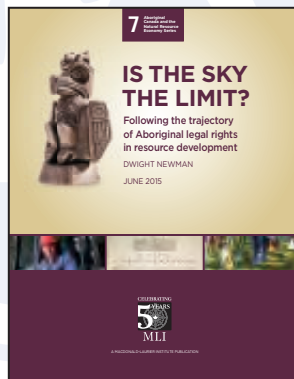
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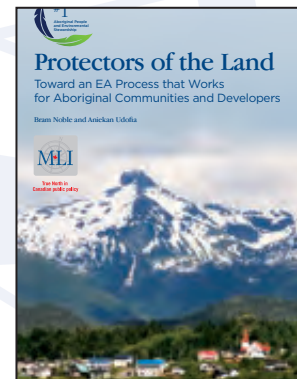
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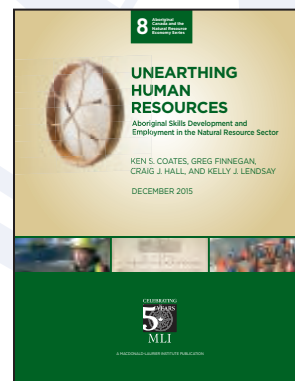
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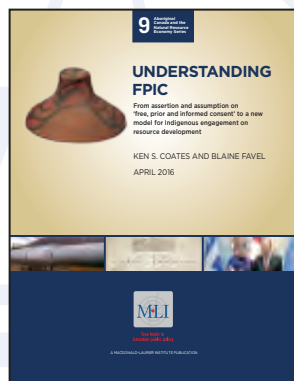
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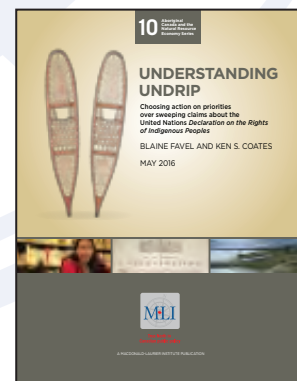
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