Environmental Assessment and First Nations in BC: Proposals for Reform

DISCUSSION PAPER

First Nations Energy & Mining Council

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Executive Summary

First Nations in British Columbia, both individually and at the provincial leadership level, have called for reform of the BC environmental assessment process. There is increasing evidence on all fronts, including new legal challenges, that the system of project review and Crown consultation being applied by the BC Environmental Assessment Office is seriously dysfunctional when it comes to ensuring that First Nations interests are effectively provided for in the assessment process, that the honour of the Crown is properly preserved in the consultation process used by the agency and, in the final analysis, that meaningful accommodation to the potentially affected First Nations has been made. The purpose of this paper is to summarize the existing situation with a view to identifying the range of deficiencies that exist and, more importantly, to propose alternative and more collaborative ways of conducting the important exercises of project assessment and consultation and accommodation.

A number of problems with the existing EA process can be identified. First, is the matter of the legislation itself. To summarize, the *BC Environmental Assessment Act* is silent with respect to a number of important aspects, such as First Nations involvement in the process, objectives, standards and principles for delivery for the EA process, and methodological content for the conduct of reviews.

Additionally, the executive director has a wide range of discretion that is explicitly open to ministerial direction and influenced by government policy mandates. Far from being the independent, neutrally administered, technically robust, transparent and accountable process it needs to be, the *Act* is constructed to achieve the opposite of these characteristics in its implementation.

Another problem is the way the legislation is implemented by the EAO. Despite having complete discretion in designing and implementing the process, the EAO appears unprepared to adapt the process when required to meet the needs of First Nations. No stated objectives exist to guide the executive director and the process, and First Nations are not involved in determining the scope of the assessment or the terms of reference for the process. Any funding offered by the EAO to a First Nation is trivial compared to

what is required. And the unilaterally designed consultation process now used by the EAO is somewhat cynically conducted and misleading in the result.

In short, the entire BC process for project assessment is ripe for reform. A significant number of First Nations has lost the confidence in the process. This is unfortunate, because it is a fundamental inclination of Aboriginal people to promote economic development in their territories that they view as sustainable. There is, in other words, a common interest between BC and First Nations in seeing the rights kinds of development projects materialize and, therefore, a common interest in an assessment process that will deliver the goods. We don't have one, and so it is important now to get on with the job of collaboratively designing such a process.

Considerations for reforming the process need to answer three basic questions:

1. What should a project-specific EA look like?
2. What legislation and structure for the EA process should be put in place?
3. How should the Crown's consultation duty relate to the EA process?

The essential goal for EA reform is to make project assessments neutrally administered, independent, and technically robust so that they can deliver defensible assessments, and also incorporate effective Aboriginal input into the design of the processes such that they are responsive to First Nations needs. Here is how a reformed EA would work:

1. Proposed major projects (mines, energy and road corridors, etc.) that would affect Aboriginal territory or communities would be conducted by a 4-person assessment team (i.e., mini-panel) of independent individuals jointly selected by the affected First Nation community and BC government.
2. Before a project assessment commences, a government-to-government process between the affected First Nations and BC would be carried out to agree on the 'terms of engagement' for the following:
    - appointment of members of the 'project assessment team'
    - conduct of the project assessment;
    - conduct of the consultation process to be carried out after the assessment is complete but before approval decisions are made by either party; and,
    - funding arrangements for the First Nations in both the assessment and consultation processes.
3. Following the development of the 'terms of engagement' agreement, the project assessment team would then conduct an independent assessment according to the

terms of reference established in the government-to-government process, as well as guidelines established by a new assessment authority which would replace the existing Environmental Assessment Office (see below).

4. Potentially affected First Nations would participate in the assessment process according to guidelines established by the new assessment authority, as modified by the terms of engagement that they have negotiated with BC at the outset of the assessment.
5. The assessment authority would serve as a watchdog of individual assessment processes to ensure process integrity. Additionally, any party (including First Nations) who had concerns about whether the process was being implemented by the project assessment team consistent with the terms of reference would be able to seek a binding opinion on the matter from the authority.
6. Once the project assessment team has produced an assessment report, the consultation process previously agreed to by BC and the affected First Nations would kick into gear using the assessment report as a basis for resolving outstanding issues, including infringements of Aboriginal title and rights.
7. The end product of this process would be an accommodation agreement between the parties. Only a negotiated agreement would deliver upfront certainty to both parties about what accommodation measures the Crown is committed to make to ensure that the project contributes to sustainability.
8. With an accommodation agreement in place, the ministers and the First Nation communities would then be in a position to make a joint project approval decision.

A new assessment agency is required to replace the EAO. As this report shows, the EAO has a corporate culture that systematically undermines Aboriginal interests. It is not independent or neutrally administered but, rather, is politically mandated and managed to produce results that the government wants. To fix this, and also to expand the scope of the assessment body to include sustainability issues, the following steps are proposed:

1. a new Sustainability Authority to design the assessment process, standards and guidelines, and to be the keeper of the assessment process, would replace the EAO;
2. the Sustainability Authority would report to the Legislature, not to a cabinet minister. It would have 3 independent commissioners (or board of directors) who are appointed by the Legislature, but nominated by BC and FNLC.
3. the board would hire a professional, experienced EA practitioner to be the new executive director. The executive director would hire staff for a secretariat to support the work of the Authority, and develop the procedures and guidelines of the assessment regime for approval by the board. Much of the EAO could likely be subsumed into the new authority, but the executive director would need to determine this.

4. A government-to-government process between BC and FNLC would be conducted to jointly design the mandate of the Authority, including:
    - charter for the Authority;
    - terms of reference, qualifications, and nominations of individuals to the Board of Directors (with official appointments by the Legislature);
    - development of 'consultation guidelines' which establishes principles, objectives, standards and general procedures for consultation processes that will be required at the project-specific, community level (see next section).
5. the authority could serve as a watchdog over specific project assessments where First Nation participants have concerns about the process;
6. the authority would design and implement follow-up programs, including monitoring, inspection, and enforcement capacity, to 'watchdog' the results of project assessments, compliance with approval conditions (environmental certificate plus accommodation agreement), and verification of impact predictions and mitigation effectiveness;
7. the *BC Environmental Assessment Act* would be repealed, and new legislation would be required to implement the institutional arrangements proposed.

Finally, reforming the current provincial consultation process is an indispensable part of EA reform. It would be futile to change one process and not the other when they are so interdependent. The three key places in the EA regime where government-to-government discussions are required include:

1. BC and FNLC jointly design key elements of the Sustainability Authority—charter, mandate, terms of reference, process for selecting directors, nomination of first term appointments.
2. Local First Nation and BC meet on specific project assessments to agree on the EA and consultation processes that will be implemented for that project.
3. Local First Nation and BC implement consultation process at completion of specific project assessment and reach accommodation before project approval decision is made.

A fourth exercise, with a more expansive scope of First Nations issues than just EA, is also essential:

4. BC and FNLC to jointly develop a provincial level consultation protocol which sets out the objectives, principles, standards to be employed, and idealized procedures of consultation for all Crown land use decision-making (of which EA is only one piece). This is not to be a detailed 'one size fits all' consultation process, but, rather, a principled framework (or guidelines) that establishes goal posts within which local First Nations could adjust the terms, and can at least know upfront the operating principles BC is coming to the table with.

This concept here is to set minimum standards of what is to be expected in the way of talks when a local First Nation meets with the Province to consult on an impending land use decision. Such guidelines could be used by local First Nations to use and modify, on a voluntary basis, when they meet with BC in a government-to-government process.

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Part 1. The Need for Change

Introduction

This report proposes major changes to the existing BC environmental assessment (EA) and associated consultation process.

The supporting critique and solutions presented are from a First Nation perspective because, of all constituent groups affected by the process, Aboriginal title, rights and interests in land throughout the province are continuously being adversely affected by government land and resource use decisions that result from the current EA process. The process used to arrive at those decisions is a large part of the problem.

Changes are needed because there is an array of substantive and procedural deficiencies in the current process that render it ineffective (at best), and even harmful (at worst) in the way it addresses First Nations' interests. This is clearly evidenced by the burgeoning discussion on the topic at the Aboriginal political leadership level.

In October, 2008 BC First Nations held a mining summit in Prince George to survey concerns with the mineral exploration and mining industry's behaviour in Aboriginal territories. Along with other issues, BC's environmental assessment process received heavy criticism, and was elevated to a primary target for reform in the *Mining Action Plan*:

> "Pursue legislative reform of environmental assessment processes: conduct an independent review of the federal and provincial environmental review processes and draft a proposal for a process to reform the environmental assessment process to respect First Nations authority and decision- making, including a political government-to-government process between First Nations and government.

In the fall of last year, also, the BC Minister of State for Mining created a council of industry and First Nations representatives to help identify conditions necessary for the long term success of BC's mineral exploration and mining sector. The need to jointly develop a new environmental assessment process that respects and recognizes the rights

of First Nations was one of two priorities raised at this table.

On May 29, 2009, the First Nation Summit wrote to BC Mines Minister Gordon Hogg and submitted two resolutions passed by the Chiefs-in-Assembly that called for the government to work jointly with First Nation Leadership Council to create a new EA process that respects and recognized the rights of First nations to be decision-makers in the process, and for the Chiefs to exercise their jurisdiction in shared decision-makers with the two Crowns in any EA process.

As recently as July 30, 2009, the Union of BC Indian Chiefs wrote to Premier Campbell about the lack of implementation of the *New Relationship* and 'bad faith' activities of the Province, citing among other things a concern about the provincial EA process,

> "The present Environmental Assessment Review Process is the most blatant example of unilateral Crown decision making which is used to veto our Aboriginal title and rights interests as big projects are permitted to proceed, over our objections and often to the detriment of the land itself."

The *New Relationship*, established in the spring of 2005 between the Province and the First Nations Leadership Council, envisioned a different future. It described a new relationship in which BC and Aboriginal governments would work together to develop processes and implement new institutions and structures including the following:

- Integrated intergovernmental structures and policies to promote co-operation, including practical and workable arrangements for land and resource decision-making and sustainable development;
- Efficiencies in decision-making and institutional change;
- Recognition of the need to preserve each First Nation's decision-making authority;
- Financial capacity for First Nations and resources for the Province to develop new frameworks for shared land and resource decision-making;
- Mutually acceptable arrangements for sharing benefits, including resource revenue sharing; and
- Dispute resolution processes which are mutually determined for resolving conflicts.

Sadly, the current BC EA process continues to be an obstacle to achieving any of these objectives.

In short, the BC EA process is broken. A number of factors work to render the BC EA process ineffective at producing credible, objective assessments of major projects

proposed for First Nation territory, and at involving the affected communities in any meaningful way such that their issues are effectively considered and addressed in the process.

Several recent examples of First Nations who participated, or who attempted to participate, in the BC EA process with disappointing results serve to highlight the deficiencies addressed in this report.

The proposal for reform is based on the need for an assessment process that will work for both BC and First Nations. After all, both are interested in economic development activities that can enhance regional and local sustainability, and therefore both need a review process that will promote this end. As a basis for contemplating the needed changes, an identification of the deficiencies of the current BC environmental assessment process, with respect to both its ability to deliver defensible assessments and its ability to properly engage potentially affected First Nation communities, is the starting point. A brief review of EA processes in other jurisdictions was helpful in conceptualizing options for reforming the process. So, too, was a one-day 'think-tank' organized to help formulate the reform measures proposed.[1]

Part of the challenge in reforming the process is that there are inherently two distinct processes that must interact somehow when decision time arrives. These comprise the technical process of impact prediction and the political process of consultation with the intent of reconciling the interests of the Crown with those of Aboriginal people who may be affected.

EA is largely a fact-finding process focused on the interaction of a project with a particular environmental and social setting. It is one of several potential sources of information for decision makers—perhaps the most thorough and reliable source if done correctly.

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[1] Participants, gratefully acknowledged, included Karen Campbell, Kathleen Johnnie, Arthur Pape, Greg McDade, Bill Andrews, Mark Haddock, and Paul Blom, all of whom participated as individuals and not as representatives of their various employers.

As a source of good information about a proposed project, EA can effectively be a critical first step for any meaningful consultation process between the Crown and an affected Aboriginal population. However, for several reasons as outlined below, the EA process cannot constitute the whole of consultation as defined by the Supreme Court.

These two processes—EA and consultation—have been merged in BC through policy, such that both are attempted under the current BC EA process. The provincial agency set up to conduct assessments, the Environmental Assessment Office (EAO) has also been given the mandate to execute the Crown's constitutional duty to consult and accommodate. The result, discussed in more detail below, has been a dismal failure in a number of cases.

This paper begins with a review of the purpose of environmental assessment, followed by an overview of some of the key principles that underlie effective and meaningful EA practice. A detailed review of the deficiencies of the current BC process is then provided—both in terms of the legislation and in how it is implemented by the executive director. The paper concludes with proposed reform in the three key areas—the assessment process itself, the institutional arrangements required to give life to the process, and the need for a distinct but harmonized consultation process.

What is the purpose of EA?

The place to start in a review of this kind is to understand clearly what it is that is being talked about. This section attempts to clarify the concept of EA and to set out some parameters for what should be inside and outside the 'EA box'.

The International Association of Impact Assessment (1999) offers perhaps the most succinct definition of EA—"the process of identifying, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made".

Thus, EA is fundamentally a tool for decision-makers—a systematic way of identifying and evaluating the potential impacts of a proposed project or activity so that decision-

makers are properly informed about the consequences. But it is also a process that is characterized by complexity, misconception, and heightened expectations about what it can, or should, accomplish.

In addition to impact prediction, EA is also used to take the next step—that is, to identify and evaluate potential means of mitigating, or compensating for, the predicted impacts. The key is to use the tool before a decision is made whether or not to proceed with the project, and under what conditions.

In practice, EA comprises a number of discrete exercises, as follows:

- collecting information about the project and its environmental setting;
- identifying causal links between elements of the project and environmental components;
- predicting potential effects of the project on the environment;
- identifying and evaluating potential mitigation and/or compensation measures; and,
- evaluating residual effects as to their significance.

It can be seen from this list of activities that some of the steps are fairly mechanical, while others require some interpretation—in the analysis, for example, or determining significance. These interpretive aspects of EA raise the issue of who is doing the interpreting, an act that bears varying amounts of subjectivity. This is an area where some First Nations have had particular difficulties with the BC process, as described in more detail below.

While project approval decisions are made by politicians outside the EA process, it would be wrong to think that those managing the assessment do not make significant decisions along the way. These are often process decisions, but they can be decisions about substance or significance, and can very much be coloured by the subjective preferences of, or administrative pressures on, the assessor. EA is seldom the neutral, objectively administered process it is often touted to be—much value-laden influence is brought to bear along the way which can shape the outcome. Since there are different interests and values at work in the process, this raises the question of how responsive and inclusive the process needs to be to produce an outcome that reflects this diversity. This, too, is an

area of significant concern to First Nations with respect to the BC process.

To be useful EA must be, and be seen to be, a rigorous, technically robust process that effectively examines all relevant aspects of how a project might change the important characteristics of the affected natural and social environments, and what workable measures might be necessary to ensure that the project can be made sustainable. Where interpretation and value-laden decisions about process and content are made, the process must be transparent, accountable, and must provide for the meaningful involvement of those affected.

Part 2. Principles for Effective EA

Credibility

Credibility needs to be an EA process objective. For assessment results to be meaningful, the process has to do credible work and, importantly, it has to be perceived to be doing credible work. Credibility is an indispensable property of an EA outcome—people involved in the exercise, and those affected by it, have to believe in the results.

Credibility means, in part, that the conduct of an EA needs to be methodologically rigorous, and needs to apply the best available knowledge and expertise, relevant to the project and its environmental setting, that can be collected from knowledge-based sources (including western science and indigenous knowledge). Evaluation techniques applied must be technically defensible, agreed to by the assessors, and appropriate to address the problems being investigated.

Further, project assessors should be technically qualified as EA practitioners, and that assessments of major projects will usually require both specialized expertise and interdisciplinary approaches to impact prediction and resolving issues. The process should ensure that the appropriate knowledge-holders (biophysical, socio-economic, cultural) and analysts are involved as a team in a collaborative and interactive assessment process.

Finally, the process must be able to recommend rejection of a proposed project. Even though the current legislation allows for a minister to reject a project, the executive director has never recommended this. One fundamental reason for this is that the legislation provides no explicit analytic framework, or methodological test, that can evaluate environmental acceptability. Without such a test, how can assessors properly arrive at a conclusion to reject a project? They cannot, with the result that all projects entering the BC EA process, unless otherwise abandoned by their proponents during the assessment, get approved with terms and conditions. This inability to find that a project will have significant adverse impacts to the point where its environmental acceptability cannot be reasonably confirmed (which exists in the BC process) is a major obstacle to credibility.

To achieve the credibility objective, a number of important principles must infuse the EA process. These are briefly described below.

Independence

A critical principle is that EA needs to be, and be seen to be, free from political interference. It must be independent and neutrally administered to be credible to all parties.

The principle of independence is paramount. Without it, the outcome of the process looses credibility and reliability. Decision-makers have to know that the advice they get is technically sound and not compromised by political considerations (that is their job, not the assessment body's). And those affected by the outcome need to know it was properly done so that they can believe in the results.

EA legislation, such as BC's, that enables recourse to or direction from political decision makers or current government policy during an assessment is not independent or neutrally administered, and will not be able to deliver credible results.

First Nation Participation

A basic principle of fairness is that those people who stand to be most affected by a project's adverse effects need to have meaningful participation in the decision process, including EA, particularly when they are involuntary risk-bearers of someone else's project. In the case of First Nations in Canada, the recognized legal existence of Aboriginal title and rights makes such participation mandatory. Governments approving major projects or land use activities simply are not legally able to do so without ensuring a consultative process that identifies and resolves the issues that may impinge on Aboriginal title and rights.

Additionally, Aboriginal people are currently coerced into participating in government's review process. Projects get thrust upon them, and there is an expectation that First Nations will (and must) participate in the EA process. There is clear legal direction from the courts that potentially affected First Nations should be party to the design of project review processes, where the process itself can have significant impacts on Aboriginal interests. It should be obvious that a rational EA process would provide for the involvement of Aboriginal people in its design, as well as its execution, so that the affected communities can be satisfied that the outcome is properly and fairly achieved. So, too, do First Nations need to be involved in the design of the associated consultation and accommodation processes.

Transparency

For the process to be credible it must also be transparent. This means that those on the outside of the process need to be able to clearly understand how the EA process will be conducted and the results generated.

Consequently, the process should have clear, easily understood requirements for EIA content and procedures; it should ensure public access to all relevant information; it should identify the factors that need to be taken into account in decision making, including assumptions relied upon in its findings; and it should acknowledge limitations, uncertainties, and difficulties in reaching conclusions.

Sustainability

Environmental assessment is a technology in evolution. In a number of jurisdictions more innovative and progressive EA models are moving beyond the conventional, narrow focus on impacts to something more comprehensive and multi-dimensional. This shift expands the scope of assessment to include an analysis of the net contribution a proposed project is likely to make to regional and local sustainability. Several recent project-specific EAs in Canada have explicitly utilized a sustainability analysis for this purpose, and have raised the quality of government decision-making in doing so.

Sustainability assessment adds the following core elements to the conventional model:

- a test that socio-ecological system integrity will be maintained, and ecological life-support systems will not be placed at risk;
- a test that the project will result in net benefits to local, potentially affected communities and will not compromise future opportunities for self-sufficiency and well-being;
- a test that the project will distribute its costs and benefits equally within society, and not increase the gap between rich and poor;
- a test that the project will maintain or enhance opportunities for future generations to benefit and not incur costs;
- a test for ensuring efficient resource use, minimal wasting of energy and resources by the project;
- the burden of proof for project acceptability is on the proponent; and,
- use of the precautionary approach in addressing uncertainties and formulating recommendations.

It is proposed here that sustainability should now be an indispensable element of EA practice, and that it needs to be included in any reform of the BC assessment process. First Nations are continually demanding that new developments in their territories are welcome if they are going to contribute to sustainability, and not undermine environmental, cultural and economic well-being of Aboriginal communities. The 1995 *BCEA Act* did identify a sustainability objective, but this was removed in the 2002 amendment. It is important to now bring this element back into the process in a more robust and meaningful way.

Accountability

Accountability refers to the notion that those managing the process need to be answerable or accountable to those affected by the outcome and the procedures used to get there. The process is accountable when it is obliged to inform those affected about the consequences of the recommendations and decisions made. Accountability involves elements of 'responsiveness' (to concerns raised by all participants) and 'justification' (for positions or findings arrived at).

There are several places within an EA process where accountability needs to be demonstrated—process decisions during the assessment, recommendations from the assessment body, and final decision by the ministers.

Most importantly, those affected by the outcome of an EA need to know that the process conducted and the results reached are in accord with what the purpose of the exercise is. Without knowing what is being attempted it becomes difficult to properly judge the result. This is why, especially, the purposes of environmental assessment need to be explicitly identified the legislation. Stated objectives provide a major source for the determination of accountability, for they provide clarity about the government's intent and guidance to the assessor. They identify the overarching aims of the legislators, and help reduce the potential for decisions that conflict with their initial intentions. At the end of the day, any interested person should be able to compare the outcome of an EA process against the stated objectives and reach some conclusion, at least at a high level, of how accountable the process has been.

Stated objectives are also needed in light of the fact that most EA processes are not rigidly defined but provide considerable discretionary powers to assessors. Without these, decisions along the way are effectively being made in a vacuum—there is no yardstick to evaluate the integrity of the process, appropriateness of the approach being taken, or the ultimate success of the assessment.

This argues for the need in an EA regime for an appeal mechanism to deal with disagreements about procedural and management decisions made by an assessment

director that are perceived to be in error, unfair or otherwise detrimental to the interests of participants or the rigour of the analysis.

One critical area for accountability lies in the connection between a recommendation from the assessor and a political decision to approve the project. Some regulatory tribunals in Canada, such as the National Energy Board or the BC Utilities Commission, are both assessors and decision-makers. First Nations frequently propose that decisions about projects ought to be taken out of the political arena and vested with the assessment body, as a way of ensuring that the findings of the assessment determine the ultimate result. There is a precarious balance here between democratic principles and rational action, and convincing arguments both ways. Yet it seems clear, if the final decision is to be political rather than administrative, politicians need to be constrained and held accountable in some fashion to the results of the assessment process. Some mechanism needs to be present in the legislation that constrains the decision-makers in a way that forces proper and fair consideration of the assessment results.

Follow-up

The usefulness of environmental assessment is rendered questionable if no one ever checks up after the project is built to see what really happened. An accountable EA regime needs to provide for a mechanism for monitoring the outcomes of the EA as they materialize in built projects. Such monitoring needs to include 'conformance' monitoring to determine whether approved projects are built in compliance with the EA approval conditions, and 'performance' monitoring to document the actual effects of built projects and how these compare to the EA predictions.

In some cases, where regulatory regimes are in place, these functions are provided through established follow-up inspection and enforcement measures of government agencies. In other cases there is no post-EA regulatory regime to ensure compliance and performance.

Without some formalized system of follow-up to an environmental assessment, the process risks being nothing more that a *pro forma* exercise designed to secure project

implementation rather than an environmental management tool for mitigating impacts, enhancing intended benefits and contributing to sustainability.

Statutory & Policy Regime

To give life to an EA process based on the above principles, the implementation regime needs to be properly constituted through appropriate legislation and policy. Enacting legislation that explicitly references these principles, identifies them as guiding influences on the process, and ensures that its implementing provisions reflect them is clearly an important starting point.

The next step is to ensure that regulations issued under the legislation, and the policy regime established to implement statutory and regulatory requirements are consistent with the overall objectives and principles identified in the legislation.

A final issue that needs to be considered in any institutional arrangement is how to ensure that the behaviour of the implementing body will adhere to the principles embraced in the legislation. What is clear from the BC experience is that regardless of the fact that the 1995 statute offered a meaningful role for First Nations in the process, and the 2002 amendment does not, there was essentially no difference in the EAO's behaviour in implementing the process. A misguided philosophy in terms of its responsibility to EA and its responsiveness to First Nation interests apparently has been inherent since the day the EAO was created. Institutional behaviour of the assessment body, therefore, becomes a challenging but critical issue that needs to be addressed if the current EA is to have credible results.

Part 3. Problems with the BC EA Process

The Context

At this time there exists no comprehensive, systematic inquiry into the experience of First Nations with the BC EA process. This is unfortunate, for such an investigation would

add immensely to a more comprehensive and accurate understanding of how well the process is working for Aboriginal peoples, and whether the province is meeting (generally, at least) its constitutional obligations. Strangely, the EAO conducts a 'client satisfaction' survey every two years for proponents, but has not seen fit to do so for those most affected by the process outcome.

Consequently, this analysis relies on personal experience of the writer (who has participated in a number of provincial assessments on behalf of First Nations), a review of selected material on the EAO's public registry, and anecdotal evidence from several First Nations who have participated in the process. However, it is fair to say, judging from the numerous presentations made by First Nation representatives at the *First Nations Mining Summit* in Prince George in October 2008, that problems with the EA process in BC with respect to Aboriginal interests are widespread and profound.

Some historical context is in order. BC's first environmental assessment legislation, the product of an extensive consultation process with both the public and Aboriginal groups, was enacted in 1995. This was subsequently replaced, with no consultation or warning, with the amended *Act* in 2002.

The two pieces of legislation could not have been more different.

The 1995 *BCEA Act* established the Environmental Assessment Office (EAO) to design and implement a process for conducting environmental assessments—a feature typical of most evolving EA processes in other jurisdictions since the 1970s when EA became an important policy concern for western governments. However, the 1995 *Act* also had several innovative and progressive features that placed it in the vanguard of other regimes. These included, among other things, the following elements:

- a set of objectives explaining that the assessment process was for the purposes of promoting sustainability, and that the process would be neutrally administered;
- use of a semi-independent project committee to work with the EAO in the conduct the assessments and formulating recommendations to both the executive director and ministers;
- establishment of a legal right for potentially affected First Nations to sit on

the project committee and participate in an EA;
- requirement for the Minister to consider the recommendations made; and,
- the issuance of an environmental approval certificate that legally binds the proponent to its mitigation and management commitments.

Such provisions clearly offered potentially valuable opportunities for Aboriginal communities to engage in what should have been an effective and supposedly neutral process. Some did engage. The Taku River Tlingit, for example, who had previously refused to participate in a review of the proposed Tulsequah Chief mine under the previous policy process administered by the Ministry of Energy Mines and Petroleum Resources, reversed this position when the new *BCEA Act* came into being and engaged with the new process.

However, within its first few years the EAO found itself the target of legal challenges by three First Nations who believed that the process had not been operated in accordance with the purposes of the legislation.[2] The courts, to varying degrees, agreed.

To solve these legal difficulties, the current government amended that statute, resulting in the 2002 *BCEA Act*. The amendment essentially gutted the 1995 legislation of its most important provisions, and established the executive director as having the sole responsibility and discretion to conduct assessments and advise the ministers in any fashion he deemed appropriate. Gone were the stated purposes of the *Act*, the project committee role, and the legal right of First Nations to participate in the process.

As Madame Justice Huddart summarized it in Kwikwetlem,

> "The most significant differences between the former and the current *Act* are the omission of a purposes section, changes to the criteria for the grant of an EAC, and the absence of provisions mandating participation of First Nations. The notion that the interests of First Nations are entitled to special protection does not arise in the current *Act*. As well, the word "cultural" has been omitted from the list of effects to be considered in the assessment process**.** Perhaps most importantly, the EAO is no longer required to establish a project committee. Under the former *Act*, both the formation of such a committee and First Nations participation in it were mandated. Chief Justice McLachlin wrote in *Taku River*, at para. 8, that "[t]he project committee becomes the primary engine driving the

[2] Cheslatta, Taku River Tlingit, Tsay Kay Ney

assessment process." [3]

Moreover, the opportunities for ministerial input into the process, and requirements for the process to be consistent with government policy, were now made explicit. There were no requirements for technical rigour or for methodologically robust and consistent evaluative procedures. The process was now transformed into the politically driven and cynically operated process that First Nations have been coerced to participate in since 2002.

Until we have a thorough, systematic audit to tell us whether and to what degree the process has performed for those First Nations who have engaged, it may not be fair to say that all such experience has been negative. In at least one case (Ruby Creek molybdenum mine project assessment) the EA process delivered satisfactory results for the Aboriginal community involved (Taku River Tlingit). This was a situation where a number of factors conspired in an atypical but positive way—the proposed project was relatively uncontroversial for the Tlingits since there were no 'show-stopper' predicted impacts, the proponent engaged early and collaboratively with the Tlingits, the Tlingits participated fully in the EA, the particular project director worked collaboratively with the Tlingits and, perhaps most importantly, the Crown appeared to be serious about the needed accommodation by establishing a government-to-government consultation process separate from the EAO to resolve the accommodation issues (see discussion at end on 'consultation').

However, there is sufficient anecdotal evidence from a number of cases to indicate that very serious problems with EA implementation and outcomes exist. It is probably fair to say that where any one of the conditions found in the Ruby Creek case has not been present—i.e., the project is controversial because of its perceived impacts to the community, the proponent and or project director is uncooperative, where the First Nation needs to modify the EA process (in particular, the consultation component)—the experience has been less than satisfactory. Where substantive consultation and accommodation are going to be required, and there is no mutually agreed process in place

[3] cited in Kwikwetlem

to get to common ground, the chances of project acceptability by the First Nation are non-existent.

Contrasting the 1995 statute and the amended 2002 version sheds important light on the challenges facing reform, and leads to at least one important conclusion—regardless of what is written in the legislation, successful implementation of it by the EAO will remain a problem from a First Nation perspective. In other words, fixing the legislation can only be one piece of the reform package. Other changes will be needed to correct the EAO's failing policies and practices.

Deficiencies in the Legislation

Serious problems exist with the current *BCEA Act*. This is the starting point (although it is not the complete picture) for any meaningful reform of EA practice in BC. These problems are identified and briefly discussed here.

No Stated Objectives for the *Act*

A major flaw in the existing *Act* is that it has no stated purposes. The effect of this is that those implementing the legislation are doing this without any expressed direction of what the intended outcome is. They are not told why they are doing EAs, or what the EAs are intended to achieve. Because the process and methodology are at the discretion of the project directors in the EAO, this situation results in the perverse result that processes and procedure are being designed and implemented without knowing what the ultimate objective is.

Further, a minister making a decision with respect to a recommendation from the EAO has no guidance or indication about what his or her decision is to achieve.

The absence of stated objectives is a substantive departure from the 1995 legislation, which explicitly identified purposes relevant to the role of First Nations as potentially affected communities:

- to promote sustainability by protecting the environment and fostering a sound economy and social well-being;

- to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural and heritage and health effects of reviewable projects;
- to prevent or mitigate adverse effects of reviewable projects;
- to provide an open accountable and neutrally administered process for the assessment; and,
- to provide for participation of the public, proponent, First Nations, etc. in an assessment.

The existence of these objectives was an important factor for the trial judge for the Taku River Tlingit's judicial review of the 1998 Tulsequah Chief mine approval. The objectives became the measuring stick against which the judge could determine if the process run by the EAO had been properly conducted.

> "It is clear that the Ministers' reasons demonstrate that the statutory obligation to promote sustainability criteria, an object of the EA, was not fully addressed—the obligation was not fulfilled."[4]

No First Nation Content

The vacuum in the current legislation dealing with Aboriginal interests is alarming. Despite the Supreme Court's direction for the Crown to properly consult and accommodate First Nation interests that may be affected by a land use decision, and despite BC's insistence that the EAO is the proper agency to fulfill the consultation duty, there is nothing in the legislation that enables this. There is no requirement for the EA process to include an assessment of the project's potential impacts to Aboriginal rights and title.

Despite this lack of legislative direction, in practice the EAO does routinely attempt to include such an assessment in its project reviews. Most terms of reference issued to proponents require project applications to contain information about the proponent's consultation with First Nations with respect to project's anticipated impacts to Aboriginal interests on the land. It is a murky and ill-defined process, with the proponent being delegated the task of collecting the relevant information and the EAO doing the

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[4] *Taku River Tlingit et al. v. Ringstad et al.* 2000 BCSC 1001

interpretation of it. The drawback here is that the EAO's scheme is unilaterally designed and implemented, without consultation with the affected First Nation. Consequently, it incorporates methods for assessing strength of claim that are not legally recognized, and reaches flawed determinations of impact magnitude and significance—all this without any engagement of the First Nation in the analysis.

This problem is discussed at more length in a subsequent section. It is important to note here, however, that without clear and specific direction in the legislation on the need and the process for including an analysis of the impacts to First Nation interests in environmental assessments, there is little hope for a responsive treatment of the issues.

And, as noted above, the 2002 statute eliminated the role provided in the 1995 *BCEA Act* for First Nations. There is now no specific statutory responsibility or guidance for minister to explicitly consider First Nation interests in making a project decision, or an established role for a First Nation in the process.

Absence of Substantive Content & Methodology

The EA legislation does not identify either a methodological approach to conducting assessments, or the range of substantive issues that ought to be addressed. The result for all parties is a 'black box' about the content of a project assessment, what the process will look like, who will be involved, how will the analysis and formulation of recommendations be done, what standards of review and proof will be required to reach conclusions, etc. In such a vacuum there is no clarity, and no certainty, about how any of this will be addressed.

A quick survey of EA legislation from other jurisdictions (Canada, Yukon, USA, Australia, New Zealand) reveals that such matters are routinely prescribed. For example, these other jurisdictions, including the 1995 *BCEA Act*, specify the following content to be considered in project assessment:

- sustainability
- cumulative effects analysis
- alternatives to the project
- social, economic, cultural effects;

- Aboriginal interests

An environmental assessment scheme properly requires some generalized content to be set out legislation. The methodological approaches should have some principles and procedural guidelines set out so that the foundational requirements of a robust process are clearly established. Most EA legislation has such content. New principles, such as adoption of precautionary approaches and proponent's burden of proof, are being added intermittently to legislated EA regimes as the concepts get clarified and accepted. Scoping exercises, participant engagement rules, cumulative effects, socio-economic and cultural impacts, etc., all require some initial crystallizing in the legislation. Without the broad constituents of an acceptable process being outlined in legislation, the process becomes too much an arbitrary and capricious exercise run at the discretion of the assessor or his political master.

Non Independent Process

The *BCEA Act* is clearly politically driven. Various sections of the statute provide explicitly for ministerial input. The minister may, for example, vary the scope, procedures and methods used for the assessment of a project and provide policy direction to the executive director during an assessment. This is hardly a neutrally administered, independent process. These aspects of the BC legislation are inappropriate for a process that needs to be, and seen to be, objective, science-driven, and credible.

Further, the *Act* requires that outcome of the assessment be consistent with government policy. Results, therefore, cannot be independently and objectively achieved—they must be tailored to political ends. Such a requirement undermines credibility of the process.

No Decision-making Criteria

Under the *Act*, the minister must consider the assessment report and recommendations before rendering a decision, but there are no criteria or guidelines for shaping the decision. Specifically, there is no requirement to consider the interests of potentially affected First Nations in the decision. While there is a common law requirement to do so, as confirmed in the *Haida* and *Taku* Supreme Court decisions, the assessment and

decision processes can take place without any legal responsibility under the *BCEA Act* to deal with Aboriginal issues. The discretion of the minister to decide on a project remains largely unfettered by the EA process.

The absence of explicit legal provisions for the consideration of Aboriginal interests means that a judicial review of the minister's decision is more challenging. Without such legal guidance the executive director will only consider First Nation interests in a way that he interprets as necessary—the narrow and minimalist approach of assessing the legal risks to the ministers if they approve the project. As described elsewhere in this report, this results in an impoverished view of what accommodation should entail.

Even vigorous and diligent participation in the process is no guarantee of fair and proper treatment at the end of the day. For example, the Taku River Tlingits participated fully in the recent EA of the proposed Tulsequah Chief air cushion barge project, and yet the ministers did not even read the Tlingit's final report submitted to the ministers before they approved the project.

No Accountability

Under the BC EA regime ministers must consider the assessment report when making their decision. They are also allowed to consider any other matter that they believe to be in the public interest. This allows for a wide degree of latitude, much of it nontransparent, in the final decision.

There has never been, as far as I am aware, a ministerial rejection of a project based on the executive director's recommendation. Reasons for approval most frequently relied on by ministers, in addition to findings of low environmental risk presented by the EAO, relate to the promised economic benefits of the projects such as tax revenues, investment in the province, and employment. These are all matters that are not assessed in the EA process, nor apparently by any other visible process of evaluation within government. The economic feasibility of a proposed mine for example, most of them high risk ventures at best, is never evaluated by government, with many unfortunate legacies as a result.

In most cases project assessments are likely to result in identified mitigation or management measures that the Crown will need to implement in addition to those being done by the proponent. However, the assessment report produced by the EAO seldom identifies potential requirements for government action if the project proceeds. Even more rare is a recommendation that would oblige the Crown to do something. In other words, there are no commitments made by government to do anything that might be necessary to monitor or mitigate impacts above and beyond the normal course of regulatory duty. In this sense, the process is unaccountable—ministers are not obliged to step up to the plate and do their part.

The removal of key components in the 2002 *Act* means that there are few elements that can be legally challenged if the process runs awry. The wide-ranging discretion of the executive director and lack of specific actions prescribed in the statute results in a legal vacuum, such that recourse to the courts is next to impossible. The government has inoculated itself against judicial review of actions taken pursuant to the legislation. By design, accountability has been avoided.

Similarly, with no legislated provisions for First Nations (or public) involvement, there are no effective mechanisms in the process to engage parties external to government. The process is accountable to neither First Nations nor the public. Case studies below describe the lengths the EAO will go to avoid meaningful public processes, such as, for example, panel reviews.

No Recourse or Appeal

A number of First Nations have experienced frustration with how procedures are carried out, or how process decisions are made by the project director, during the course of an assessment. Added to that frustration is the absence of a mechanism to get such issues resolved in a responsive manner.

The executive director manages the assessment process. Since there is no legal involvement of First Nations in the process and no negotiated terms of engagement for their participation, there also is no legal recourse or appeal mechanism to address

disagreements about procedures or administrative decisions along the way. One is needed.

No Follow-up

Unlike the federal EA regime, the BC legislation does not provide for follow-up programs to gauge assessment outcomes. It provides only a right of inspection, along with an ability for the minister to take certain actions for non-compliance. But this is not dedicated, on-going oversight when inspections are not automatically prescribed but occur only at the discretion of 'a person authorized in writing by the minister.' Besides, certificate compliance is not the only regulatory need. The EAO does not have a system in place to ensure that impacts and mitigation measures are materializing in the ways predicted. The environmental certificate issued by the ministers at project approval is a legal document that sets out the obligations of the proponent to build and operate its project, but without any formal monitoring, auditing, inspection or enforcement mechanisms by government, the effectiveness of all this is highly uncertain.

The recent *Draft User Guide* issued by the EAO identifies the following compliance mechanisms:

- periodic compliance reports prepared by proponents;
- requests to other provincial agencies that they draw to the attention of the EAO any issues of potential non-compliance they may be aware of;
- waiting for concerns to arise from the external sources, such as First Nations; and
- undertaking inspections where necessary.[5]

This is really a bogus bag of compliance measures. Voluntary reporting is hardly to be effective; other agencies are all too busy with their own regulatory functions that do not include administering the environmental certificate conditions, waiting to respond to outside notices is hardly effective monitoring and compliance, and undertaking inspections 'where necessary' begs the question of how the necessity is determined, and by whom. None of these can be seriously considered as effective inspection and

[5] Draft Environmental Assessment Office 2009 User Guide. Version 5. p.37.

enforcement tools. The reality is that the current regime is functionally lacking any kind of systematic and effective oversight for the environmental protection measures it places on proponents.

If this really was a bona fide set of compliance measures, and the EAO was undertaking post-project compliance monitoring, one would expect a full accounting in the EAO's annual report. Such an accounting is not to be found.

Deficiencies in the Practice

How the EA Process Actually Works

The EAO is the designated body for conducting reviews under the 2002 *BCEA Act*. As noted, procedures employed by the EAO to conduct assessments are entirely at the discretion of the executive director.

The EAO's *User Guide to the Environmental Assessment Process* outlines the general framework for a typical environmental assessment. Critical to that process is an order issued under s. 11 of the *Act* which determines the scope of the assessment, the procedures and methods to be used for that particular review, and the terms of reference, which define the information the proponent must provide in its application.

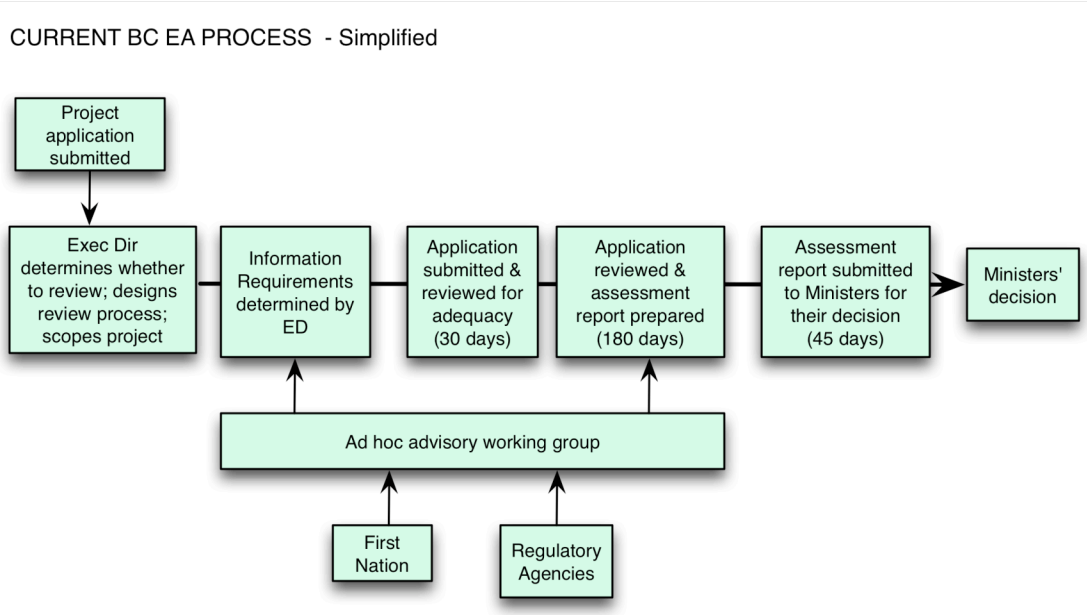
Once the executive director accepts the application for review, he has 180 days to complete the review, prepare an assessment report and refer the application to the designated ministers. The assessment report documents the findings of the executive director, including the issues raised and how they have been or could be addressed. It may be accompanied by recommendations, with reasons, of the executive director. Thereafter, the responsible ministers (Minister of the Environment and the minister designated as responsible for the category of the reviewable project) have 45 days to decide whether to issue an *Environmental Assessment Certificate* (*EAC*) or require further assessment.

At that stage, the *Guide* notes, the ministers must consider whether the province has fulfilled its legal obligations to First Nations. Since the *Act* does not provide for First

Nations involvement in the EA process, the ministers have an obvious difficulty on the face of it as to how to determine whether the legal duty has been satisfied.

In conducting a project assessment the executive director typically establishes, at an early stage in the review, a working group comprising relevant regulatory officials, local governments, and affected First Nations. Since a number of projects are always under review at any given time, the executive director's responsibility for conducting individual assessments is usually delegated to a project director.

A simplified description of the current BC EA process is shown below. In short, the executive director is solely responsible for conducting the review of a proposed project, and submitting an assessment report to the ministers for their decision on whether to approve the project.



The working groups are used by the executive director for three main tasks:

- submitting input on what information is required from the proponent in the environmental report;
- submitting input on the adequacy of the proponent's environmental report, including evaluating the impact predictions and proposed mitigation measures; and,
- reviewing a draft assessment report distributed by the executive director

prior to its submission to the ministers.

Potentially affected First Nations are invited to participate on the working group, along with other relevant provincial and federal agencies, and other jurisdictions where appropriate. However, at the end of the day, the executive director alone is responsible for making conclusions about the adequacy of the assessment and formulating recommendations for the ministers. As a member of the working group a First Nation gets an opportunity to comment on the draft report and recommendations. In more recent reviews, participating First Nations are also notified that they can submit an independent report to the ministers if they are not satisfied with the executive director's assessment report.

There is no legislated provision for the working group, as there was under the former 1995 EA legislation. As a result, there are no formal rules or guidelines informing the role and responsibilities of this group—it serves merely as an informal advisory body to the executive director who, at the end of the process, is not obliged to consider any matter or recommendation made by the group. Even though the working group is a legally invisible body, the executive director relies on its members to review the proponent's environmental assessment material (each from their own perspective) and to form the substantive content of the review.

It is important to note that the EAO itself conducts no real analysis of the project on its own. The information and analysis is done by the proponent, and reviewed by the working group and project director. If the proponent's material passes the review as determined by the project director, he then prepares a draft assessment report, including recommendations. This is typically circulated to the working group for comment before being finalized.

Working Group Composition

One of the weaknesses with the current EA process is the use of regulatory officials (sitting as members on the working group) in the assessment. These typically comprise those provincial and federal officials who will subsequently issue government authorizations for specific activities associated with constructing or operating the project,

or who otherwise have some close connection to the issues raised by the project (e.g., fish and wildlife biologists from MOE). It is fair to say that, for the most part, these officials are not qualified EA practitioners, even though they may be experienced regulators. Their job comprises nothing more than advancing government policy through their agency mandates.

A typical s.11 order for a project review makes it clear that members of the working group are to participate in the assessment 'from the perspective of the interests and/or program responsibilities of the organizations which they represent.'[6]

EA practice and government regulation are not the same thing. One requires unbiased, objective thinking; the other implementing government policy. The regulatory framework is one of issuing approvals to proponents, attaching whatever terms and conditions on the licenses that the regulator determines may be necessary to ensure effective environmental protection. But regulators are not trained to deal with, nor do they ever have to contemplate, the higher strategic questions about the environmental acceptability or sustainability of the project—should it be built or not?

By its composition, working group input to the assessment process comprises individual agency views about what it would take to get the proposed project permitted. Has sufficient information been delivered so that the regulatory function can be filled? That is the principal question being addressed in the EA stage. It is, in other words, essentially a 'pre-permitting screening' exercise that properly should be conducted at the permitting stage. As a result, there is nobody present in the EA process to integrate the individual agency conclusions and recommendations into a coherent and comprehensive assessment of project viability, and to answer in any real sense the ultimate strategic questions about project acceptability.

A compounding problem is that the EAO relies on regulatory officials in the working group as 'experts'. In various assessment reports and reasons for decision issued by the EAO, reference is frequently made to 'the expert advice of members of the working

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[6] See, for example, the s.11 order for the KSL Pipeline Looping Project, item 11.2.

group' to support a conclusion of the executive director. The EAO acts as though its advisory group of agency staff, all of whom are participating expressly to represent their agency and to act consistent with government policy, is an independent body of experts. While there is undoubtedly expertise in the relevant areas among some provincial regulatory officials, it is a dangerous conceit to behave as if they are all experts and, even more so, as if they were independent.

Working Group Process

A major problem with the working group approach used by the EAO to conduct assessments is that it is purely advisory. Moreover, the executive director is free to ignore all the advice given—there is nothing in the *Act* that requires him or the minister to consider the advice given by the working group (including the First Nation member) or, for that matter, any advice provided by a consultant hired by the EAO to provide expert advice.

A typical s.11 order for a project review identifies the following tasks for the working group:

- reviewing and commenting on draft application terms of reference;
- providing advice on First Nation consultation activities;
- providing advice on public consultation activities;
- screening, reviewing and commenting on the application;
- providing advice on issues raised during the assessment; and,
- providing advice on the assessment findings.

Under the 1995 legislation the project committee had explicit roles in formulating the actual findings and recommendations that went to the minister. This meant that there was at least a formal opportunity for participating First Nations to have an effective voice in the outcome, and for the minister to consider the recommendations. None of this exists with the working group model currently being employed.

Role of First Nations

The manner is which individual assessments are carried out presents a number of

difficulties for First Nation participants.

The figure above illustrates the structural cause of some of the problems. First, one of the key exercises in conducting a project review, since it influences all that is to come, is the design of the process and the scoping of what things need to be included. In the BC case, the executive director does this unilaterally, with the results issued to the proponent as a s.11 order under the *Act*. First Nations are precluded from this critical step, as their participation through the working group does not begin until the next step (identifying information requirements for the proponent's application).

Conceivably, this might be acceptable if the EAO produced s.11 orders that effectively provided for the First Nation's needs in the design and scope of the review. However, it does not. The list below, prepared by the Carrier Sekani in response to the s.11 order for the KSL pipeline looping project, summarizes the deficiencies:

- the order requires the proponent to provide an assessment of the adverse effects of the project on Aboriginal interests and rights, but the responsibility for this lies with the Crown and there is no mechanism stipulated for how the Crown will conduct its consultation and accommodation duty;
- the order requires the proponent to take into account 'practical means to prevent or reduce to an acceptable level any potential adverse effects', raising the unresolved issues of who determines what is practical and what is acceptable, and to whom;
- the order requires the proponent to address the issues raised by the First Nation, but why should First Nations be expected to cooperate in this when the proper venue is discussions with the Crown, and no such process is offered;
- the order requires the proponent, without any additional guidance, to consult with the Aboriginal communities along the route to identify their concerns and provide these to the EAO to assist the executive director in developing the application terms of reference, thereby forcing the First Nations to engage in a consultation process with a third party who is neither legally responsible for the duty, nor necessarily knowledgeable about what the Crown's objective is, thereby increasing the risks of misunderstanding and omission;
- the order provides no consideration about how the First Nations are to be effectively resourced so that they can respond properly to the directives

placed on the proponent for community engagement;

- the order specifies that it is the project assessment director who 'deems' what comments received from First Nations are within the scope of the assessment, raising questions about the unilateral and unfettered discretion being assumed by the project director to determine the content of Aboriginal issues, as well as the legal right of the director to 'narrow the scope' of these; and,
- the order delegates the power to the Project Assessment Director to make determinations of adequate consultation and accommodation conducted by the proponent, in advance of the Minister's decision whether the project should proceed or not, essentially morphing the EA process into an accommodation determination process that displaces the Crown's duties and presupposes the approval of the project.

Exclusion of First Nations in the scoping of the assessment, the design of the review, the design of the consultation process, and the formulation of advice to the ministers with certainty that it will be considered all render the role of First Nations inconsequential in project reviews. As will be seen in the following sections in this chapter, the net effect of the way that the executive director currently conducts project reviews essentially precludes any meaningful engagement of Aboriginal people, who stand to be most affected by the project, in the process.

Inflexible Process

Paradoxically, the absence of any provisions in the *Act* providing direction to the EAO about the content and procedures to be used in an assessment—meaning project directors have total discretion on how a project review is conducted—results in an inflexibility on the part of the executive director when a First Nation requests changes to an impending process to make it more acceptable to them.

The EAO adheres rigidly to a particular model, with no apparent willingness to adjust or shape assessment processes to meet the varying needs of First Nations who may be willing to participate, but are being frustrated by an imposed process that they feel will not allow them to participate most effectively.

There are several examples of First Nations who have attempted to negotiate the EA

process with the EAO, but who have been unsuccessful.

Kitimat/Summit Lake Pipeline

In May 2008 the EAO completed an assessment of a proposed 463 km natural gas pipeline project from Summit Lake to Kitimat. This project, a loop to an existing gas pipeline, would cross 4 major watersheds and potentially affect some 17 First Nations in BC.

Discussions between the various First Nations and the EAO started in early 2006. The Carrier Sekani Tribal Council, representing six of the 17 First Nations in early talks with the EAO, was not content to enter the existing EA process without some fundamental changes. It argued that the BC process was not adequate to deal with the Aboriginal title and rights of its members, and supported this by tabling a critique of EAO practices. CSTC sought to negotiate what it saw as the required changes in the EA, including the need to establish a government-to-government consultation process with joint decision-making.

Several meetings were held to discuss the desired modifications, but by June 2007 the EAO determined it could not agree to the changes sought by CSTC. During this period, CSTC did review the EAO's draft terms of reference for the project review, and submitted comments for the executive director's consideration. When the finalized terms of reference did not incorporate any of its suggested revisions, CSTC decided that it would not participate further in the BC process.

The EAO's consultation report on this history with CSTC notes that once the terms of reference were approved for the review CSTC did not participate in the BC process.[7] The report concludes, 'The EAO believes it took all reasonable measures to continue to consult with the Carrier Sekani Tribal Council throughout the review process.' The report also notes that the EAO was unable to obtain the views and concerns of CSTC as a result of CSTC's boycotting the EA process.

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[7] Kitimat – Summit Lake Pipeline Looping Project. EAO Assessment Report. May 12, 2008.

During the review, the EAO relied on the proponent for information about how the relationship between the company and CSTC was working. The proponent informed the EAO that CSTC had submitted comments on the project application, and discussions were underway on how to resolve the issues raised by CSTC. Discussions between CSTC and the company led to the completion of a traditional land use study that was submitted in confidence to the EAO as part of the project application.

The EAO relied on the proponent to deliver the executive director's draft consultation report to CSTC instead of sending it directly to them. However, CSTC did not provide comments on the draft, stating that it could not support the draft consultation report since it had many inaccurate or potentially misleading statements' and that, at any rate, it was premature since CSTC was involved in separate discussions with the proponent and another government agency on an alternative process.

At the end of the process, despite there having been no meeting or substantive communications between the two parties since the start of the application review, the EAO concluded that its consultation had been 'carried out in good faith, and that it was appropriate and reasonable in the circumstances.' It also concluded that 'reasonable efforts have been made to ensure the potential for effects on asserted Aboriginal rights has been mitigated to an appropriate level such that they will not significantly impact the Carrier Sekani Tribal council member First Nations from exercising their rights.'

It is interesting that these conclusions about the adequacy of the consultation and absence of significant impacts, arrived at without the engagement of the CSTC in the process, is the same conclusion arrived at for the other First Nations who did engage. One might wonder what the benefits of the EAO's consultation process are given no difference in outcomes whether or not it is even implemented.

Mt Milligan Mine

In 2008 the Nak'adzli Band Council attempted to negotiate an amended EA process with the EAO for the assessment of the proposed Mt. Milligan copper-gold mine in Nak'adzli territory.

Nak'adzli proposed a jointly managed process that would include an assessment of social, cultural, economic and cumulative effects, with all written output jointly drafted by the parties. A technical working group comprising representatives of the two parties would conduct the assessment, and all public and working group meetings would be co-chaired. The technical working group would report out to a joint process committee comprised of senior officials from the First Nation and Ministry of Mines Energy and Petroleum Resources who then deliberate on the results, identify the appropriate measures needed to mitigate or compensate for impacts, and enter into agreements required to implement the measures, and jointly issue a recommendations report to the Minister of Environment and Nak'adzli Chief and Council about whether the project should be approved or not. Finally, BC was to ensure adequate funding to enable Nak'adzli to implement the process.

The EAO would not agree to negotiate such changes to its process. Instead, the EAO conducted its regular EA process without the participation of the Nak'adzli. In February 2009, the ministers approved the project without having executed their duty to consult with the Nak'adzli.

Sharp Dealing

In commenting on the nature of the relationship between the Crown and Aboriginal people, the Supreme Court of Canada has held that it needs to be one of reconciling the interests of the Crown with that of Aboriginal people, and that the honour of the Crown requires that this be done. [8] The court also noted that the Crown must act honourably in all its dealings with Aboriginal peoples. In doing so, the court explained, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing".

The fact that the EAO is operationally inflexible and unresponsive to First Nation engagement needs is problem enough. But some First Nations have experienced behaviour by the EAO that can only be described as 'sharp dealing', in the sense that the agency's actions and behaviour seem to be deliberately unfair and devious, disrespectful

[8] *Haida Nation*. SCC. para 19.

and otherwise prejudicial to Aboriginal interests. The EAO has shown on a number of occasions that it does not really understand the concept of the honour of the Crown, and that it cannot be trusted to act consistent with that honour when it deals with First Nations. These are strong words, but the following experiences support this view.

Tulsequah Chief Mine 1998

At the conclusion of the assessment for the proposed Tulsequah Chief Mine in 1998, the executive director, under what was clearly political pressure at the time, abruptly truncated the review process. This prevented several impact and mitigation issues important to the participating Taku River Tlingit First Nation from being properly resolved. To enable this, an extraordinary memo from a deputy minister was secured to provide a policy-level rationalization for the acceptability of what was otherwise agreed by the project committee to be insufficient wildlife baseline information.

Moreover, the record of the project committee proceedings was falsified to make it appear to the ministers that an issue clearly identified by the committee as being unresolved had, to the contrary, been resolved by the majority committee with only the Tlingits not in agreement.

The project was approved, and after six month's of attempting to get the Crown to resolve the issues raised by the ministers' approval, the Tlingits had the case judicially reviewed. The trial judge quashed the ministers' approval on the basis of a deficient EA process.

Prosperity Mine

In early 2008 the Tsilhqot'in National Government met on several occasions with BC and Canada for the purposes of negotiating Tsilhqot'in participation in a forthcoming joint review panel for the proposed Prosperity Mine—a process that all parties, including the proponent, supported at that time. A discussion paper had been circulated, and a draft framework agreement setting out arrangements for both the joint panel process and a separate consultation process, was being discussed.

All this changed when the proponent Taseko Mines abruptly wrote to BC and stated that it was now opposed to the joint panel process, and wanted something different. Within three days, the EAO wrote back and told the proponent that it could have another process instead—either a panel that could not make recommendations, or the BC EA process. The proponent opted for the latter. The EAO's initiative was done without consultation with either the TNG or Canada, despite the fact that it had been negotiating in presumed good faith with these parties for a joint panel review process.

This event inescapably raises several issues about the credibility of the EAO. First, the speedy unilateral reversal of position demonstrates the agency's lack of integrity and respect for its engagement with the TNG and for due process. Second, its integrity is further called into question by the fact that now a proponent gets to decide what kind of a process it wants. The type of review is normally determined by objective, pre-established criteria set by the assessment agency or by regulation. Third, what does the EAO's offer of a panel process that cannot make recommendations tell us about the integrity of the agency? No party could take such a concept seriously and, in fact, the proponent chose the only option it knew it could depend on for a favourable result.

Tulsequah Chief Air Cushion Barge

From 2007 to 2009 the Taku River Tlingits participated in the provincial assessment of a proposed air cushion barge to operate on the Taku River between the Tulsequah Chief mine and Juneau Alaska. At the conclusion of the review, the Tlingits notified the EAO that they would be producing their own assessment report to the ministers, but that this would be submitted a few days following the completion of the executive director's assessment report. The Tlingits ended up submitting their report nine working days later, on the same day the ministers issued their approval for the mine. Either the executive director did not bother to notify the ministers that a separate report from the Tlingits was forthcoming, or the ministers did not bother to wait. This was a serious breach of the consultation duty that only be interpreted as gross incompetence (at best) or sharp dealing (at worst).

That such an egregious violation of the Crown's honour happened when the ministers

were under no regulated timeline to act and there was no real proposal on the table (since the company had previously filed for bankruptcy protection) is even harder to reconcile.

In their report to the ministers the Tlingits noted some of the questionable actions taken by the executive director.

First, there was the demand on short notice for the Tlingits 'to identify, with specificity, the activities and asserted Aboriginal rights of the TRT First Nation that could be impacted', and to submit this within one month.

Second, the EAO never explained to the Tlingit what it meant by consultation. It prepared its consultation report unilaterally, and then asked the Tlingits for their comments. The Tlingits did not supply comments on the draft report, but they did arrange a meeting with the EAO to discuss the accommodation issues as the Tlingits saw them. None of these issues got properly incorporated into the executive director's final consultation report, with the result that the ministers were never informed of the Tlingits' concerns before they issued the environmental certificate.

Third, the executive director, in his 'strength of claim assessment' for the Tlingits, found that,

> "it is likely that a court would find that the Taku River Tlingit First Nation could establish a strong *prima facie* claim to Aboriginal title to the proposed amendment area (and, as noted above, a strong *prima facie* claim to Aboriginal rights to hunt, fish, trap and gather)."[9]

Despite the fact that this conclusion should have led the executive director to make a concerted effort to consult seriously on the outstanding issues, no such effort was made. Instead, the executive director made what he called 'deep' consultation, which consisted of the following:

- the Tlingits received all information on proposed project;
- the Tlingits got to participate in the EAO's working group;
- opportunities were provided to the Tlingits to comment on all documents;
- the EAO responded in writing to the Tlingit's comments;

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[9] First Nations Consultation Report for Tulsequah Chief Mine Project. EAO. February 13, 2009.

- the Tlingits had an opportunity to provide feedback on the consultation report; and,
- the Tlingits had an opportunity to provide a separate report to ministers.

This is a very impoverished view of consultation, let alone 'deep' consultation. Nowhere was there any serious attempt by the EAO to resolve issues and reach agreement on what accommodation measures would be needed. The executive director's consultation report presented a misleading picture to the ministers since the real situation is the following:

- there never was a process established to execute the Crown's duty of consultation and accommodation;
- the EAO's written responses did not resolve the issues raised, and some things were never responded to;
- even though the Tlingits identified their accommodation issues to the EAO, there never was any resolution of these, nor were they even identified in the executive director's consultation report; and,
- even though the Tlingits wrote a separate report to the ministers, it either did not get delivered to them by the EAO or else the ministers ignored it.

The problem of all this unilateral assessment done by the EAO is that, among other things, it results in findings that are both perverse and unacceptable. An expert report submitted to the EA process identified that the barge operation would result in a 10% loss of fishing opportunity by Tlingit fishers in the Taku. The EAO did not argue with the finding, but concluded that the impacts 'would not be a significant impact on the TRT First Nation.' This conclusion was reached without any consultation with the Tlingits, and without any explained methodology about how the determination was made.

Mt Milligan Gold-Copper Mine

A petition filed by the Nak'azdli First Nation in the Supreme Court of BC on June 23, 2009 illustrates clearly the current state of confusion and resistance within the EAO and, sadly, bad faith on the part of the Crown, about putting in place a meaningful consultative process for First Nations around approval decisions for major projects.

The proposed gold-copper mine at Mt. Milligan within Nak'azdli territory was subjected to a BC EA review in 2007-2009. Early in the process Nak'adzli met with the EAO to express its concerns about the EA process, with a view to negotiating a modified

government-to-government process that would meet the needs of the First Nation. Until this was resolved, Nak'azdli could not participate in an EA process that it viewed as fundamentally flawed and unable to give proper consideration of the First Nation's interests.

These talks were unsuccessful. Despite the high level of discretion in the *Act* regarding how the assessment can be conducted, the EAO would not agree to modify its process. Ultimately, it advised that a consultation process outside of the EA process to discuss Nak'azdli's issues would be possible.

Talks were then established between MEMPR and Nak'azdli, with the EAO in attendance. During this period the First Nation tabled a letter of understanding with the Crown describing the process ahead that Nak'azdli envisioned. Neither agency was willing to sign on to the proposal, but MEMPR eventually produced a statement of principles for a joint government-to-government decision-making process. Nak'azdli responded to this by adding components that included shared decision-making on the project approval decision. It took MEMPR from September of 2008 to February of 2009 to notify Nak'azdli that it would be pursuing government-to-government discussions since it had now received a mandate to do so.

In the meantime, the EAO continued its assessment of the project without the First Nation's participation. It notified Nak'azdli that it could find no support for Nak'azdli's asserted Aboriginal rights and title in the Mt. Milligan area. In February, the ministers issued the environmental approval for the project, without consulting Nak'azdli.

Nak'azdli then discovered that MEMPR had previously decided that there would be no government-to-government process to address the strategic issues, that the issuance of the certificate had resolved the strategic decision about the project, and that any further consultation would be restricted to technical issues to be dealt with in mine permitting activities. This was a reversal of its original position to engage in strategic level consultation and accommodation talks.

The fact that the EAO had privately undertaken its own assessment of Nak'azdli's

Aboriginal rights in the project area is another example of sharp dealing. A previously submitted report to the EAO by Nak'azdli on its Aboriginal interests in the area, plus two expert reports on the same subject submitted in mid-February, 2009, had no influence on the EAO's position that Nak'azdli had no Aboriginal title or rights in the area. The EAO supported the claim of a neighbouring First Nation that had come out publicly in support of the project.

By withholding that report until near the end of the EA process, the EAO kept the First Nation in the dark about what it was up to, and deprived Nak'azdli of a reasonable period for responding.

Further, despite the fact that BC had previously accepted the Carrier Sekani Tribal Council's statement of intent for treaty talks (of which Nak'azdli is a member), the EAO assessed the strength of the Nak'azdli claim using a standard of proof different than that required by law and, concluding that Nak'azdli had no Aboriginal rights and title in the project area, found it had no duty to consult. This is another example of how the agency does not uphold the honour of the Crown in its actions.

The Nak'azdli petition highlighted the problems with the EA process as a consultative mechanism:

- it did not provide a forum for the proper assessment of impacts to Aboriginal interests;
- it used its own secretive and flawed process to evaluate the strength of Nak'azdli's Aboriginal interests to reach a determination that there were no Aboriginal title and rights held by the Nak'azdli in the project area;
- it denied any role for the First Nation in the decision about project approval;
- it did not give proper notice of or opportunities to respond to significant documents;
- it could not provide any accommodation measures;
- it established no structure or criteria for addressing Aboriginal rights and title; and,
- it proceeded and concluded without ensuring any adequate process for addressing Aboriginal rights and title.

Despite having indicated to Nak'azdli that it would have an opportunity to review the

assessment report, the executive director finalized that report and submitted it to the minister without providing that opportunity.

Finally, the Nak'azdli petition concludes that the Crown acted in bad faith since it led the First Nation to believe that the Crown was interested in a meaningful consultation process that would address the real concerns of the Nak'azdli, all the while it was conducting other activities so that it could expeditiously complete the EA process and issue a certificate.

Issuance of the environmental certificate clearly represented a strategic decision by the Crown to allow the project to proceed. The Crown knew, when it decided to approve the mine, that consultation had not been completed and was relying on future consultation during the regulatory phase to address the interests of Nak'azdli. This was legally wrong and deliberately harmful to the First Nation's interests, since consultation and accommodation, to be meaningful, must be completed in advance of the Crown's decision to approve the project.

Process not Neutrally Administered

The EAO conducts its assessments in ways that are, arguably, overly accommodating to the interests of proponents. It is a pronounced bias in the process, and undermines the agency's claim to conducting objective and balanced processes.

For example, while the proponent is not a formal member of the working group no meetings occur without the proponent present. There is a place for the proponent at stages in the EA process, but there are also critical stages (such as the determining of residual impacts, significance, or final recommendations) when discussions in the working group should remain unfettered and free-flowing, without the proponent.

There are examples of where the proponent gets to decide what kind of an EA process it should be subject to. As noted earlier for the currently proposed Prosperity copper mine project, the proponent rejected the proposed joint review panel, and instead asked the EAO if it could have the BC assessment process. The request was granted by the EAO.

In other situations, the EAO is all too eager to please the proponent in meeting specified timelines, blocking discussion of relevant topics in the working group process, or otherwise contemplating only those mitigation measures which are acceptable to the proponent. The 2008-09 review for the Tulsequah Chief air cushion barge exemplified all three problems. When the EAO explained its reason for the specified completion date, the explanation was that the certificate could then be issued in a timely way to assist the proponent (at that point in creditor protection) in meeting its refinancing target dates to avoid bankruptcy. The project had already been suspended by the proponent for an indefinite period of time, with the company's news release explaining that the project may be substantially changed in the future. Further, since the application was for an amendment to an existing certificate, there also was no regulated timeline involved. Despite there being no real project in hand, the proponent being under creditor protection, and no formal timelines, the ministers issued the certificate a scant 13 days following receipt of the EAO's assessment report.

A mitigation proposal by the Taku River Tlingit for the same project illustrates the second problem of the proponent influencing the process. The proposal was for an environmental oversight body to 'watchdog' the environmental performance of the Tulsequah ACB. Discussion of this was effectively vetoed by the proponent. The agency would neither distribute it to working group members for discussion, nor consider it as a mitigation option, solely on the basis that the proponent had stated its unwillingness to pay for it (estimated annual cost of $80,000).

This highlights a third, and very significant, problem with process bias. Only those mitigation measures to which the proponent will voluntarily commit are ever listed as conditions in the environmental certificate. Such an arrangement can never guarantee an effective environmental protection scheme.

Another example of bias in the EAO's approach to its mandate is shown in the agency's commissioning of a 'satisfaction survey' among proponents. It has had three of these done to date (2004, 2006, 2008). The stated intent is 'to improve client service' to proponents. Here, the EAO has it wrong. The agency's purpose is not to perform a client

service but to conduct an objective evaluation of a proposed land use activity to assist government in making the right choice. Its 'clients', if this is the appropriate term, are really the public and, especially, the communities who stand to be affected by the project.

It is unfortunate that the EAO does not see its task in this light, or recognize its responsibility to those affected. On the basis of anecdotal evidence we have on hand from First Nations at least, it would be reasonable to predict that the conduct of a 'potentially affected community satisfaction' survey might produce results in stark contrast to the satisfaction ratings of proponents.

Inadequate Funding

The lack of adequate funding for First Nations to participate in any effective way in the BC EA process is a serious problem. First Nations are essentially forced to participate in EA and other regulatory processes as new land use and development applications are advanced in their territories. It is not fair, nor is it consistent with the concept of reconciliation, that BC forces these processes on First Nations but will not provide them the necessary funds to properly engage in them.

The EAO's consultation reports and annual service plan reports are quick to point out that capacity funding was provided (or at least offered) to First Nations participating in an EA process. However, these reports never specify the amount of funding, and never provide any analysis as to the funding needs of Aboriginal participants, whether the needs have been met, whether funding has produced any tangible benefits, etc. There is simply no serious consideration by the EAO of this very real problem. The reality is that the funding offered by the EAO is usually trivial relative to the real costs of participating borne by the First Nation. In most cases it is so little as to be demeaning.

The EAO attempts to encourage proponents to provide the necessary funds to the First Nation for participation in the EA process. There is some merit to this position, since it is proponent's project that is imposing the costs of assessment on both the government and the First Nation. However, the duty to consult, and hence the duty to fund, falls to government. If the proponent is unwilling to provide adequate resources to the First

Nation, then government must step up to the plate to ensure that Aboriginal interests are properly and effectively represented in the process. Government is chronically delinquent in not dealing with this problem, and in not even properly attempting to understand the severity of the issue.

Consultation & Accommodation

A central objective for decision-making on a major project is the need to reconcile the impacts posed by the project with the interests of the potentially affected First Nation. This exercise is what is formally known across Canada as the Crown's duty to consult and accommodate. The 2004 *Haida* and *Taku* decisions of the Supreme Court held that the Crown has a legal obligation to act honourably when it makes decisions that may infringe upon Aboriginal title and rights. There is, consequently, an onus on government to attempt an appropriate reconciliation with any First Nation that may be affected by the approval of, among other things, a major project or land use activity.

The manifestation of this in BC is a shadowy and non-transparent process that, for environmental assessment purposes, has been delegated to the EAO by government. It is badly designed and deviously implemented. And there is now sufficient experience with the process to date to indicate that it does not achieve what it should be achieving.

The description above about 'sharp dealing' in the Mt. Milligan project assessment clearly illustrates the deficiencies in the province's consultative process. Below, with reference to a few additional examples, several others problems posed by this process are reviewed. As explained, BC officials have yet to understand that a unilaterally designed and imposed consultative process (as is the case for the EAO) will never meet the intent of the Supreme Court's directive to maintain the honour of the Crown. And for that reason it will never be acceptable to First Nations.

Consultation and accommodation are not distinct concepts—the first is a process of engagement to discuss the issues; the second is the concrete outcome or resolution of the discussions. Consultation, no matter how long or how well it is conducted, is pointless if it does not produce a meaningful and, ideally, a mutually acceptable resolution of the

issues (i.e., an accommodation).

In *2004*, the Supreme Court defined the consultation duty,

> "At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. ...
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. ...
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.
>
> …Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations… When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. [*emphasis added*] [10]

A year later, in *Mikisew Cree First Nation*, the Supreme Court added,

> "The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action." [Emphasis in original.][11]

These and other pronouncements from the senior courts make it clear that the nature of

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[10] Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511. 2004. para.43-47.
[11] Mikisew Cree First Nation v. Canada, 2005 SCC 69. para.64.

the relationship between First Nations and the Crown should be trust-like rather than adversarial. As we shall see, the relationship imposed on First Nation participants in the assessment process is the reverse of what the court contemplated.

Many if not most major project assessments in First Nations' territory will typically indicate that certain actions will need to be taken by the Crown to prevent or mitigate impacts to the environment or Aboriginal interests. The environmental certificate issued to the proponent sets out the requirements for mitigating impacts of the company's project, but no mechanism exists to address or give life to those measures that the Crown might need to take to mitigate other impacts, or to meet its constitutional obligations as outlined by the courts. Indeed, there is no mechanism in the Act that even binds the ministers to making a decision consistent with the environmental assessment results, let alone one that is reconciled with Aboriginal interests.

The predictable result is that First Nations can be left at the end of an EA process with no accommodation, and no formal process to meaningfully discuss with the Crown any necessary accommodation measures.

BC holds the view that consultation toward this end can be carried out by the executive director during the EA process. Further, BC's view is that any accommodation still needed at the end of the EA can be achieved by First Nations participating in the subsequent regulatory processes and negotiating its accommodation needs in the relevant permits. This is almost certainly doomed to failure, as it has substantial and generally insurmountable problems associated with it, for the following reasons:

- accommodation is not achieved until after the project is approved;
- it assumes all accommodation can be achieved through regulatory processes;
- forces the First Nation into a negotiating process with regulatory officials with delegated decision-making responsibilities who are not properly briefed, have no or little negotiating mandate, and who insist that their decision-making powers remain unfettered; and,
- forces the First Nation into situation of additional costs, with no sources of funds to enable participation and hiring of expertise.

Two case studies are summarized below before I turn to a general analysis of the

problems with the current consultative process.

Tulsequah Air-cushioned Barge Project

At the same time as Mt. Milligan project was being run through the BC EA process, the EAO was also conducting its assessment of Redfern Resource's proposed air cushion barge project to operate from the Tulsequah Chief Mine down the Taku River into Alaska to Juneau.

The Province had already approved the mine and a 160 km access road to Atlin in 1998, over the objections of the Taku River Tlingit which centred on very significant unresolved predicted impacts of the new road opening up Tlingit territory for development. For a variety of legal, technical and economic reasons, the road never got constructed, and the barge access proposal was Redfern's new approach to solving the problems.

The Tlingits participated fully in the EA for the barge access. They had no real objection to the barge, since this obviously was a much more sustainable option than the road. Despite their full involvement in the process, however, the EAO frustrated the Tlingits' substantive proposals for mitigating and monitoring the impacts of the barge in a number of important ways.

At the end of the assessment, for example, only one 'moderate' rated wildlife impact was identified—the possible displacement of habitat use by grizzlies along the river corridor. For this, the EAO would not support the Tlingits' proposal for a grizzly bear DNA sampling program because, it stated, Redfern would or should not pay for the $7500 per year cost, even though such a program was recognized as being able to deliver technically sound and useful information for wildlife managers. The EAO instead recommended a grizzly track survey program, generally recognized as useless by wildlife managers, as mitigation.

The Tlingits then recommended a sanctuary, or protected alternate habitat, for the bears in the Taku Valley. The EAO would not consider this option.

Additionally, the Tlingits wanted to ensure there was an effective and independent oversight of the environmental monitoring programs that would be conducted by the company, since there was no existing regulatory regime for the ACB once approved by the minister. The EAO would not entertain this option because the company stated that it would not pay the $80,000 per year to run the oversight committee. The EAO even thwarted discussion of this option at the working group level by not distributing the Tlingits' proposal for the oversight body to the other members, or even acknowledging that it had been submitted.

A traditional use study of the lower Taku area affected by the proposed barge project was conducted, but its results were almost totally ignored by the EAO. It provided no assessment of the report, but simply left it to the proponent to resolve the issues raised, even though some of these clearly fell to the Crown to deal with.

The traditional use study showed that the barge operation would diminish Tlingit fishing opportunity in the river by about 10%. The EAO concluded, without any consultation with the Tlingits or other visible analysis, that this loss was 'insignificant' and, therefore no mitigation or compensation was required—by either the Crown or the proponent. Further, the EAO would not impose any mitigation or monitoring to document whether the barge would interfere with fishing activity or destroy nets, etc. in the river. The barge would be allowed to operate without any systematic oversight about its impacts to Tlingit use of the river.

The assessment report by the EAO provided the ministers factually incorrect conclusions, including:

- all issues identified by the Tlingits during the review had been 'adequately addressed' by the proponent;
- the potential for adverse effects on Tlingits' Aboriginal interests had been avoided or mitigated or otherwise accommodated;
- the Crown had fulfilled its obligations for consultation and accommodation; and,
- 'practical means' had been identified to prevent or reduce any potential significant adverse effects (when, in fact, many of the means were speculative and unproven).

The executive director's consultation report to the ministers also had serious flaws:

- it concluded that the EA process represented 'deep consultation';
- it concluded that while there was a strong case for Aboriginal title and rights in the project area, there were no significant issues that needed to be addressed, and no accommodation was therefore necessary; and,
- it made no effort to report on the actual issues identified by the Tlingit as requiring Crown accommodation and, thus, deliberately deceived the ministers into thinking that all the Tlingit issues had been resolved and the Crown's duty taken care of.

What's Wrong With the EAO's Consultative Process?

The consultation process conducted by the EAO is not formally defined, and First Nations entering the EA process are given no clear picture about how the consultation process will be conducted, and what exactly it entails. Some examples of the major deficiencies of the EAO's consultation procedures have been described above.

A generalized picture of what happens is that the EAO notifies the First Nation at some early point in the EA process that the executive director will be producing a consultation report for the ministers, and that the First Nation will have an opportunity to comment on the draft before it is finalized. The EAO offers to meet separately with the First Nation for consultation purposes if the First Nation would like; otherwise the EAO uses the issues as identified in the proponent's environmental impact statement and the working group process as a basis for preparing its report.

Separately, away from the EA table, the EAO conducts a 'strength of claim' assessment to determine the nature and extent of any Aboriginal title or rights that may exist in the project's zone of influence. It uses whatever information it has on hand relevant to the First Nation's territorial claim, including any new information that may be generated for the current EA, such as traditional land use studies.

There is an obvious problem with this approach. As the Carrier Sekani put it in commenting on the EAO's section 11 order which set the scope for the assessment of the KSL gas pipeline project, noting that it had been issued without adequate consultation,

> "The Environmental Assessment Office has no legislated authority or mandate,

> nor any expertise, to determine the nature of CSTC Aboriginal rights and title, or the degree of infringement which would be "acceptable". It is inappropriate to ask the staff of the EAO, while undertaking an environmental assessment, to fulfill the Crown's duty of consultation and accommodation."[12]

The problem here is that not only is the EAO poorly equipped (legally and technically) to carry out a strength of claim assessment, but that it is missing the boat in terms of what the consultation process should be attempting to do. Recent consultation reports, such as that done for the KSL project, are better characterized as legal risk assessments, rationalizing to the ministers the executive director's assessment of just how much (or how little) accommodation may be needed to meet the constitutional duty and avoid a legal challenge. Rather than adopting such a minimalist approach to identifying the Crown's responsibilities, a true reconciliation approach would attempt to resolve the outstanding issues identified by the assessment through joint discussions, not a unilateral exercise undertaken by an agency that does not have the required expertise and is otherwise compromised by its pro-development bias.

The Carrier Sekani comments on the s.11 Order for the KSL pipeline also identified the paramount problem with the EAO's consultation process,

> "Further, the s.11 Order does not contemplate how First Nations—who are not involved in the process—will be able to raise issues with the Crown. It appears that First Nations who do not agree to participate in this flawed process will not have their 'issues' addressed at all by the Crown."[13]

Most of what transpires in the EAO's consultation process is unwritten and poorly explained. Told by the EAO at the outset of an EA process, a participating First Nation has no accurate picture of what to expect along the way. Not much is explained, nor does any real consultation occur. Near the end of the process the executive director produces a draft consultation report, with an offer to the First Nation to review and comment.

The EAO apparently views the participation of the First Nation in an EA process as the entirety of its consultation duty—consultation is considered to be more or less complete at the end of the EA, whether or not separate 'consultation' meetings have occurred in

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[12] Comments of Carrier Sekani Tribal Council re S.11 Order, KSL Pipeline Looping Project. March 16, 2007.

[13] as above.

addition to the regular working group discussions. Indeed, consultation is considered by the executive director to have been completed successfully even when the First Nation never participated in the EA, or ever met separately with the EAO for the explicit purpose of consulting, as happened with both the Carrier Sekani in the KSL pipeline project and the Nak'azdli for the Mt. Milligan mine review (discussed further below).

In his *Reasons for Decision* on the KSL pipeline project, the executive director put it this way,

> "A draft consultation report for each First Nation, outlining this assessment, was shared with each First Nation with a request for review and comments. Any comments received were considered by EAO and incorporated, to the extent possible, in the final consultation report…"[14]

The main point here is that what the executive director conceives of as 'deep consultation' consists of little more than providing an opportunity, at the end of the process, for the First Nation to comment on a draft report. This is the case, as it was for the Carrier Sekani Tribal Council in the KSL pipeline project, even though they did not participate in the EA, they had no consultation meetings with the EAO, nor did they submit comments on the draft report.

Here is another example of a statement by the executive director that would clearly mislead a minister reading the consultation report,

> "The EAO and the Proponent have been engaged in consultations with the First Nations throughout the EA to jointly discuss the potential for impacts and to develop measures to mitigate or otherwise accommodate First Nation Aboriginal rights or Treaty rights. The First Nations have had an opportunity to review and comment on the EAO Assessment Report and to specify the nature and scope of their rights from their point of view."[15]

This is simply not true for the six First Nations of the Carrier Sekani who had never been consulted by the EAO on the issues. Note that while it is stated that the First Nations had 'an opportunity' to review and comment on a draft report, the executive director does not tell the minister who actually did comment, and what those comments were. In fact, the

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[14] Kitimat-Summit Lake Pipeline Looping Project. Executive Director's Reasons for Decision. May 12, 2008. p.13.

[15] as above.

executive director's assessment report states,

> As the Carrier Sekani Tribal Council did not participate in the Working Group technical review of the Project Application, the EAO was unable to obtain specific Carrier Sekani Tribal Council concerns about the Project or any additional information on the nature and scope of the Aboriginal rights asserted by the Carrier Sekani Tribal Council member nations.[16]

The EAO's consultation report for the same project concludes that the 'process of consultation has been carried out in good faith, and that it was appropriate and reasonable in the circumstances.' This could hardly be further from the truth, at least with respect to the Carrier Sekani First Nations. What the executive director should have stated was that the Crown's duty to consult had not been fulfilled because a consultation process had not been established with the CSTC, the issues were not known to the EAO, and that the ministers should be mindful of this fact, possibly with a recommendation that BC meet at a political level with the First Nations to reconcile the issues.

It was also not true for the Wet'suwet'en who, on the same day that the executive director published the words above, sent a letter to the minister stating,

> "We are writing to express our strong reservations about the KSL pipeline project as currently proposed. Despite our best efforts to participate in the review process, we do not find that the environmental risks and effects of the project have been adequately assessed…We also bring to your attention that the proposed KSL pipeline project is in conflict with other cooperative initiatives the province and the Office of the Wet'suwet'en have in progress… The Office of the Wet'suwet'en believes that the inability of the BC EAO review to adequately account for and address our concerns reflects poorly on the provincial New Relationship Policy. How can the New Relationship possibly work, when ministries and agencies of your Government continue to blatantly disregard our efforts to collaboratively work with your ministries? The British Columbia EAO process has yet to demonstrate consideration of Wet'suwet'en Interests, especially our Title and Rights… To date after repeated attempts to resolve major infringements to Wet'suwet'en Rights and Title with the proponent and BC EAO, our efforts are to no avail and the Wet'suwet'en are considering pursuing alternate measures."[17]

How could the EAO get it so wrong? How could there be such an outcome from a 'deep' consultation process? The Wet'suwet'en letter to the minister is a plea for understanding, desperately made, following a protracted period of obvious failure at getting the Crown

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[16] Kitimat-Summit Lake Pipeline Looping Project Assessment Report. May 12, 2008. p.206.
[17] Office of Wet'suwet'en letter to Minister Barry Penner. May 12, 2008.

agency charged with leading meaningfully EA and consultation processes to properly consider the issues. How else can the consultation report be interpreted now as other than a whitewash and misleading summation that 'all First Nation issues have been resolved, ministers, go ahead and issue the certificate!'

In addition to being confused about the nature of the task at hand, and about the need to actually sit and discuss the issues with First Nations, the truncated process established by the EAO has a huge structural difficulty in that accommodation can never be delivered by the time the ministers approve the project. This is because the EAO sees any needed accommodation as something that needs to be resolved in the somewhat uncertain arena of the permitting stages of the project.

This unfortunate policy forces First Nation to withhold their potential support for the project for some undefined period of time into the future—possibly years ahead—in order to gain certainty that the various accommodation measures will be, or have been, implemented.

Proponents and First Nations both, and one would think government as well, would like to be in position where the First Nation can give its approval (or not) to the project concurrent with the ministers' decision. There are obvious significant benefits to all parties if they can arrive at the decision point simultaneously and with complete certainty about the outcome.

The current process deliberately thwarts this result, and places First Nations at an extreme disadvantage in subsequently having to negotiate, inappropriately, accommodation measures with regulatory officials after the project has been approved.

Another major problem is that there is no formalized or statutory process for First Nations to negotiate accommodation measures in the permitting phases of the project. It is a world of *ad hocery* and uncertainty, wherein the participating First Nation is entirely subject to the vagaries of various regulatory processes that are furthering government interests, not Aboriginal interests. There is no reconciliation directive from the political level to the bureaucratic.

Regulators are typically in the position of not having been properly briefed to respond to First Nations accommodation needs, or are otherwise believe themselves to be constrained about how far they can go on matters that are apparently beyond their stated mandates. Regulatory officials can be inflexible about how their responsibilities are conducted and authorizations issued; and are usually uninformed about the need for change in procedures. Even though commitments by government officials are sometimes made (or indicated) during the EA process, regulators turn out to be inflexible, narrowly and technically focused, and unwilling to move against the professed taboo about fettering their discretion. First Nations typically have little or no technical capacity or regulatory experience to deal effectively with regulatory processes.

Moreover, neither government nor proponents seem willing to step up to the plate to provide the necessary funds to the First Nation so that it can engage with the permitting process in an effective manner.

The regulated timelines for the EA review also present a constraint on meaningful consultation and resolution of the issues. It is only near the end of the EA process when complete and accurate assessment of the relevant impact issues is known, so that effective accommodation discussions are precluded prior to this point. This greatly reduces the window of opportunity to negotiate appropriate accommodation prior to the ministers' decision. However, as demonstrated by the Ruby Creek Molybdenum Project accommodation process, this can work if a properly negotiated consultation process is established ahead of time and the Crown has the political will to move efficiently (*this case study is discussed below under 'Consultation')*.

Perhaps the major problem, however, is that the EAO is simply the wrong venue to be conducting what is essentially a political process, one that properly should be carried out on a government-to-government basis. The EAO is staffed with technical managers who have no qualifications or statutory basis for conducting negotiations between the Crown and First Nation governments. Moreover, they have no cross-agency mandate or negotiating skills to make deals on behalf of other agencies.

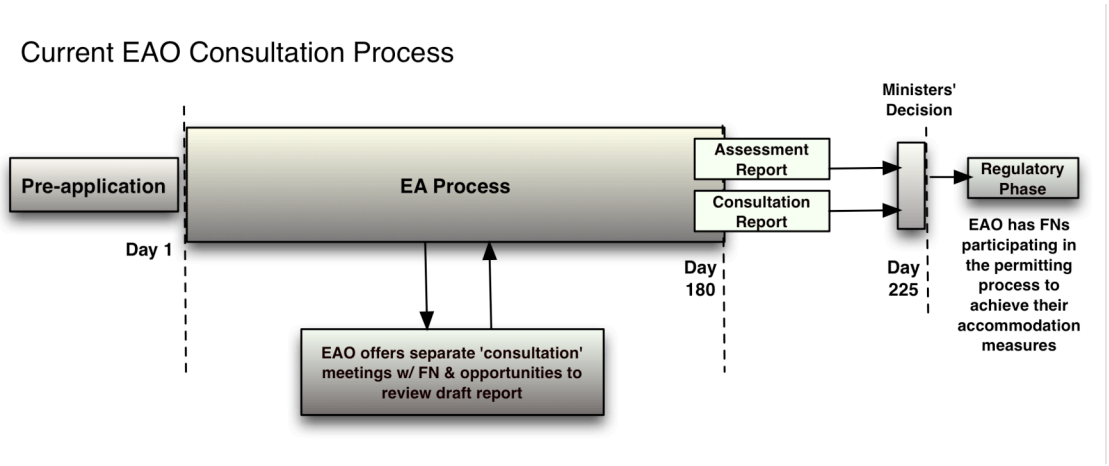
The consultation and accommodation process should properly require political

representatives from both sides who have a mandate to reach political accommodations on behalf of (in BC's case) the relevant government ministries and (in the First Nation's case) the local government.

That BC has not been willing to institute a government-to-government consultation process probably reflects their view that accommodation does not have to be negotiated, and agreement does not have to be reached. Interpreting the *Haida* decision in the minimalist sense, the Crown takes the position that it can unilaterally determine what accommodation measures are appropriate in the circumstances, and not necessarily have the agreement of the First Nation. This is unfortunate, since it means that the Crown is not serious about a collaborative approach to accommodation that would rightly reflect the '*New Relationship'* but, instead, is approaching the task by gauging how little it can legally get away with to meet the accommodation test and then unilaterally adopting that as the solution. Agreement by the affected the First Nation is not worth pursuing.

This somewhat cynical approach is verified by the fact that the EAO now conducts its own 'strength of claim' assessment—something that its officials are arguably not qualified to do—on the affected First Nation's Aboriginal title and rights, and submits a 'consultation report' to the ministers at the same time as the project assessment report. These consultation reports have resulted in the delivery of information to the ministers that is often sadly deficient, wrong, or otherwise harmful to Aboriginal interests, as described above in a couple of examples.

The EAO states in the consultation reports that it uses 'an approach of deep consultation'. Nowhere is 'deep' consultation defined, although the executive director provides a list of features in his consultation reports that seem to indicate what is meant by the term.



At the end of such consultation reports the EAO typically renders an astounding conclusion—it states that the EAO believes the review process has 'reasonably balanced Aboriginal concerns of potential for impacts on asserted rights with other societal values.' This, despite the fact that there is no evidence that an assessment of societal values is ever undertaken during the assessment process, nor is there any justification for why or how the executive director gets to make this determination. This is a political conclusion, not a technical one.

While the Supreme Court did not state that First Nations would have a right of veto on such matters, it seems in the spirit of the judgment that BC would at least attempt to reach a mutually acceptable accommodation, and that it would do this through a mutually-agreed process. The *New Relationship* would also suggest that this is the right thing to do. At the end of the day, First Nations engaging in a process they had voluntarily agreed to, and reaching an formal understanding with BC about the actions the province would take to protect or further the interests of the affected community, would find respect and reconciliation in the outcome. The appropriate product in such a case would be an accommodation agreement, jointly reached.

Part 4. Solutions

What is Needed

The preceding discussion illustrates well the range and severity of the problems that plague the current EA process. To summarize, here are the lessons to date:

1. The *BCEA Act* is woefully inadequate in terms of what it establishes for both process and content for the conduct of EA—new legislation is required;
2. Given the same behaviour under both the 1995 and the 2002 statutes, changing the legislation alone is clearly insufficient—the EAO has shown itself unable to properly implement whatever legislation is in place;
3. The deficiencies range from lack of understanding of what is EA is to achieve, (especially in the context of Aboriginal rights), deliberate inflexibility, institutionalized 'sharp dealing', technical incompetence, and an evident corporate culture hostile to the reconciliation philosophy articulated by the courts;
4. First Nations are coerced to participate in processes that are designed unilaterally by government officials to approve projects and advance agency mandates;
5. There is a lack of First Nation involvement in the design of the processes and procedures involved;
6. There is no meaningful role, or resourcing, for First Nations to participate in the process, or to negotiate improvements the process, with the result that their interests are undermined;
7. The design and implementation by the EAO of BC's consultation and accommodation duty is dysfunctional, harmful to Aboriginal interests and structurally prone to failure; and,
8. Where a proposed project raises serious environmental concerns for an Aboriginal community, or has high uncertainty and risk about outcomes, the process does not work. Uncertainties and risk are trivialized and superficially dealt with in the executive director's assessment and consultation reports.

All this suggests a dire situation. Because EA is such an essential tool for ensuring that land use decisions in an increasingly complex world can be made in a sustainable fashion, the current debasement of this tool has serious implications for both the reconciliation process in BC and the attainment of sustainability. This is unfortunate, since these goals are in the best interests of all parties, and having a credible means of making good decisions along the way would be a great advantage.

This chapter lays out a general framework for what an idealized solution might look like.

No attempt has been made to modify the approach to reflect political or economic realities—this is for a later discussion. What is presented here is an attempt to identify what the process ought to look like in the best of all possible worlds.

To make the whole system of land use decision-making work meaningfully in the provincial context, reform must embrace the following three dimensions. Reform in one alone will not accomplish what is needed.

Considerations for reforming the process need to answer three basic questions:

1. What should a project-specific EA look like?
2. What legislation and structure for the EA process should be put in place?
3. How should the Crown's consultation duty relate to the EA process?

What Should an Environmental Assessment Process Look Like?

The goal for EA reform, from the First Nation perspective, is to inject an acceptable level independence into the implementation of a technically robust process that has been jointly designed and agreed to by First Nations, and is inclusive of them. Further, the process must ensure that participating First Nations are provided sufficient resources in a timely way to enable their effective engagement.

The principle that First Nations need to be involved in the design of the process is essential if consultation is to be meaningful and reconciliation to be achieved. If First Nations cannot have faith in the impartiality and rigour of the process, then there will always be controversy about the outcome. It is critical to eliminate the amount of discretion and opportunities for political interference in the current review process.

The following model is proposed as a solution to deal with the many problems identified above about the conduct of individual environmental assessments in the province.

1. When a project application is submitted to the assessment authority, the executive director of the agency (not the EAO; see next section) would determine what First Nation's Aboriginal title, rights and interests could be affected by the project.

The executive director would then notify the First Nation about the application. The First Nation would respond by informing the executive director about whether it wanted to participate in the assessment or not.

2. A determination by the First Nation to participate in the project review would result in the formation of a project assessment team (think 'mini-panel') who would then conduct the assessment independently from the assessment authority. If the First Nation decided not to participate, the executive director would conduct the assessment according to the procedures developed by the assessment authority for that situation.

3. The project assessment team would be established through a government-to-government negotiating process that takes place external to the assessment process. Relevant BC political representatives would meet with the affected First Nation leadership to select the members of the team, modify the assessment process if required, determine funding, and arrange the future process of consultation and accommodation that may need to be implemented at the conclusion of the EA process. A written 'terms of engagement' agreement would be produced to provide clarity and certainty about the assessment and consultation processes to come.

4. The project assessment team should comprise four individuals, two each appointed by BC and the affected First Nation(s), who would operate at arms-length from the parties. This is critical—members of the team need to be appointees, not representatives of the parties who appointed them. Their mandate would be to conduct a neutrally administered, transparent, and technically robust process to ensure that a high quality assessment is conducted. Guidelines and procedures for aiding in this task would be previously established by the assessment authority.

5. Assessment team members would be selected through a process agreed to by both from BC and the First Nation. One option would be to adopt a list of qualifications prepared by the executive director and then each party nominates two people who meet the qualifications. Another could be that the parties jointly

select four mutually acceptable candidates. Several variants of selection process exist, and the parties could determine the best approach. The key is that once appointed, these individuals would work collaboratively as an independent team of assessors for that project, according to the assessment guidelines established by the executive director for project reviews, plus whatever specific terms of engagement result from the government-to-government process.

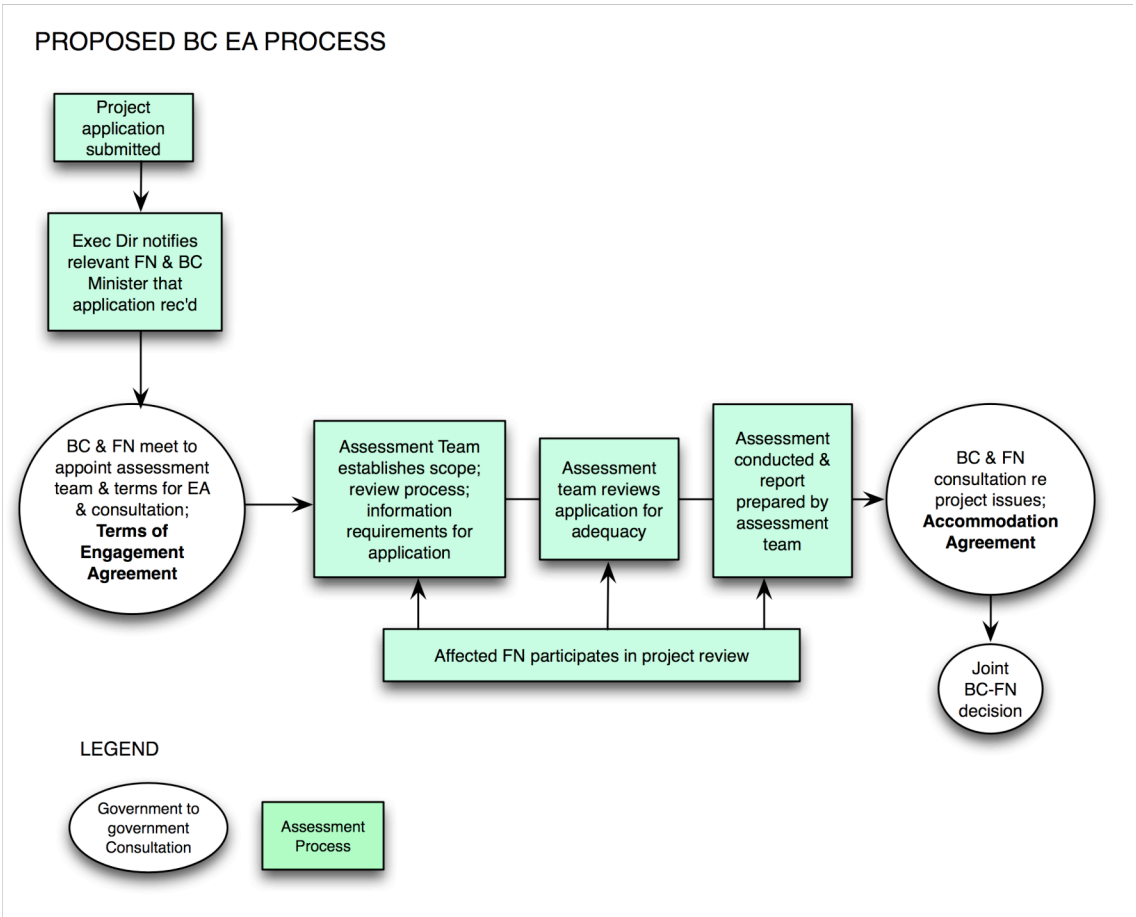
6. This four-person team would be responsible for conducting the assessment and for writing the assessment report.
7. Pre-existing guidelines and procedures for the process, as developed by the executive director, would be utilized by the assessors, but they would have to have sufficient flexibility to shape and scope the review process they determined would be most effective. This would include the ability to hold community hearings.
8. The First Nations potentially affected would have a right, and be properly resourced, to participate in the assessment process using their technical and administrative staff plus outside technical expertise as necessary.
9. The job of the assessment team would not necessarily be to do all the work, but to manage the process and ensure that the assessment gets done by the most effective means. For example, existing EAO staff and infrastructure, as well as other provincial resource agencies, could be utilized (as they now are) as a technical secretariat to support and take direction from the assessment team where appropriate. The assessment team would also be able to contract its own outside expertise to assist it in conducting the review.
10. At the conclusion of the assessment process, the assessment team would produce a final assessment report, with recommendations about how decision-makers should proceed. The report would explicitly identify unresolved issues that need to be resolved through the government-to-government consultative process established before the assessment commenced. This assessment report would form the basis, in other words, of a separate, formal consultation process to reach agreement on accommodation measures that would then need to occur prior to a

final decision on the project.

11. Application fees for proponents would be instituted to cover the participation costs of the First Nations and the conduct of the assessment.

12. An appeal mechanism for procedural issues should be provided for First Nation participants in the process. The first line of appeal could be the assessment authority itself, since it is now independent from the specific review underway. It would review referrals made to it by participants and could render a binding decision. Alternatively, the terms of engagement agreement could provide for an alternate dispute resolution mechanism.

13. The final outcome should be a joint decision by the parties. The probability of a consensus decision would be very much higher under the new process, since the EA result would be seen to be credible and the accommodation agreement would presumably have resolved the outstanding Aboriginal concerns about the project and provided certainty about the Crown's commitments to make the project work more sustainably. Where there is a disagreement at the end of the day, the matter will need to be resolved through a dispute resolution process.



Where Should the EA Process be Housed?

As this analysis has shown, the present EA process is rife with political influence, with the EAO continuing to act in an adversarial way instead of the trust-like manner indicated by the courts. This calls for a structural change in the institution itself.

There are abundant theoretical arguments about why an assessment process—to be credible and to allow independent thinking—ought to operate at arms length from government agencies that have explicit pro-development mandates and policies. But in the BC case, real world experience with the EAO operating under a minister of the government and being explicitly subservient to political mandates of that ministry has clearly demonstrated that the theoretical arguments are real. On the basis of such experience, the EAO neither is, nor is seen to be, the independent, neutral administrator that the task requires.

The recommended home for the EA process is a separate, independent body headed by a commissioner (or board of directors) who is an officer of the Legislature. There are precedents where the provincial government has recognized that such an independent and arms-length relationship is essential to eliminate politics from effective program delivery—for example, the Auditor General, the Ombudsman, the Information and Privacy Commissioner, and the Representative for Children and Youth. Environmental assessment needs the same kind of independence and objectivity.

The case is made here that a board of directors (3) would be preferable to a single commissioner. This is because contemporary environmental assessment is complex and rapidly evolving public policy tool, with dimensions that include not only the biophysical environment, but the economic, social, and culture ones as well. Additionally, as a tool for decision-makers, it is rapidly becoming an essential, and perhaps the only, mechanism for predicting how well future actions might contribute to the achievement of sustainability. The perspectives needed to manage such a process and render it an effective decision-making tool in an increasingly complex world clearly highlight the advantages of a multi-person board as opposed to a single director.

The most ideal governing mechanism would likely be a three-person board of directors (or commissioners)—one, for example, appointed by each of BC and First Nation Leadership Council, and the third jointly appointed.

Appointment of the directors would be similar as for the existing legislative officers named above—in this case, appointment by the Legislative Assembly upon unanimous recommendation by BC and First Nation Leadership Council. The parties would jointly draw up a list of qualifications for potential candidates, and then conduct the search for appropriate candidates. Three qualified individuals would then be nominated to the Legislature for appointment as commissioners.

The board would not necessarily be a full-time operation, although the development work required for the first year or two might demand this. The board would hire a professional EA practitioner as executive director to run the operations of the assessment authority, according to the charter and terms of reference determined by the board.

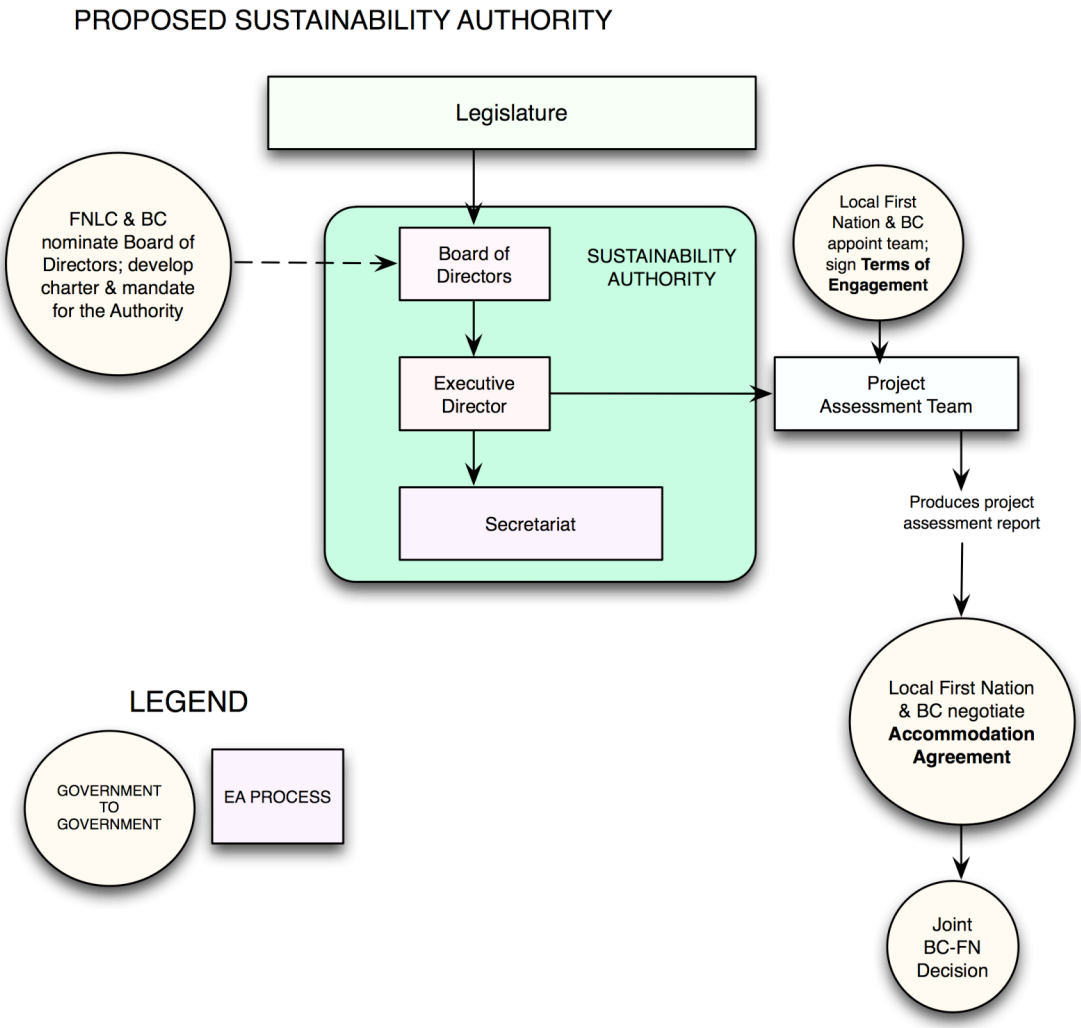
With this change in governance, the current EAO might serve as the basic administrative infrastructure and support system for the assessment agency. There are obvious economies of doing so. However, such a determination would need to be the responsibility of the executive director. New expertise relevant to the practice of environmental assessment is clearly needed in the current EAO, and the executive director would need to have the authority to properly staff the agency.

The qualifications of potential candidates, terms of reference for the board of directors, and the new agency's governing charter would be jointly negotiated by BC and First Nation Leadership Council ahead of time. The key enabling provisions for the board of directors' authority, role and responsibilities, etc., would then have to be captured in the new EA legislation.

Sustainability Authority

The new assessment body should have a name that reflects its responsibilities. With respect only to the environmental assessment role that currently exists with the EAO, the new agency and its governing board would have the following functions:

- review and redesign impact assessment methods, procedures, and standards to guide the conduct of project reviews to ensure technical rigour and completeness, consistency of assessments, transparency, accountability, etc.;
- ensure that project assessments are completed in accordance with the statute, regulations, and procedures;
- provide administrative and technical support to project assessment teams;
- establish guidelines for First Nation (and public) participation in the assessment process;
- establish an independent process for determining funding for First Nation participation;
- conduct follow-up (i.e. post-construction) monitoring and audits to ensure that the terms of the certificate are being adhered to; and,
- enforce compliance of the certificate.



This list of duties, however, would be insufficient in today's context. The case is made here that the new agency needs to do more than the existing process, which focuses only on assessing and mitigating adverse environmental impacts. As noted earlier, the theory and practice of EA as reflected through initiatives in other jurisdictions have moved beyond this role to include an evaluation of a project's contribution to sustainability.

In one sense, the concept is not new to the BC regime. Sustainability assessment was a stated purpose in the 1995 environmental assessment legislation, although it was never properly implemented by the EAO. The government removed it in the 2002 amendment of the *Act*.

The notion that new projects should be locally sustainable is a frequently stated core principle in Aboriginal communities. It is time to give teeth to the concept, and make sustainability assessment the crux of the new decision-making tool. Designing the tools and procedures to meet this objective for project assessments would become a primary focus of the new board.

Such ideas are not novel, as illustrated below by a couple of precedents from other jurisdictions where independent bodies have been set up to advise government on sustainability issues.

U.K. Sustainable Development Commission

The Sustainable Development Commission is the United Kingdom's independent advisor on sustainable development, reporting to the Prime Minister, the First Ministers of Scotland and Wales and the First Minister and Deputy First Minister of Northern Ireland. The SDC's roles are threefold:

- advisory: providing informed, evidence-based advice to government on sustainability issues;
- capacity building: developing the attitudes, skills and knowledge within government to deliver on sustainable development; and,
- scrutiny: holding government to account on progress towards sustainable development and on its operational commitments.

The SDC has 19 commissioners from a mix of academic, scientific, business and NGO backgrounds. Appointments to the Commission are made by the Prime Minister in agreement with the First Ministers of Wales and Scotland and First and Deputy First Minister of Northern Ireland. The Commission is supported by a secretariat of 50 full-time staff (appointed by open competition and by secondments from various sectors).

The Secretariat, led by its executive director, acts independently and is able to investigate any topic within its mandate. The work program is decided taking into account knowledge gaps in government, new policy initiatives, contentious issues and technological innovations.

Northern Territory Environmental Protection Authority

A new independent Environmental Protection Authority in Australia's Northern Territory was established in 2008 to:

- serve as an independent public watchdog on the government's environmental assessment process;
- provide independent strategic advice on sustainability issues to government, business, and community;
- publicly recommend legislative and policy frameworks for improving sustainability initiatives in the territory;
- undertake its own investigations on sustainability issues in public policy;
- monitor and report on EA follow-up programs and certificate compliance for constructed projects; and,
- monitor and report on operations and systems of government agencies to ensure environmental monitoring and regulation is properly undertaken in accordance with endorsed standards and practices.

The agency is much smaller than the UK's Sustainable Development Commission, but its purpose echoes the same focus about oversight and independence of the environmental assessment process, and the need to fold sustainability issues into government planning.

The EPA has three directors appointed by the Executive Council of the territory, and makes recommendations to the responsible ministers and Parliament. In addition to the above objectives, the EPA:

- cannot be directed by government in terms of its investigative methods, scope and findings;
- has a role in identifying any systemic failure and a role in receiving reports on agency activities in respect of compliance and enforcement;
- is established by legislation that takes precedence over any conflict with other laws;
- has transparency as a fundamental principle—i.e., it makes matters public unless there are reasonable grounds not to;
- can 'call in' government processes in order to provide advice on their adequacy;
- can initiate its own investigations and/or inquiries and accept third party references;
- can require government agencies to provide information; and,

- has capacity and resources to fund its own investigations and reports.

The range of activities undertaken by these two independent agencies, if applied in BC, would greatly benefit public policy design and implementation in the province. If the move to reform the provincial environmental assessment regime gains traction, then it should consider embracing this larger role in the new legislation. In such a case, if government was to move in the direction of a broader sustainability role for the new assessment legislation, then what is really being proposed here is a Sustainability Authority.

The term 'authority' is used here to designate the agency's independent and proactive role as a developer, advisor and intellectual repository of knowledge on sustainability issues—to be the authority and watchdog, in other words, on the substantive content of sustainability issues in the public policy arena.

A New Environmental Assessment Act

Given the suggestions above for overhauling the assessment process and revamping the institutional arrangements to make it work more effectively and responsively, it should be clear that the existing 2002 *BCEA Act* is not adequate as a basis for making the required changes. An entirely new statutory regime is required to provide the independence and scope that are needed. This paper does not provide the details of such new legislation. This is for a future collaborative exercise between BC and First Nations to establish, with greater dedication of time and thought than can be given here.

However, on the basis of the preceding discussion, some critical elements for what is required can be identified. In short, the new statute for assessing major projects or activities should, among other things, provide explicitly for the following:

- creation of a new independent assessment authority with an expanded scope to include sustainability evaluation, reporting to the Legislature;
- stated objectives and principles to inform the assessment process;
- assessments to be conducted in accordance with guidelines, standards, and procedures to be developed by the authority;
- provisions for First Nations to have input into design of project-specific

assessments, including appointments to project assessment teams, scope and terms of reference.
- use of independent project-specific assessment teams to conduct assessments and formulate recommendations to the decision-makers;
- principles for First Nation participation in design and implementation of assessments;
- provisions for establishing a separate government to government table to complete the consultation and accommodation process following completion of project assessments;
- assured funding at meaningful levels for participating First Nations; and,
- an appeal process regarding procedures used in the assessment process.

Consultation & Accommodation

Introduction

As earlier indicated, reform of the environmental assessment process alone is not sufficient to deal with the problems posed for First Nations. There are also huge problems with the current approach taken by BC to fulfill its consultation duty with respect to project assessments. Reform in this area is also drastically required.

This paper was commissioned because there is increasing substantial evidence that the present situation is not tenable, and must change if BC's relationship to Aboriginal peoples is to move closure to the reconciliation objective. At some point in the future, hopefully sooner rather than later, the province and the First Nations Leadership Council, will need to sit together at a government-to-government table and hammer out guidelines for a proper consultative process to guide further communications and collaborative processes between the parties. It is hard to imagine that effective reconciliation about land and resource issues can be achieved without this.

Properly implemented processes that deliver meaningful accommodation to the affected First Nations are much more likely to deliver parallel decisions by the parties about whether the project should proceed or not. Correspondingly, contradictory decisions are likely to be much rarer than under the current, non-responsive consultative regime that First Nations are currently forced into.

It is not within the scope of this paper to provide a detailed proposal for what a reformed consultation process should look like. However, some principles that should guide a new process are worth highlighting at this point so that overall scope and intent of the needed reforms can be understood in the integrated sense that is needed.

Before turning to a generalized description of what is required, it is worth first considering one example of where an effective consultative process between a First Nation and the province occurred.

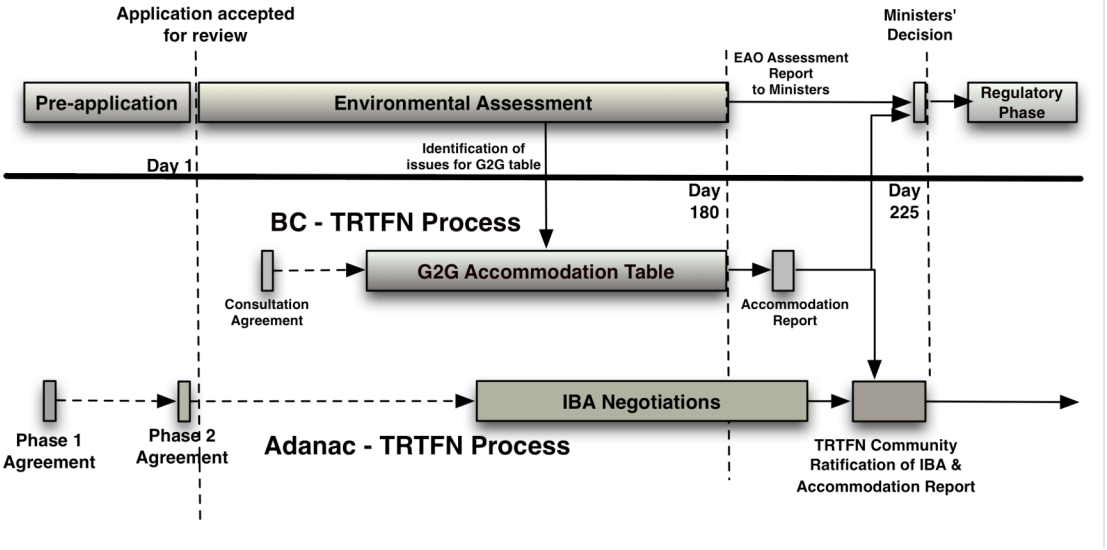
Ruby Creek Consultation Process

For the 2006-07 assessment of the proposed Ruby Creek molybdenum mine near Atlin, BC, the consultation process negotiated between the Taku River Tlingit and the provincial government came very close to getting it right.

At the outset of the assessment, the Tlingits insisted that a consultation process independent from the EAO was necessary so that proper government-to-government discussions about needed accommodation measures could be undertaken. In the Tlingits' perspective, the EAO had neither the capacity to be resolving issues that would span one or more government agencies, nor personnel qualified or mandated to negotiate political arrangements. BC eventually agreed to this approach, and a memorandum of understanding was signed between the two parties that established a government-to-government consultation process.

One significant difference separated the parties in setting up this process. The Tlingits wanted the product of this process to be an accommodation agreement, one that would spell out the commitments that the Crown would undertake to resolve any potential infringement issues. With a written commitment about how the province would accommodate, the Tlingit leadership and community would have complete certainty about what the Crown would do. In this case, BC would not agree that an accommodation agreement was needed, and so the negotiated process outcome became a jointly authored 'accommodation report' that would go to both the ministers and the Tlingit leadership.

During the EA process, discussions were also continuing with the proponent, who was providing financial assistance to the Tlingits for their participation in the EA and in negotiating an impacts and benefits agreement. The overall 'harmonized' process was carried out over three separate paths of activity, as illustrated in the figure below.



The above illustration is an idealized version of what was intended to be achieved in terms of the various components coming together, and in the end this ideal was almost achieved. The government-to-government consultation, utilizing conclusions and recommendations from the assessment process, produced a report that reinforced the EA recommendations in strong and more detailed advice to the ministers. The report stopped short of recommending to the ministers that the identified and agreed upon accommodation measures should be formalized in an accommodation agreement with the Tlingits.

The Tlingits by this point had developed their own mining policy, which called for all three processes (EA, IBA, accommodation) to be more or less completed prior to the ministers' and the Tlingits' decisions on the project. The consultation process delivered the accommodation report concurrently with the EAO's assessment report going to the ministers. The IBA negotiations were never completed as the proponent went into receivership shortly after the project was approved.

Despite the fact that the project is now unlikely to be built in the foreseeable future and, thus, the accommodation measures to be implemented by BC unlikely to be realized, the Ruby Creek harmonized consultation model is a useful concept to consider in developing an effective framework for future project assessments.

The Approach

The Ruby Creek consultative process revealed that a negotiated government-to-government process, separate from the EAO, could work. What are the lessons?

First, it seems clear that whenever a Crown-First Nation consultative process comes into play, it should be one that both parties agree to. Therefore, the Crown's current practice of unilaterally imposing a consultation process on First Nations is not tenable and needs to be changed to a collaboratively designed process.

Second, there needs to be a government-to-government consultation process, or protocol, established at the provincial level in order to both conduct discussions that need to deal with strategic or policy issues, and to ensure that a high quality process will be consistently applied in project-specific situations at the community level.

Having such a protocol, or procedural guidelines, is also needed for high-level consultations that will arise, such as the design of the proposed Sustainability Authority. This is one example of where joint collaboration at a high, government-to-government level needs to happen.

Having a protocol to guide government-to-government talks at a community level should ensure that certain standards are met, and best practice principles adhered to, when local communities are consulted by provincial officials on various land use decisions. There is a wide range of experience and sophistication among individual First Nations that marks their ability to negotiate effectively with government officials. Accordingly, a set of guidelines would be a great advantage to many communities in ensuring that certain standards and principles are upheld in their discussions with government.

A meaningful consultation protocol established between BC and First Nations that is to

provide a basis for any kind of shared decision-making, should embrace the principle of free, prior and informed consent. While the Supreme Court has said that Aboriginal people do not have a veto in such matters, the spirit of recognition and reconciliation should place great onus on the Crown to recognize and reconcile the community decision with its own. The consultation protocol should advance this goal.

This is what the assessment process, and the linked consultation process (discussed below), should deliver to the affected community. If these are designed and implemented collaboratively, they can deliver what most Aboriginal communities are demanding from government when it makes project approval decisions—fairness, transparency, rigorous assessment, and sustainable outcomes.

Third, the jointly designed consultation process should be enacted through legislation. While establishing the intent, principles, and general approaches to consultation, the legislation must be sufficiently flexible to provide for adjustments and variation at the local level. When land use or project approval decisions are the issue, community context is where real consultation and accommodation needs to take place.

Fourth, for specific projects undergoing assessment, government-to-government discussions will also be required—both at the outset of the assessment process to establish the terms of engagement, and at the conclusion of it. The Crown's constitutional duty lies in the accommodation talks that need to follow the assessment. However, the consultation process should be designed and agreed to before the assessment process is engaged with, so that the First Nation community has certainty that an acceptable process is in place when it comes time to resolve the issues. The consultation process should be formalized in the terms of engagement agreement or, if necessary, a separate memorandum of understanding between the parties. From the First Nation's point of view, having a terms of engagement agreement in place should be precondition for it to participate in an environmental assessment process.

What should also be clear is that the assessment agency, in whatever form it emerges, should not be the provincial participant in the consultation process. Project-specific consultations need to be run external to and independent from the assessment process.

There is an obvious functional link between the two—the consultation process needs to use the information generated in the environmental assessment—but the process demands a different, more politically responsive and accountable forum.

Finally, the Ruby Creek government-to-government process shows that project-specific consultation processes will likely require engagement with more than one provincial agency. This is another reason for the process to be flexible enough to ensure that the right mix of representation and the necessary authority is available.

Summarizing these lessons, the key elements for designing an effective BC-First Nations consultation process include:

- a General Consultation Protocol, developed collaboratively by BC and First Nations Leadership Council and enacted though legislation, that sets out objectives, principles, standards, best practices and general guidelines for the conduct of talks between the parties at both provincial and community levels;
- project-specific consultation process, consistent with the General Consultation Protocol guidelines, established through a negotiated 'terms of engagement' agreement between the Crown and the affected First Nation community before the EA process starts;
- an explicit recognition in the terms of engagement agreement that the intent of the consultation is to discuss issues remaining at the end of the EA with a view to identifying mutually acceptable and effective accommodation measures to address impacts and sustainability objectives;
- separation of consultation activities from the project assessment body;
- participants need to be the appropriate political officials from both sides who can offer and commit to the necessary accommodation measures that may be agreed to;
- provision of sufficient resources to the First Nation to effectively participate in the consultation process;
- process to be implemented and completed within a time-frame between the conclusion of the assessment process and the ministers' decision; and,
- process to conclude with a formal accommodation agreement.

A common demand amongst First Nations with experience in the BC process is that they need to be involved in the various decision-making exercises associated with project assessments. These include decisions about the design and implementation of the

assessment processes, procedural decisions made during the process and, especially, final decisions about whether a project should be approved or not.

The scheme for project assessment and consultation outlined above goes a long way toward enhancing First Nations' role in the relevant decision-making. In particular, the government-to-government processes recommended for the design of the Sustainability Authority, and for the design of both provincial and local level consultation processes, would ensure that First Nation views have greatly increased effect on the result.

Indeed, recent initiatives by the provincial government seem to indicate that this would be desirable. The 2005 *New Relationship* accord between BC and the First Nation Leadership Council explicitly contemplated a basis for shared decision-making in land use decisions. To date, however, such arrangements have not visibly materialized. Despite the vision outlined in the *New Relationship*, there are no evident examples of where meaningful shared decision-making has been readily implemented by the province in the project approvals decision process. It seems clear that the present system of conflict and frustration created for First Nations by the province's unilateral imposition of assessment and consultation processes, and its exclusion of Aboriginal participants in the decision processes associated with these, will continue to fail.

If the Crown is not prepared to undertake the necessary changes, it needs to ask itself one basic question. Why would First Nations participate in a process that is constructed on a fundamentally different basis than what the courts have said? Why would they want to be involved in processes that continually undermine their interests and fail to deliver sustainable outcomes for their people? Why would they bother?