1764-1959 Marine Drive
North Vancouver, BC V7P 3G1 *Telephone: 604 924 3844*

ENVIRONMENTAL ASSESSMENT – DRAFT DISCUSSION PAPER ON OUTSTANDING ISSUES
November 27, 2017

Summary

The government of British Columbia has made a commitment to revitalize environmental assessment (EA), and to do so through legislative reform that is consistent with section 35 of the *Constitution Act, 1982*, and upholds the *United Nations Declaration on the Rights of Indigenous Peoples*, the Truth and Reconciliation Commission Calls to Action and the Supreme Court of Canada's decision in *Tsilhqot'in v British Columbia.*

To achieve this overarching goal, key issues proposed for discussion and legal implementation include:

1. Joint decision-making
2. First Nations-led assessments
3. Higher level planning and assessment
    a. Legally enforceable land use and stewardship plans that are fully funded and developed by First Nations
    b. Legislatively mandated, co-governed regional and strategic assessments to inform land use planning and guide project assessment
4. Protecting rights and values through a substantive sustainability test
5. Mandate, composition and reporting of the body overseeing EAs in BC
6. Legislated fee schedule to ensure sufficient funding
7. Monitoring, compliance and enforcement
8. Tripartite engagement with First Nations, Canada, and British Columbia
9. Legislative change for EA revitalization

Anticipated legislative changes need to encompass collaboratively developed solutions on the above issues, as well as implement enhancements previously agreed to by the First Nations Energy and Mining Council (FNEMC) and the BC Environmental Assessment Office (EAO).

The FNEMC and the EAO are seeking guidance from BC First Nations on how these should be addressed in new EA legislation and institutions. Outcomes from dialogue with First Nations will inform a broader EA revitalization process co-governed by the Province and the First Nations Leadership Council to commence in 2018.

Background

In July 2017 the First Nations Energy and Mining Council (FNEMC) and the BC Environmental Assessment Office (EAO) produced a joint report containing 26 recommendations for enhancements to the environmental assessment (EA) process (Joint Report).[1] This report was prepared at a time when the BC Government did not support the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and held the position that it would not pursue legislative reform of the provincial EA Act. As such, some matters considered important by First Nations for revitalizing the EA process were determined to be "out of scope" of the mandate of the EAO in the discussions.

The BC Government is now committed to work with Indigenous nations to implement UNDRIP, as well as the 2014 Supreme Court of Canada's *Tsilhqot'in v British Columbia*[2] decision and the Truth and Reconciliation Commission's (TRC) Calls to Action. The BC Government is now committed to moving forward on the Calls to Action and reviewing policies, programs, and legislation to determine how to bring the principles of UNDRIP into action in British Columbia.[3] The rights recognized in UNDRIP include the right of self-determination and self-government, which includes the principle of free, prior and informed consent.

In July 2017, the Premier issued a mandate letter to the Minister of Environment and Climate Change Strategy, George Heyman, mandating the Minister to revitalize the EA process to "ensure the legal rights of First Nations are respected, and the public's expectation of a strong, transparent process is met." In November 2017, the Minister confirmed that the previously "out of scope" issues noted in the Joint Report are now fully on the table for discussion to find solutions moving forward in revitalizing EA. This includes legislative change to, among other things, fully implement the UNDRIP and the principle of free, prior, informed consent, the TRC Calls to Action, and principles articulated in *Tsilhqot'in Nation.*

We note that recommendations relevant to these issues were also set out in an earlier FNEMC discussion paper titled *Environmental Assessment and First Nations in BC: Proposals for Reform*,[4] which were adopted by resolution of the BC Assembly of First Nations, the First Nations Summit, and the Union of BC Indian Chiefs, many of which were echoed during regional EA workshops with First Nations in 2016-17.

FNEMC and EAO are seeking guidance from BC First Nations on how the following issues should be addressed in new EA legislation and institutions. Outcomes from dialogue with First Nations will inform a broader EA revitalization process co-governed by the Province and the First Nations Leadership Council to commence in 2018.

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[1] A summary of the enhancement process leading up to those recommendations, including regional First Nations workshops, is set out in the FNEMC-EAO letter transmitting the Joint Report to the First Nations' Leadership Council and provincial ministers.
[2] 2014 SCC 44.
[3] The 2017 Confidence and Supply Agreement between the BC Green Caucus and the BC New Democrat Caucus confirmed that: "A foundational piece of this relationship is that both caucuses support the adoption of the UN Declaration on the Rights of Indigenous Peoples, the Truth and Reconciliation Commission calls-to-action and the Tsilhqot'in Supreme Court decision. We will ensure the new government reviews policies, programs and legislation to determine how to bring the principles of the Declaration into action in BC."
[4] FNEMC, *Environmental Assessment and First Nations in BC: Proposals for Reform* (2009), online: **http://fnemc.ca/?portfolio=ea-proposals-for-reform**> ["FNEMC Proposals for Reform"].

Overarching Goal: Implement UNDRIP, including the principle of free, prior, informed consent, TRC Calls to Action, and *Tsilhqot'in* principles in EA reform

UNDRIP:

UNDRIP is an international human rights instrument adopted by the United Nations a decade ago. The rights affirmed in it "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" (Article 43). In May 2016 at the United Nations Permanent Forum on Indigenous Issues, federal Minister Carolyn Bennett formally confirmed Canada's commitment to adopt and implement UNDRIP, stating: "We are now a full supporter of the declaration, without qualification." Minister Bennett noted that implementing the UNDRIP in Canada will require the support of all provinces and territories and in cooperation with Indigenous peoples.

In July 2017, Premier Horgan's mandate letter to the Minister of Indigenous Relations and Reconciliation stated: "As part of our commitment to true, lasting reconciliation with First Nations in British Columbia our government will be fully adopting and implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)."

Of central importance to discussions about EA revitalization is the UNDRIP principle of "free prior and informed consent", and Canada and BC's stated commitment to this principle. Article 32(2) reads:

> *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions* ***in order to obtain their free and informed consent prior to the approval*** *of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources [emphasis added].*

The UNDRIP requirement to obtain Indigenous peoples' "free, prior, informed consent" applies not only to proposed development in their territories, but also prior to adopting and implementing legislative or administrative measures that may affect them (Article 19). A failure to uphold these rights may be justified under UNDRIP only where state action is non-discriminatory and strictly necessary for securing due recognition and respect for the "human rights and fundamental freedoms" of others (Article 46).

Thus, UNDRIP implementation creates an important driver for designing new legislative frameworks and institutions that reflect the jurisdictional responsibilities, law and decision-making role of Indigenous peoples in the context of environmental assessment.

TRC Calls to Action:

One of the elements of the Indian Residential Schools Settlement agreement, the largest class-action settlement in Canadian history, was the establishment of the Truth and Reconciliation Commission of Canada. The final report of the TRC contained 94 Calls to Action to further reconciliation between Canadians and Indigenous peoples.

Particularly relevant to the EA reform discussion, the TRC urged the recognition and integration of "Indigenous laws and legal traditions in negotiation and implementation processes" and called on

Crown governments "to reform those laws, government policies and litigation strategies" that reflect outdated concepts of Crown sovereignty over Indigenous peoples.[5]

Tsilhqot'in v. British Columbia

The 2014 *Tsilhqot'in* decision resulted in judicial recognition of Tsilhqot'in title over approximately 1800 square km of their territory. In *Tsilhqot'in*, the Supreme Court of Canada affirmed that Aboriginal title encompasses "the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits." In other words "the right to proactively use and manage the land".[6] Revitalization of the EA process presents an opportunity to develop a new legal framework and make institutional shifts based on recognition of Indigenous title and rights, and the legal pluralism that exists in Canada.

Such an approach has the potential to advance reconciliation and reduce conflict. As the Supreme Court of Canada noted in *Tsilhqot'in*: "Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."[7]

Issue 1: Joint Decision-making

Implementing the UNDRIP principle of "free, prior and informed consent" will require new approaches to EA that recognize First Nations as decision-makers with respect to EA process and outcomes affecting their territories. Article 18 of UNDRIP affirms the right of Indigenous peoples not just to participation in decision-making that would affect their rights by their chosen representatives and "in accordance with their own procedures", but also to "maintain and develop their own indigenous decision-making institutions."

Indigenous nations are jurisdictions with the right and responsibility to ensure that decisions about land and resource use in their territories are consistent with their own laws. As a recent federal policy document states: "Recognition of the inherent jurisdiction and legal orders of Indigenous nations is therefore the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws."[8] Taking an approach which recognizes Indigenous jurisdiction and law will also mean acknowledging that authoritative decision-makers within each Indigenous legal tradition may vary, that there may be more than one level or type of Indigenous approval required, and ensuring that there is transparency with respect to agreements reached.

It follows that when more than one nation may be impacted by a project, EA participation and responsibilities should be determined internally between the nations themselves according to their Indigenous laws and processes rather than through unilaterally conducted Crown "strength of claim" assessments. Strength of claim was used as a tool by past governments to minimize First Nations rights and title. New processes to resolve shared territory disputes must be led by First Nations, not the Attorney General's office.

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[5] http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf, Calls to Action 45-47.
[6] At para 94.
[7] At para 97.
[8] Principles respecting the Government of Canada's relationship with Indigenous peoples, Principle 4, online < http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

Key Drivers

The failure of the current EA regime to recognize and respect the right of First Nations to be decision-makers regarding the EA process and outcomes is the crux of First Nations' frustration and lack of trust in the process.[9]

Rectifying this problem begins with legislatively recognizing First Nations' inherent jurisdiction and right to trigger higher level planning and assessment (see issue 3 below), as well as project assessments, and establishing funding mechanisms for such plans and assessments (issue 6 below). The current, narrow, "list-based" approach to determining what requires an environmental assessment has failed to address the cumulative effects of development in First Nations territories over time.

Flexibility to accommodate the laws and needs of individual nations in relation to EA process should be enabled through a requirement for up-front government-to-government agreements about the terms of reference for specific assessments. An EA may then be conducted by the First Nation (see issue 2 below), a jointly appointed panel or other agreed to mechanism that addresses the legal responsibilities of both Indigenous and Crown governments. Regardless, there should be a legislated requirement that no project may proceed in the absence of government-to-government agreements with all impacted Indigenous nations regarding project approval and on what conditions.

In short, recognition of First Nations' rights and responsibilities in relation to EA should occur through a legislative framework that mandates:

- **A government-to-government agreement on the conduct of EA**[10] including either collaborative or First Nations-led approaches, before EA commences. The EA must be a transparent process which takes into account Indigenous ecological knowledge and empirical science to provide a robust evidentiary basis for decision-making. Public participation in, and trust in the process is imperative. Funding at the earliest stage from the proponent is important for the First Nations to become adequately informed;
- **A government-to-government agreement regarding the outcomes of EA before a project is approved;** impacted First Nations and the Crown commence and complete negotiations to protect the title, rights and interests of those communities, including binding EA conditions, and the terms of compensation to them if a project is to be approved. Government-to-government agreements must be negotiated in good faith and not imposed by the Crown as a take-it-or-leave-it offer. The Crown must pay for all related negotiation costs of the First Nations; and,
- **An impact-benefit agreement (IBA) between the First Nation and the proponent.** Also known as socio-economic participation agreements (SEPAs), these practices are not always adhered to by industry proponents. Negotiations toward these agreements vary significantly and a variety of skill sets are required. Industry must pay the First Nations for these

[9] The First Nations Summit letter to the Premier and Environment Minister in October 2016 stated that: "There is a need to create a new EA process that respects and recognizes the rights of First Nations to be decision-makers in the process, and to exercise their jurisdiction in shared decision-making."

[10] Including roles and responsibilities at all phases of the project, timelines capacity requirements, information needs, and implementation expectations.

negotiations, including the legal and negotiation costs. There is legislative precedence in some jurisdictions where industry is legally obligated to negotiate an IBA/SEPA prior to the project proceeding.[11]

Once all three processes are complete then the First Nations can make a decision based upon their free, prior and informed consent.

There is also a corresponding need for a body with appropriate legal, cultural and technical competency to assist the Crown and First Nations in co-governing EA (see issue 5 below). With this new body playing a neutral secretariat and dispute resolution role, the Ministry of Environment and Climate Change Strategy would be responsible for negotiating government-to-government EA process and outcomes.

Discussion Question:

How should the UNDRIP principle of free, prior and informed consent, the TRC Calls to Action and the *Tsilhqot'in* decision best be given effect in joint decision-making regarding EA process and outcomes?

Issue 2: First Nations Led Assessments

First Nations have an inherent right and responsibility to evaluate whether proposed development in their territories is consistent with their own laws, to do so according to their own procedures, and with access to sufficient information to make informed decisions. The current EA process in BC fundamentally fails to achieve this.

Key Drivers

Several First Nations in British Columbia have undertaken their own environmental assessments due to a lack of trust in the current federal and provincial processes. First Nations have consistently informed the FNEMC that they want to undertake their own assessments, in accordance with their own standards and values, and not compete with federal and provincial processes. Where requested, First Nations must be supported to lead their own reviews and not compete with federal and provincial processes.

Agreements should be reached about responsibilities and funding for additional studies or processes (such as public hearings or other forms of public participation) that the Crown will require to meet its legal obligations if these would not otherwise be addressed by a First Nations review.

[11] See e.g., *Oil and Gas Act*, RSY 2002, c.162, s. 68.

Issue 3: Higher level planning and assessment

a) **Legally enforceable land use and stewardship plans that are fully funded and developed by First Nations;**
b) **Legislatively mandated, co-governed regional and strategic assessments to inform planning and guide project assessment.**

First Nations participants emphasized the importance of legislatively mandated, adequately funded higher level planning and assessment to guide project level EA and regulatory decision-making. First Nations also underlined that they must play a leadership role in in planning in order to protect important rights and values, manage cumulative effects, and secure their cultural and economic future.

Issue 3a: Strategic land and marine use planning

Strategic land and marine use plans establish high-level direction for conservation and resource management in a planning area, typically through new land designations and management objectives applicable to different geographic zones. Strategic land and marine use plans that have been legalized in both provincial and Indigenous law can enhance the effectiveness, efficiency and predictability of project level environmental assessment and regulatory decision-making. Marine spatial plans can fill the same role in First Nations marine and coastal territories.

Key Drivers

While there are strategic land use plans covering many areas of BC, most of these reflect out-of-date policy restrictions (such as a 12% cap on protection areas) and did not involve Indigenous peoples at a government-to-government level in their development or legalization. In fact, First Nations were treated as mere "stakeholders" in the land use planning processes which occurred two decades ago. Further, most industries are exempt from land use plan requirements outside of parks and conservancies, and there is no legal requirement for environmental assessment outcomes to be consistent with land use plans. For at least the last decade, BC has only supported land use planning where there is a "business case" to do so, creating a gap of political will and capacity to plan in a way that upholds Indigenous title and rights. Innovative marine area partnership plans have been completed by the Crown and 17 First Nations but these lack legal teeth in provincial law and did not involve the federal government. The absence of proactive planning and binding strategic-level direction is a wasted opportunity to deal with big picture issues up front, which results in inefficient use of time and resources in project assessments for First Nations as well as the EAO, proponents and the public.

In July 2017, the Minister of Forests, Lands, Natural Resource Operations and Rural Development was mandated by the Premier to: "Work with the Minister of Indigenous Relations, First Nations and communities to modernize land use planning and sustainably manage B.C.'s ecosystems, rivers, lakes, watersheds, forests and old growth."

Discussion questions:

- How should legislative EA reform be linked to land use planning and marine spatial planning?

- What conditions need to be in place for successful Indigenous-led or collaborative land use planning to guide assessment and regulatory decision-making going forward?
- How will the Province provide financial support for First Nations to complete their land and marine use plans?

Issue 3b: Regional and Strategic Assessment

Regional assessment evaluates how different scenarios for development, protection and restoration in a region will cumulatively affect values and rights compared to historic and current conditions. It can identify management objectives and ecological limits based on best available science and Indigenous knowledge, which can be directly applied in project level assessment and regulatory decision-making, and serve as an input to land use or marine planning. Strategic assessment evaluates how higher-level policies, plans, and programs impact values and rights. These concepts can be combined through regional strategic assessments that assess a particular type of development or policy for a region, such as LNG development in northern BC, or fish farms in the Skeena watershed. Regional and strategic assessment also reflect the reality that the needs of some species and values, and the scale of projects that impact them, may extend beyond an individual nation's territories or provincial administrative units.

Key Drivers

Adverse impacts to local environments and communities from development have built over time and interact in a cumulative way. First Nations' present and future ability to exercise title and rights will require identifying and establishing limits on the cumulative impacts of past, present and reasonably foreseeable development, and then managing activities to avoid reaching those limits (or where necessary undertaking restoration).

The BC Auditor General found in 2015 that "current legislation and directives do not effectively support the management of cumulative effects across all of B.C.'s natural resource sector ministries and agencies."[12] BC has recognized "the need to look at resource development projects on a regional basis, as opposed to a sector-by-sector or project-by-project basis."[13] However, while BC's new cumulative effects framework may help provide information to environmental assessments of projects[14], it "does not create new legislative requirements; rather it informs and guides cumulative effects considerations through existing natural resource sector legislation, policies, programs and initiatives."[15]

The federal government, in seeking to address similar issues in the reform of federal environmental assessment law, has proposed "*Regional assessments* to guide planning and management of cumulative effects (e.g. biodiversity and species at risk), identify the potential impacts on the rights

[12] https://www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Cumulative%20Effects%20FINAL.pdf
[13] https://news.gov.bc.ca/stories/cumulative-effects-framework-being-implemented-throughout-bc
[14] https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/cumulative-effects/bulletin_1_cef-ea_feb_2017.pdf
[15] https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/cumulative-effects/interim_policy_faq_3_feb_2017-1.pdf

and interests of Indigenous peoples, and inform project assessments."[16] The federal government's proposed approach is based in part on the report of the Expert Panel for the Review of Environmental Assessment Processes, which recommended that regional assessments be conducted co-operatively by Indigenous, federal and provincial jurisdictions. The Expert Panel identified this is "the best way to create a forum for all jurisdictions to have input and to assess alternative development scenarios for the region. Additionally, the co-operative approach best supports a broad implementation of regional IA [impact assessment] decisions."[17] The Expert Panel added that legislative requirements may help outline how the outcomes of regional assessment, such as thresholds and objectives, apply to project assessments and other decisions in the region.

Discussion Questions

- How should regional and strategic assessment best be integrated in BC's legal framework for EA and land use planning/marine spatial planning?
- What are ways to ensure that regional assessments respect and reflect Indigenous jurisdiction?

Issue 4: Protecting rights and values through a substantive sustainability test

Article 29(1) of UNDRIP states that: "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources," as well as protection of cultural and religious sites (Articles 12), and their "distinctive spiritual relationship" with their territories, including the right to "to uphold their responsibilities to future generations in this regard" (Article 25). In implementing UNDRIP rights particular attention is to be paid to vulnerable populations (Article 22).

Consistent with these substantive requirements, the FNEMC *Proposals for Reform* paper recommended legislative reform to shift EA from a largely process-based exercise to one focussed on achieving substantive sustainability and reconciliation goals. This was also a top recommendation from a recent EA expert summit involving academic, legal and private sector EA practitioners,[18] and was reflected in the recent Expert Panel report on federal EA reform. In this approach EA is seen as a planning tool to identify the option from among reasonable alternatives, including the option of not proceeding, that best protects Indigenous rights and safeguards ecological, cultural, social and economic values.

A sustainability test would establish a set of criteria that EA decision-makers must address to ensure that EA is achieving these goals in an accountable, transparent fashion. Legislated criteria would spell out the need for EA decisions to protect or restore ecological integrity, cultural areas, sustainable livelihoods, intergenerational equity and other important objectives (such as Canada's ability to meet international climate commitments). If all criteria can't be met, the alternative chosen should make the greatest overall contribution to sustainability while avoiding infringements of title and rights.

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[16] https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/share-your-views/proposed-approach/discussion-paper.html

[17] https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html#_Toc051

[18] Executive Summary, Federal Environmental Assessment Reform Summit Proceedings (August 2016), online: < https://www.wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_proceedings_fnl.pdf>.

Key Drivers

Negative environmental and cultural impacts in First Nations' territories have continued despite more than two decades of EA practice in BC. Ensuring that generations to come can access healthy lands, waters and resources in abundance in their territories is a prime concern for the ongoing exercise of title and rights and to sustain communities, cultures and economies. Yet the current EA regime does not require EA decisions to consider and be consistent with achieving such fundamental goals through a sustainability test. As the FNEMC *Proposals for Reform* paper noted: "Without such a test, how can assessors properly arrive at a conclusion to reject a project?" Similarly, how can appropriate conditions for an approval be put in place? The absence of a sustainability test to evaluate whether or not a project should be approved, and under what conditions, compromises the credibility, accountability and effectiveness of EA in BC.

It is noted that non-Indigenous stakeholder groups, and members of the public, are increasingly aligned with First Nations, on the strength of their inherent rights, to protect the environment in the face of proposed major projects, due to mistrust of the effectiveness of federal and provincial EA processes.

Discussion Questions:

- What are the most important outcomes that EA processes and decisions should achieve?
- How should these criteria be expressed in legislation, and how should decision-makers be required to apply them?
- If trade-offs are required between environmental, cultural, social and economic sustainability criteria, what rules should apply? (For example, should protection of sensitive cultural or spiritual areas be absolute? Are there other "non-negotiables"?)

Issue 5: Mandate, composition and reporting of the body overseeing EAs in BC

The body overseeing EAs must have the necessary mandate, expertise and capacity to accomplish the goals of a revitalized EA process that is aligned with UNDRIP, the TRC Calls to Action and *Tsilhqot'in*, and which furthers the objective of reconciliation. One way to achieve this would be to evolve the EAO into a new Sustainability Authority as recommended in the FNEMC *Proposals for Reform*. As an arms-length, independent board reporting to the Legislature, the Sustainability Authority would include an equal number of First Nations and Crown nominated members. The charter, mandate, terms of reference, process for selecting directors, and nomination of first term appointments would be co-designed by First Nations and BC. The new board would be responsible for achieving substantive sustainability and reconciliation goals as well as overseeing assessment processes; serve as a secretariat to ensure necessary government-to-government agreements and IBAs are in place at various stages of the EA process; ensure that both Indigenous and provincial legal requirements are met through EAs, and that the proper information basis is available to do so.

Assessment processes, standards and guidelines developed through the Sustainability Authority would provide minimum standards. However, detailed "terms of engagement" for the conduct of EA and post-EA consultation would be determined through assessment-specific government-to-

government agreements between local First Nations and BC.[19] These agreements would specify, for example, whether a jointly-appointed independent panel, the First Nation itself, or the Sustainability Authority would conduct the assessment. The Sustainability Authority could also provide dispute resolution functions if a party believed that government-to-government or IBA agreements were not being followed, and oversee follow-up programs.

Key Drivers

The current structure, mandate and practice of the EAO is not well aligned with anticipated shifts in the BC EA process. For example, current EA legislation does not enable the EAO to act as a neutral, independent body; nor does it require the EAO to have due regard to Indigenous laws, title or rights; rather EAs are explicitly open to political interference through ministerial policy direction. Indeed, the EAO is considered the Crown for the purposes of consultation.

Insufficient oversight and lack of First Nations involvement has meant that studies proposed and implemented by the proponent and relied on by the EAO often fail to deliver the EA information First Nations need to make decisions and protect their rights. Yet the BC *EA Act* does not currently provide for co-governance or co-administration of EA with First Nations, or for assessments led by First Nations. New expertise will likely also be required as the body overseeing EAs steps into a role of evaluating whether substantive sustainability and reconciliation goals have been met.

The body overseeing EAs should be mandated to ensure that robust information is available to support First Nations and provincial decision-making (encompassing traditional, cultural and scientific knowledge, including spirituality, language, cultural transmission and identity); implement transparent, inclusive and accountable EAs and enable information sharing among First Nations post-EA. Complementary legal changes, for example to the *Freedom of Information and Protection of Privacy Act* will likely be required to protect, secure and maintain confidentiality of sensitive First Nations cultural information and indigenous knowledge within the process, as required by Article 31(2) of UNDRIP.

Discussion Questions

- Is a new body required to oversee a revitalized EA processes in BC?
- If so, what should its, mandate, functions and composition be?

Issue 6: Legislated fee schedule to ensure sufficient funding

Meaningfully implementing the provincial government's commitments to revitalize assessment and planning processes in keeping with UNDRIP will require mechanisms to ensure adequate funding for First Nations to fully perform their roles at all stages throughout the process. Article 39 of UNDRIP affirms that "Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration."

[19] The FNEMC *Proposals for Reform* paper suggests that government-to-government agreements address 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.

The Joint Report recommends creating a legislated fee schedule, payable by proponents, as a key mechanism to ensure adequate funding in this regard. At the same time, the Joint Report notes that carrying out certain First Nations' responsibilities relevant to EA, for example land use planning and monitoring, will also require other funding mechanisms such as government-to-government arrangements.

Key Drivers

First Nations have stated that insufficient funding is a major impediment to meaningful engagement in the current EA regime, and identified a number of key aspects of EA revitalization that must include mechanisms to fund First Nations' assessment and decision-making responsibilities, including:

- First Nations' role in undertaking and implementing higher-level regional assessment and land use and marine plans;
- Early and ongoing government-to-government engagement in jointly planning EAs, and making and implementing EA decisions,
- Where desired, First Nations-led assessments;
- Studies and technical work undertaken by a First Nation during an assessment, emphasizing that Indigenous knowledge must infuse the entire assessment process from pre-engagement to project closure;
- First Nations participation in ongoing monitoring and enforcement, including guardian programs; and
- Internal First Nations' discussions related to "strength of claim" and shared territory prior to commencement of an EA (to replace unilateral Crown strength of claim assessments).

Funding must enable First Nations to carry out technical and governance roles in relation with EA and planning, not simply participate in proponent-driven processes.

Discussion Questions

- What funding mechanisms must be in place to ensure that First Nations can meaningfully carry out their EA roles and responsibilities?
- How should funding mechanisms be legally required or enabled?
- In what circumstances should funding be provided by proponents, the province, or a combination of both?

Issue 7: Monitoring, Compliance and Enforcement

The issuance of an approval and conditions for a project is not the end of an EA, in fact it is just the beginning. Robust ongoing monitoring and enforcement, in which First Nations play a leading role, is key to ensuring that proponents meet their obligations and to providing the information necessary for effective stewardship of lands and waters for generations to come.

Ensuring a prominent role for First Nations in strengthened monitoring and enforcement under a revitalized EA regime is consistent with UNDRIP Article 29, which affirms the right of Indigenous peoples to the conservation and protection of their territories as well as the state's obligation to

implement assistance programs for Indigenous peoples in undertaking such conservation and protection.

Key Drivers

First Nations have identified the need for stronger requirements and more funding for increased monitoring and enforcement, both to follow up on project EAs as well as for landscape-level monitoring of cumulative impacts on lands, waters and values.

The Joint Report recommends that increased monitoring must better incorporate Indigenous knowledge and values such as food security and healthy habitat, as well as recognize the role and authority of First Nations-led monitoring and enforcement such as Indigenous guardian programs.

Indigenous guardian programs are increasing in number and gaining broader recognition throughout BC and across the world. There are currently over 30 Indigenous guardian programs in Canada, with many of the earliest and most robust guardian programs located in BC, and an estimated 200 First Nations are looking at starting guardianship programs in the near future.[20]

Supporting the role of such guardian programs in a revitalized EA regime is an opportunity to improve monitoring and enforcement, both by reflecting the jurisdiction of First Nations as stewards of their territories, and by drawing on the expertise of Indigenous guardians who already occupy and deeply understand their lands and waters.

New enforcement tools may also be required. For example, the Joint Report recommended implementing an administrative monetary penalty ("AMP") program similar to the AMP program implemented under the *Mines Amendment Act, 2016.*

Discussion Questions

- What is required in new EA legislation to achieve more effective monitoring and enforcement? What are other necessary conditions for success?
- How can the role of Indigenous guardian programs in EA monitoring and enforcement best be enabled/required?

Issue 8: Tripartite engagement with First Nations, Canada, and British Columbia.

The federal and provincial governments have different jurisdictional powers set out in the Canadian Constitution, but environment is an area of shared responsibility that touches on both. Thus, some projects and activities impacting First Nations' territories will also require federal assessment or involve federal approvals. Indigenous jurisdiction pre-exists and crosscuts these areas of responsibility. There is thus a need for tripartite engagement First Nations, Canada, and British Columbia.

Key Drivers

[20] Clogg et al, **Paddling Together: Co-Governance Models for Regional Cumulative Effects Management (West Coast Environmental Law Research Foundation, 2017**).

Federal and provincial governments each have constitutional obligations to First Nations that must be met before they make decisions within their respective legislative frameworks and in an ongoing way. In the past, First Nations have had to commence litigation to ensure that the federal and provincial government both uphold their legal responsibilities and don't use delegation or substitution to avoid doing so. For example, in a recent case, Coastal First Nations and the Gitga'at successfully challenged the BC's delegation of EA decision-making to the National Energy Board.[21] Conversely, in 2010 the Gitanyow Hereditary Chiefs challenged the constitutionality of the federal government's decision not to conduct an EA of the Northwest Transmission line, and instead to delegate the EA to the EAO.[22]

It follows that where applicable conduct of assessment agreements should be tri-partite In order to ensure that each level of government (federal, provincial, and Indigenous) is able to meet its responsibilities with respect to EA process and decision-making. This will be particularly important as the federal government moves toward regional and regional strategic assessments that address a broad range of rights and values in a region. In a planning context, tri-partite engagement would particularly enhance the impact of marine spatial planning, which addresses many matters such as fishing and marine shipping over which the Crown asserts jurisdiction.

Issue 9: Legislative change for EA revitalization

Article 38 of the UNDRIP provides that: "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."

The First Nations Summit and the Union of BC Indian Chiefs wrote to BC in 2016 expressing the need for a "complete review and legislative reform of the British Columbia *Environmental Assessment Act*". They urged the BC Government

> *to undertake such a reform using a process which represents proper consideration of Indigenous Title and Rights, and Treaty Rights, including their jurisdictional, economic, social and environmental implications, the Tsilhqot'in Nation Decision; the Truth and Reconciliation Commission 94 Calls to Action; and full implementation of the United Nations Declaration on the Rights of Indigenous Peoples.*

British Columbia has now confirmed that it is committed to such reform. The issues noted above, along with the all of the recommended EA enhancements from the Joint Report[23] are proposed as components of a new legislative framework.

Key Drivers

The current BC *EA Act* provides wide-ranging discretion to the executive director and/or the minister,[24] but past experience has left First Nations distrustful that this discretion will be used in a manner that protects First Nations title and rights. In *R. v. Adams*, the Supreme Court of Canada

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[21] *Coastal First Nations v. British Columbia (Environment)* 2016 BCSC 34.

[22] *Watakhayetsxw et al v. Canada*, FC T-282-10 (filed February 26, 2010).

[23] The content of the latter (Joint Report recommendations) should, however, now be read in light of BC's new commitment to full implementation of UNDRIP, including the principle of free prior and informed consent.

[24] While the 1995 *EA Act* specified the purpose of EA and provided for formal First Nations involvement in EAs, these requirements were removed in 2002.

cautioned that it may not be constitutionally permissible for the Crown to "adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications."[25]

Relying on negotiated non-legal or policy measures alone would leave EA revitalization on an unstable and uncertain foundation. The Crown commonly asserts that non-legislative commitments embodied in agreements with First Nations cannot fetter the discretion of statutory decision-makers.[26] Furthermore, highly discretionary decisions are more difficult to successfully judicially review.

In the context of new provincial and federal mandates for UNDRIP implementation, which will require measures that exceed minimum Canadian legal requirements and significant shifts in governance and institutional culture, a new legislative framework will be particularly important to build trust and provide certainty to all participants involved in EAs.

Discussion Question

- In the spirit of UNDRIP is BC committed to jointly draft the legislation with First Nations including the memo to Cabinet and the instructions to the drafting team?

[25] *R. v. Adams*, [1996] 3 S.C.R. 101 at para 54.

[26] While section 21 of the EA Act permits referral of policy matters to the minister for direction during an EA, this is an ad hoc approach that does not lend itself to the type of systemic reforms anticipated by First Nations and BC, and legally permits unilateral political interference with EA processes and outcomes.