Report to the National Energy Board Modernization Panel

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CIER, the Centre for Indigenous Environmental Resources, is a national First Nation directed environmental non-profit organisation. We offer research, advisory, and education and training services to Indigenous communities, governments and private companies through our two program areas: Building Sustainable Communities and Protecting Lands and Waters.

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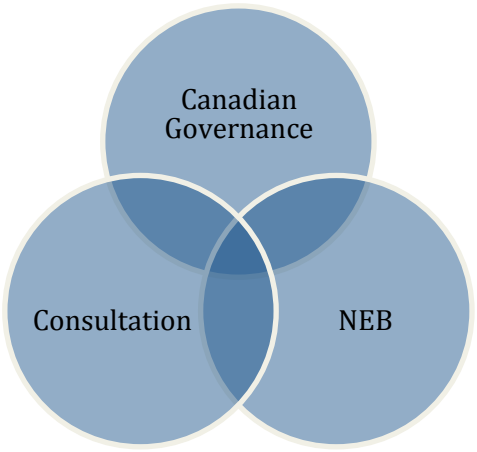
1 SCOPE OF THIS REPORT

There are three main areas of concern when considering the nexus between Indigenous peoples and pipeline and transmission line development in Canada. First, the legislative authority governing pipeline development as set out in *National Energy Board Act* (NEB Act). Second, when a project is proposed, this triggers possible Crown decision-making that might impact the rights of indigenous peoples. The basis and method of addressing these impacts are generally addressed through 'consultation and accommodation' processes. Third, outside the boundaries of either of the other two areas, is the broader context of Canadian governance. Many of the most important elements of decision-making relating to a proposed pipeline have occurred in what the authors refer to as the governance realm, well before project-specific decision-making within the NEB process and consultation decision-making processes occurs. It is the view of the authors that many of the challenges being faced in relation to proposed projects subject to NEB processes and consultation by the Crown are a result of the failure to build appropriate governance mechanisms that include Indigenous governments in discharging political commitments, policy and program development, and other obligations.



This report, as a secondary focus, comments on some key inadequacies in the NEB-Crown consultation process. It also provides, as answers to questions articulated in the relevant NEB Modernization Process Discussion Papers, some recommendations about how to improve Indigenous-specific elements of the NEB itself.

The primary goal of this report is to articulate the optimal structures that would allow for the darkest blue triangle represented in the graphic below - that is, the place of overlap between the mandate of the NEB, the Crown's duty to consult, and the structures of Canadian governance - to operate the most efficiently and effectively and, hopefully, be a mechanism to move towards reconciliation in Canada.

The first part of this report (Section 2) sets out the context to this discussion and describes some of the challenges with Indigenous consultation in broader terms, and links this issue to the Canadian public interest and reconciliation. The second part of the report (Section 3) sets out a proposed path forward, aimed mostly at governance reform that would begin to achieve broader goals related to reconciliation and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). This part (Section 4) also provides examples. The final part of the report (Section 5) provides recommendations.

Finally, we understand that the NEB Modernization process may result in dramatic changes to the NEB, including that it no longer conducts assessments at all (as was the

case prior to 2012). These matters are beyond the scope of our review, however, the recommendations we present in this report would apply to whichever agency or body charged with relationships and responsibilities as regards Indigenous peoples and resource development in Canada. Many of our recommendations go well beyond the mandate of the NEB or any individual federal department or agency.

2 CONTEXT

2.1 Wicked Problems

In May 2008, the Harvard Business Review wrote an article discussing a certain type of extremely difficult challenge faced in today's increasingly complex world: the "wicked problem".[1] A number of writers have described these types of problems, but the Review described them as having special characteristics that make them fairly easy to distinguish from regular problems: they involve many stakeholders with different values and priorities; their roots are complex and tangled; they are difficult to come to grips with and change with every attempt to address them; they have no precedent; there is nothing to indicate the right answer to the problem. Others have added: Every wicked problem is a symptom of another problem.[2]

The challenge facing all Canadians in addressing our collective colonial history of disempowerment and oppression of Indigenous peoples may be one such problem. It certainly has many of the key characteristics:

- The institutions and institutional thinking resulting from colonization have given us the reserve system, residential schools, assimilation, the *Indian Act* and numerous extremely costly and lengthy land claim negotiation processes. These are all based on a colonial view of the inherent inferiority of indigenous people, or some notion that "they aren't ready". In many cases these institutions and institutional thinking still exist today (hence this review). This reality has created **a host of interrelated problems that are impossible to separate from one another** and that appear to be almost unsolvable without solving them all at the same time (poverty, health, economic development, governance, racism, intergenerational cultural loss, language loss, etc.);
- No problem has a single solution, and **many of the solutions are interconnected and potentially a response to a diverse set of causes**. Even a cursory review of three seminal reviews of issues plaguing the health and well-being of Indigenous peoples (and by extension, all Canadians) shows a multiplicity of similarities: The Royal Commission on Aboriginal Peoples [3], the Truth and Reconciliation

[1] Harvard Business Review, "*Strategy as a Wicked Problem*", March 28, 2008 at https://hbr.org/2008/05/strategy-as-a-wicked-problem

[2] Stanford Social Innovation Review, "*Wicked Problems: Problems Worth Solving*", March 6, 2012, https://ssir.org/articles/entry/wicked_problems_problems_worth_solving

[3] Established in 1992, the RCAP was tasked with reviewing many issues of Aboriginal peoples that had arisen through the Oka Crisis and the Meech Lake Accord.

Commission[4], the Aboriginal Justice Inquiry in Manitoba[5]. The outcomes of the current National Inquiry into Missing and Murdered Indigenous Women and Girls[6] is certain to highlight many of the issues identified in these previous inquiries. The recommendations have almost all been uniformly accepted by Crown governments, but most have not been implemented;

- One only has to read the comment section of any reputable news website to see that there are **many stakeholders with a wide variety of views** (ranging from understanding and compassion through to racism and ongoing oppression) and interests (both legal and non-legal).

We have a history, and that history is still here in many ways. Through implementing recommendations of the Truth and Reconciliation Commission (and others before it), we are beginning the process of moving away from that history. However, there is an imprint of the past on the present just as a strong grip on the arm of another person, once released, still leaves an impression for a time.

Canada, at 150 years old, is in a transition, but we must not wait another 150 years to complete that transition. We need to leap-frog over a gradual shift out of the current thinking. The modernizing of the National Energy Board (NEB), and the other reforms being undertaken to environmental review processes, represents a time for nation-building, not just legal reform. Laws are implemented by governments through governance. To address the intersection between Indigenous peoples and the NEB, a broader willingness to address the broader issues of related governance is mandatory.

While daunting, we have source for optimism because never in Canadian history has any government made the statements of commitment to relationship, partnership and support for Indigenous peoples, as has the current government. We cannot understate the importance of these pronouncements; but nor can we assume that by their mere statement that they will have lastly or meaningful effect. The statements, having been made, must now be realized.

2.1.1 Wicked NEB Problems

Colonization has left us with some specific challenges that get in the way of a truly modern, trusted and effective NEB:

- There is a fixation on defined rights (and potential rights infringements) as the basis for dialogue between Indigenous nations and non-Indigenous governments;
- There is growing social unrest within Indigenous nations as seen in numerous demonstrations and legal actions against resource development licensing (such as the Standing Rock protests against the Dakota Access Pipeline); there is a movement among Indigenous government's to politically mobilize and form

[4] The parties to the Indian Residential Schools Settlement Agreement established a Truth and Reconciliation Commission to contribute to truth, healing and reconciliation. http://www.trc.ca/websites/trcinstitution/index.php?p=7

[5] In April 1988, in response to the long-unsolved murder of Helen Betty Osborne and the murder of J.J. Harper by Winnipeg police, the Manitoba Government created the Public Inquiry into the Administration of Justice and Aboriginal People, also known as the Aboriginal Justice Inquiry.

[6] See https://www.aadnc-aandc.gc.ca/eng/1448633299414/1448633350146

alliances among Indigenous governments. It seems that the NEB has lost any "Indigenous social license" it may have had;

- Canadian legal processes such as environmental assessment are designed to limit input to very narrow project concerns and thus appear burdened by interventions that seem 'beyond the scope' of the matter at hand;
- Litigation is often the only resort for resolution of rights issues, but litigation does not resolve the associated governance issues, plus over time has led to sentiments about the loss of legitimacy of the current process and the projects it recommends;
- There is a lack of Indigenous institutions that can assist Indigenous governments in analyzing and addressing their needs and challenges in the face of pipeline projects;
- Institutions, institutional thinking and language (such as the characterization of Indigenous governments as Indigenous "groups") reflect colonial thinking that betrays the view that Indigenous nations are somehow not full governments. This ensures their exclusion from full participation in Canadian governance (meaning, decision-making) mechanisms (such as those that are discussing Canada's energy and climate future);
- There is a polarization of language, such as the use of the term "veto" when referring to a free, prior, informed consent requirement as set out in the UNDRIP. This threatens to delegitimize the need for collaborative decision-making where Indigenous rights might be impacted;
- Cumulative effects (regional, environmental, social/cultural/political, economic) have for too long been inadequately addressed, and the hard decisions (such as the setting of thresholds that must not be crossed[7]) has been left to some future project, panel, government or generation.

These important challenges also contain the seeds of their solutions. They are problems worth solving, but they will require extremely creative thinking, a willingness to try something different and take risks, an understanding that adaptation will be necessary, and, above all, a belief that indigenous governments must be collaborators in setting the path for Canada. This is discussed later in this report, at Section 4.0.

2.2 The Consultation Box

The NEB engages with Indigenous peoples into two main ways: through the environmental assessment (and associated processes) of projects that it is reviewing, and through discharging, to the extent possible, the consultation requirements of the Crown. It is mainly through this latter element, the consultation process, that Indigenous rights matters are discussed and deliberated upon.

In an attempt to improve the outcomes as regards Indigenous peoples and their rights, the Terms of Reference for the National Energy Board's Modernization Panel (NEBMP) refers to the need for "enabling early conversations and relationship building between the Government of Canada and Indigenous peoples". This is important and laudable. However, the "Indigenous Engagement and Consultation" discussion paper is framed

[7] National Energy Board Chair, *Letter to Chair of Expert Panel on CEAA Review*, dated December 14, 2016, page 6.

solely around Indigenous rights and improving the s.35 consultation and accommodation process.

One of the primary goals of this paper is to explain how long-term resolution of the issues that plague the relationships between Indigenous peoples of the Crown is due to the excessive reliance on the consultation process as the main basis for discussion.

2.2.1 The Section 35 Framework

Section 35, which recognizes and affirms Aboriginal and treaty rights, sets a minimum standard of behavior for a Crown decision-maker that might seek to make decisions that could impact rights protected by s.35. It is meant to protect those rights against infringements flowing from Crown behavior, but, in setting out this standard, it affirms that Crown is allowed to engage in rights infringements. If the Crown fulfills the requirements set out in numerous court decisions (i.e. justifies its proposed decision), through showing, among other things, that it has meaningfully attempted, through consultation, to address and accommodate the concerns and potential impacts on Indigenous rights, then it is allowed to adversely impact those rights.

This process is important, but to work well two conditions must be in place: first, Indigenous governments must be full participants in governing Canada, and two, consultation and accommodation must be used as a safety net, not the standard process used to engage with Indigenous governments.

2.2.2 The Basis for Conversation is Limited to Rights Infringements

If there is a proposed Crown decision that might affect a specific right, then the discussion is about discussing and if necessary justifying potential rights infringements (through consultation and accommodation processes). Issues beyond the narrow focus of project-related rights infringements are defined as "out of scope".

However, discussions about potential rights infringements, no matter how seemingly fair and reasonable process-wise, are not a reconciliation process; they are a dismantling process, because at the end of the day rights infringements back the parties into a zero-sum position. For example, if despite all mitigation measures and accommodations, there remains a fundamental disagreement in values about whether a project should go ahead or not, the final decision always rests with the Crown (as represented by the NEB or the Governor in Council [GIC] as the case may be). In the case of a large pipeline, the GIC alone decides what is in the Canadian public interest, and this often means considering economic interests to be more important the rights of Indigenous peoples that are infringed in the process. The NEB is charged with assessing the Canadian public interest, and even when that interest is weighed against possible infringements to Indigenous rights – thereby engaging the honour of the Crown – Indigenous peoples are not participants in the discussion where the final determination is made.

However, there is no other decision-making forum for indigenous governments to express their related views, for example by participating in energy policy-making and decision-making in Canada.

2.2.3 The Canadian Public Interest and Consultation

The approach to fulfilling the honour of the Crown and meeting the duty to consult should be used only as a safety net, when all other forms of consent-based governance collaboration have failed.

Many improvements are needed particularly if it is to be any kind of a successful mechanism leading towards reconciliation. A few other examples of concerns with the federal policy are provided at Appendix B, however one issue is worth reviewing in some detail here, and this relates to the Canadian Public Interest determination in the TMX case, as this is where Indigenous rights were finally traded off against broader Canadian public interests.

2.2.3.1 Canadian Public Interest

NEB has an integrated mandate to consider whether very complex proposed projects are in the Canadian public interest.[8] In doing this, it weighs many issues, including the impacts on Indigenous rights.

The NEB has two main tasks that involve balancing Indigenous rights and other issues with a proposed project. First, the NEB, under sections 52 and 58.16 of the NEB Act must **make recommendations** as to whether a proposed project is in the "Canadian public interest" and **set out terms and conditions** towards that end**.** For projects that also fall under *CEAA 2012*, NEB assesses whether there will be "**significant adverse environmental effects**".

Second, the NEB consults with Indigenous groups and assesses whether the proposed decision might impact Indigenous rights and interests, in particular whether any remaining post-accommodation **impacts on Indigenous rights are justified** in the circumstances.

Under the first task, NEB recommendations must take into account whether the proposed project "is and will be *required by the present and future public convenience and necessity*, and the reasons for that recommendation; and (b) regardless of the recommendation that the Board makes, all the terms and conditions that it considers *necessary or desirable in the public interest*…. " The NEB can consider any public interest in making its recommendation.

The NEB Act does not define *public convenience and necessity* nor *public interest*. The NEB has provided: "The public interest is inclusive of all Canadians and refers to a balance of economic, environmental, and social interests that change as societies values and preferences evolve overtime. As a regulator, the board must estimate the overall public good the project may create and its potential negative aspects, weigh its various impacts, and make a decision."[9]

The NEB's assessment of *present and future public convenience and necessity* has shifted into just assessing the Canadian public interest assessment, apparently eliminating the 'convenience' and 'future' elements. This has also then further morphed into a "benefits

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[8] *Supra*, note 7, pages 2-3.

[9] National Energy Board, "Deck 2: Overview of the National Energy Board's Current Structure, Roll and Mandate, Presentation to the Expert Panel Conducting the NEB Modernization Review, dated November 29, 2016."

versus burdens" assessment, as was recently done in the TMX assessment. This approach works well if one wishes to rely on more easily quantifiable and identifiable economic benefits. It is a very poor approach where burdens and benefits are less tangible (such as impacts on endangered killer whales, Indigenous rights impacts, or the impacts on future generations). It is also biased against local communities and rights-holders: large economic benefits outweighed local burdens (even if these burdens are permanent impacts on Indigenous rights), which are seen as minor in scale and comparison. This is exactly what the NEB's assessment in TMX indicated, which was supported by the Crown Consultation Report and finally approved by GIC.

2.2.3.2 Significant Adverse Environmental Effects

On projects that are also under CEAA 2012, the NEB is also charged with determining whether there might be 'significant adverse environmental effects'. The NEB Chair acknowledges that because there is no 'significance test' the NEB has challenges with addressing this requirement, and he has asked for guidance to be given.[10]

The determination is a policy matter with a science base, not just a science matter. Science can generally tell you when an ecosystem reaches a point of no return and is likely going to change without an ability to recover. But only a policy discussion can tell you if Canadians are okay with that change.

Therefore, as regards Indigenous peoples perspectives on significance, they need to be involved in that discussion because the matters that are considered 'significant' are culturally driven. So, the NEB should be specifically requesting Indigenous viewpoints on why and how an adverse effect is seen as "significant" by an Indigenous presenter. Further, the NEB should be required to articulate not only the science or traditional knowledge measurements of significance, such as whether the proposed project might push an ecological or other aspect of the potentially impacted area past a threshold of no return, but the different values that are inherent in the determination.

The relationship of this determination as regards impacts on Indigenous rights must be made clear. For example, passing a threshold may effect not only the health of the environment, but also may affect the ability for Indigenous rights that are dependent upon that environment to be exercised.

Impacts on Indigenous rights that cannot be accommodated should automatically indicate that an adverse environmental effect is significant because it engages the honour of the Crown.

Further, there should be a presumption (see Recommendation 5.4.3) that projects that create significant adverse environmental effects are not in the Canadian public interest.

2.2.3.3 "Out of Scope" Matters

It is unclear where and how the Crown determines, ultimately, whether Indigenous rights should be infringed in any specific situation. While a prescribed formula in not feasible, the exact locus, process, and criteria of final decision-making as to which Indigenous rights infringements might be considered "acceptable" is unclear.

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[10] *Supra*, note 7, page 4.

An example is useful to illustrate this problem. As part of the NEB Modernization Panel briefing and hearings process, a number of documents were presented explaining the Crown, MPMO (Major Projects Management Office) NEB decision-making regarding Indigenous rights consultation outcomes. These include:

1. Letter from NEB Chair to Panel (dated November 24th, 2016);
2. Major Projects Management Office Initiative, Expert Panel – National Energy Board Modernization Briefing Binder (presentation, undated);
3. Table entitled "Indigenous Consultation typically undertaken for NEB Project Reviews (Sections 52 and 58.16)"

We did a brief comparative review of these documents, plus two others:

4. The Government of Canada's, "*Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult – March 2011*";[11]
5. "Project Agreement for the Trans Mountain Pipeline Expansion Project in Alberta and British Columbia" (various dates in September 2014). It is very important to note that Indigenous governments are not signatories to the Project Agreement.

The goal of the comparison was to try to locate the source of decisions regarding the assessment of infringements on Indigenous rights, and in particular, who would address residual concerns, especially if those concerns were deemed to be "out of scope" to the NEB review. The assumption made was that a project agreement, such as the Project Agreement for the Trans Mountain Pipeline (Project Agreement), should clearly indicate the understanding of the approach to addressing "out of scope:" issues. For example, the Project Agreement indicates that:

The NEB will:

- Assess the potential impacts of the Project on Aboriginal interests, including Aboriginal and treaty rights, as well as the appropriateness of potential mitigation measures; and,
- Refer to the MPMO and relevant federal authorities, all issues raised by Aboriginal persons or groups in the context of the NEB's Aboriginal engagement activities as well as during the public hearing proceeding.

The Departments will:

- In collaboration with regulatory authorities and other federal departments and agencies, assess project impacts to potential or established Aboriginal and treaty rights;
- When issues are raised by Aboriginal groups or persons outside the NEB process that are beyond the regulatory departments' and agencies' mandates, but are relevant to the NEB's proceeding, refer these issues to the NEB. If these issues are outside the mandate of the NEB, refer them to the MPMO;

MPMO will:

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[11] Government of Canada, "*Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011*".

- For Aboriginal consultation activities outside the NEB process, the MPMO will house and maintain the official Record of Crown consultation;
- Work with federal departments and agencies to determine whether further Crown action is required outside the NEB process to meet the Crown's duty;

Natural Resources Canada will:

- Prepare a submission by the Minister to Cabinet for a decision and Order in Council for the project.

A few conclusions are clear from the above:

- Indigenous "out of scope" considerations presumably end up in the "official Record of Crown consultation", but this is not clear;
- There is no process or commitment in the Project Agreement to address any "out of scope" concerns, even if they are documented in the Crown Consultation Record;
- MPMO was not required under the Project Agreement to engage with Indigenous governments to determine whether further Crown action is required outside the NEB process to meet the Crown's duty (for example, where the Indigenous government feels that the NEB did not fully address "in scope" matters or the Crown did not fully address "out of scope" matters);
- The content of the Natural Resources Canada report to Cabinet does not appear to involve any review or input by Indigenous governments (meaning, Indigenous governments do not have the opportunity to assess or comment on the accuracy of the NRCan assessment of the extent or importance of any residual, post-accommodation impacts on their rights). It appears that NRCan passes the NEB report to GIC[12], but whether NRCan elaborates on that report especially in terms of adding their considerations regarding Crown consultation matters, unresolved "out of scope" Aboriginal concerns etc. is unknown;
- Under this Project Agreement, Cabinet would never hear directly from those Indigenous governments that will be impacted by the proposed project, even though Cabinet will make the final "Canadian Public Interest" determination that will result in impacts on Indigenous rights;
- Cabinet will never hear from Indigenous governments on "out of scope" issues even though many of them – almost by definition - would require Cabinet deliberation to be resolved, and Cabinet will make the sole determination as to whether and how they should be addressed.

It is particularly important to consider this information from the perspective of an Indigenous rights holder trying to understand where the locus of decision-making is as regards whether an impact on their rights is considered significant enough by the Crown to warrant accommodation, or is even too severe to be justified. These are the determinations of primary significance to Indigenous peoples, but they currently have no apparent access to that final determination.

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[12] Chair of NEB, *NEB Response to NEB Modernization Review Expert Panel – 2017_02_03 – EN*, (dated February 3, 2017), page 8.

In addition, the authors compared and commented on the MPMO and NEB process tables (documents 2 and 3 above). This review is attached as Appendix A.

2.2.4 Balancing Interests and Reconciliation

The approach taken by the Crown in the TMX Crown Consultation report (TMX CCR)[13] regarding the Southern Resident Killer Whale population illustrates the challenge faced by Indigenous peoples:

- "The NEB concluded that Project-related vessel traffic would have a **significant adverse effect** on Southern Resident Killer Whales."[14] [emphasis added]
- "However, based on the expert knowledge of marine mammal researchers within the Department of Fisheries and Oceans (DFO), the Crown is of the view that the risk to Southern Resident Killer Whale and stellar sea lions from Project-related vessel collisions **may be extremely low to negligible**."[15] [emphasis added]
- "The Crown understands that **Aboriginal groups still have serious concerns** regarding impacts on marine mammals with increased vessel traffic."[16] [emphasis added]

The NEB recommended the project despite the existence of these (and other) residual significant adverse environmental effects. The Crown disregarded the deep expertise of the NEB, and both the Crown and NEB recommended the project despite these problems and the unresolved concerns of Indigenous groups. The TMX case contains other examples similar to this:

- "The Crown acknowledges that proponent commitments, NEB conditions and the existing pipeline safety regime would not eliminate the potential adverse impacts of the Project on Aboriginal Interests specific to freshwater fishing."[17]
- "…the Crown notes that many Aboriginal groups maintain that the cumulative effects of development activities have severely impacted their ability to exercise their Aboriginal and treaty rights to fish."[18]
- " For the TMRU [Traditional Marine Resource Use] activities directly affected by the WMT, the NEB finds that these effects would persist for the operational life[19] of the Project, as TMRU activities would not occur within the expanded water lease boundaries for the WMT. The NEB finds that while the effects would be long term in duration, they would be reversible in the long term. Aboriginal groups would *likely be able to adapt* to the expanded water lease boundary." [emphasis added]

The problem the above example illustrates is the Crown's view that it has "a duty to weigh impacts on Aboriginal interests with other interests". The Crown provides a list of principles

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[13] Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project, November 2016
https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/TMX_Final_report_en.pdf
[14] *Ibid*, page 86.
[15] *Ibid*, page 86-87.
[16] *Ibid,* page 87.
[17] *Ibid*, page 76.
[18] *Ibid*, page 77.
[19] The operational lifespan of the TMX projects is about one generation, or twenty years.

it follows in so doing, it does not share the analysis about *how* the principles were applied and *how* it is satisfied that the these interests outweigh the impacts on Indigenous rights.[20]

In the TMX situation, some of the potential impacts on Indigenous rights were noted as being severe, and the Crown indicated in less than a page at the end of the report that these rights were being "weighed" along other interests. The interests included matters like "potential economic development" and "resources or values that may no longer be available for future generations".

This determination is the fundamental final step in the consultation assessment, because even severe impacts that cannot be addressed will not prevent a project approval if the Crown assesses that there are "interests" that are more important. While the courts have made clear that the Crown can do this weighing, it makes a mockery of the consultation process, if at the end of the day, even when impacts are acknowledged as being moderate or severe, long term, that the project can proceed any way. In the TMX situation, the Crown assessed that 28 of the First Nations along the proposed project had a deeper (as opposed to lower or middle) depth of consultation required, and almost 30% of those First Nations will face moderate impacts as a result of the project.

Clearly even extensive impacts on Indigenous rights and interests are somehow being weighed as less important than "other interests" or the Canadian public interest. How this is justified as a substantive outcome that meets the honour of Crown is mystifying. We suggest that this is one of the main reasons for the lack of public trust in the process.

It is absolutely critical that a much higher standard of care and level of transparency be required in this determination.

The Crown's "weighing" and Canadian public interest determination are probably the most important assessments made in the review and consultation processes. They are, by definition, a policy or values determination…a 'should we' type of question. Answers to these questions; matters of deep concern to Indigenous governments and people such as the ongoing desirability of continued resource development within or that impact Indigenous rights and traditional territories, and the willingness of Crown governments to proceed with those projects in the absence of full and final resolution of Treaty and Indigenous land, water, and governance rights implementation, must be made nation-to-nation in a decision-making step created specifically for that discussion.

2.3 Current Improvements are Not Sufficient

2.3.1 The NEB Chair's National Engagement Initiative

The NEB has indicated in submissions[21] that its Chair has created an initiative to build relationships with Indigenous groups. This initiative appears to go beyond what the NEB sees as (or has been told is) its role in discharging the duty to consult. This initiative is aimed at the NEB having a regional presence, delivering workshops on a number of issues relevant to NEB, and engaging in "proactive dialogue with Indigenous people and

[20] *Supra*, note 13, pages 150-151.
[21] National Energy Board, *National Energy Board Mandate and Role under CEAA 2012*, presentation dated September 9, 2016 at slide 9. Available at https://drive.google.com/drive/folders/0B7Cm2PHQeQqhNi1LVXFzNUtybmc

communities on their unique viewpoints, needs, and requirements for lifecycle regulatory information."

The challenge with this initiative is that it is optional, revocable, is significantly constrained and is cosmetic since the NEB has indicated that it does not provide policy advice to Canada (instead, it implements the policy direction if receives). A valid question exists as to the veracity of a process designed to engage Indigenous people that will not result in information or advice being provided to the Crown on the issues of concern raised by Indigenous people in that process.

2.3.2 The Interim Principles

On January 25, 2016 Canada announced the creation of five interim principles that were designed to act as interim measures until a full review and overhaul of the federal environmental assessment process could occur. The two principles of relevance to this paper were:

- Decisions will be based on science, traditional knowledge of Indigenous peoples and other relevant evidence.
- Indigenous peoples will be meaningfully consulted, and where appropriate, impacts on their rights and interests will be accommodated.

The challenge with these principles is that they were already required under law or the NEB Filing Manual. They represent no improvement beyond the situation that existed prior to their announcement, and they do not serve as any kind of a model or guidance for what should be done to improve the NEB in the long-run.

2.4 The New Context of Consent

"…I can tell you from myself, I didn't go and work at the UN for 27 years on the Declaration to break up Canada. It's the reverse. It's to build a better and stronger Canada. But anyway, the partnership that's reflected by Treaty is the basis for strengthened good relationships which reconciliation is….both the UN Declaration and the Treaty are solutions. They're not problems. They're solutions."[22]

After years of opposition, on November 12, 2010 Canada endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) stating, "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework."[23] The issue of the need to secure consent of Indigenous peoples, especially regarding resource development projects, and the concern that "free, prior and informed consent when used as a veto"[24] could stop all development, has arguably been the most discussed issue when it comes to giving full expression to the UNDRIP. As argued by Tom Flanagan in the Globe and Mail, "a veto

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[22] William Littlechild, *Testimony to the NEB Modernization Panel,* (undated), page 7.
[23] *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* at http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142.
[24] *Ibid*.

power would be particularly threatening to corridor projects, such as pipelines, railways, highways and power lines."[25]

The Tsilhqot'in decision of the Supreme Court of Canada provided that "governments and others seeking to use the land must obtain the consent of the Aboriginal title holders,"[26] regarding resource developments being proposed on Indigenous title lands. If the Indigenous rights-holder does not provide its consent, then the government's only recourse when establishing that resource development is to ensure it can meet the justification test required by the courts in upholding s. 35 of the *Constitution Act, 1982.* This justification test includes engaging in 'consultation and accommodation' with Indigenous rights-holders. While some wonder at how this requirement for consent applies to Indigenous traditional (non-title) territories, the Supreme Court is – and has been for many years – sending a very strong message about the significance of Aboriginal rights in the Canadian federation and society. The Supreme Court is not prepared to allow these rights to be ignored in decision-making.

Finally, Canada accepted all recommendations of the Truth and Reconciliation Commission of Canada, including those which called for the "federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation" and "to develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*."[27] How this will be done is as yet unclear. In the next section of this report the authors present a proposed approach that has precedent in Canada, and has worked to move all parties down the path of reconciliation.

3 A Proposed Path Forward: Collaborative Consent[28]

3.1 What is Collaborative Consent?

'Consent' is the process and outcome of agreeing. In typical situations, it involves one entity (a person, group, government or nation) sharing a need, want, or desire or proposition and the other entity responding in the affirmative.

'Collaborative consent' is a nation-to-nation approach to mutually building trust and giving and receiving respect in a process where governments – Indigenous and non-Indigenous – work to build options and then achieve each other's consent to a proposed action or

[25] "Support for UN declaration on native rights may spell trouble for Canada's resource sector", Tom Flanagan in the Globe and Mail, November 23, 2015 at http://www.theglobeandmail.com/globe-debate/support-for-un-declaration-on-native-rights-may-spell-trouble-for-resource-sector/article27415342/

[26] Tsilhqot'in Nation *v.* British Columbia, 2014 SCC 44, para. 76.

[27] Truth and Reconciliation Commission of Canada: Calls to Action, http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

[28] A previous version of elements of this section of this paper was published at www.mullfret.com and was also provided to Natural Resources Canada to assist in regards to implementing Canada's commitment to a new nation-to-nation relationship with Indigenous governments.

decision. There are many possible mechanisms through which to have these discussions, and the exact approach is tailored to the matter at hand.

3.2 Why Engage in Collaborative Consent?

3.2.1 Setting Canada's Direction, Nation-to-Nation

Framing most, if not all, of the engagement opportunities with Indigenous people within the section 35 consultation framework has, to date, meant that there is little or no opportunity for ongoing, nation-to-nation dialogue on the important matters.

The federal consultation framework, while necessary in some very narrow, project-based circumstances dealing the potential for direct impact on Indigenous rights, eliminates the front end dialog that is necessary to set the policy direction that predates legislative and program development. Is this policy, legislative and program direction that sends the signal to the economy as to whether and how forms of resource development will be allowed.

The reality is that the policy discussions that result in pipeline applications happen well before the final project application and the final decision to approve a pipeline and infringe Indigenous rights often occurs many years later. However, unless there is a specific proposed Crown decision that might affect a specific Indigenous right, there is no mandatory mechanism to ensure that Indigenous governments are involved in any of those discussions. This also limits discussions to the directly affected Indigenous nations, and precludes their participations as nations in Canada's evolution.

The above graphic is a fairly simplistic illustration of the various conceptual steps between the political, policy, and legal approval of a pipeline. The earliest possible stage in the life of a potential pipeline, for example, would be in the realm of platform statements made by a political party trying to become a government in power (1). This moves through to policy indications made in the public arena and governance arenas (2), into the formal decision-making phase after a proponent has commenced the process through legal application (3). This creates the NEB's environmental assessment and review process. Finally, assuming the project is considered by the Crown to be in the Canadian public interest (4), the pipeline would be approved (5).

The challenge for Indigenous governments is that they are not included, as a rule, in anything other than the narrow legal confines of the third step. The consultation process is triggered by virtue of a potential Crown decision being requested by a proponent in that stage. However, many of the concerns presented by indigenous peoples in NEB hearings relate to matters that likely fit in one of the other four stages of the above process. This creates the challenge where the NEB appears, in their attempt to remain within the

boundaries of the NEB mandate, to "listen but note as being out of scope" matters of significance to Indigenous presenters.

Creating consent-based, collaborative tables to address these issues are needed.

3.2.2 Indigenous Laws and Policies

While Indigenous nations have long indicated their rights to make and implement their own laws, the *Tsilhqot'in Nation* decision was the Supreme Court of Canada's most recent reiteration by Canadian courts that Indigenous nations have law-making powers.[29] Neither Indigenous nations nor Canadian courts have fully defined the breadth and scope of Indigenous law making authority, but they include inherent authorities (held by Indigenous governments independent of explicit Canadian legal recognition), those agreed to in treaties, land claims and self-government agreements, those granted under Canadian legislation and those held at international law.

As Indigenous legal traditions will continue to be articulated and implemented, collaborative consent processes are the mechanism to achieve governance coherence between these legal systems today. As explained further in section 3.5 below, Canadian Crown governments engage in cooperative federalism which is a consensus building process used as a result of the absence of full legal jurisdictional clarity. Collaborative consent is a governance process that creates the decision-making tables with Indigenous governments (similarly, even in the absence of full legal jurisdictional clarity).

3.3 Hallmarks of Collaborative Consent

The following are hallmarks of a collaborative consent process:

Nations, through their governments, create **permanent discussion and agreement making tables** (e.g. such as intergovernmental forums or councils) and commit to agenda items of ongoing mutual concern (e.g. business as usual matters, special matters such as addressing a policy gap, meeting a political commitment, setting a broad vision or goal, achieving reform of laws and regulations, etc.). Governments approach each other with agenda items; collaborative processes are not only engaged by proposed Crown decision-making that might impact Indigenous rights. These arrangements are set out in government-to-government memorandums of understanding.

Governments engage with each other in an ongoing, iterative way, continually defining interests and goals, articulating assumptions, exploring options, reaching agreement, and then circling back to refine goals, revisit assumptions, check progress, etc. There is an **ongoing process of mutual engagement, rather than a specific, singular focus**.

Governments work together in areas of **overlapping or complementary authorities or jurisdiction**, even if they don't agree with each other's views about the scope of their jurisdictions. They treat each other as political governments, even if the legal scope is still under discussion or negotiation at other tables. No government loses or limits its authority by participating; nor is the process a legal affirmation of any authority. The idea is that

[29] For a concise articulation of the recognition of Indigenous laws in Canadian jurisprudence see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, University of Toronto Press (2007), pages 5-12.

governments choose to exercise the authority they believe they have to participate in the consent process.

Governments **reach agreements** that are articulated in various ways. Some agreements are cooperative intergovernmental agreements; others are strictly legally binding. All are in writing. They are all honoured and acted upon.

Governments agree that the **collaborative consent process may satisfy a duty to consult** and accommodate, if the parties agree. If governments reach an accord or understanding that addresses a specific decision, s.35 consultation may be rendered duplicative or unnecessary.

No government has a veto in the process, meaning **governments commit to reaching agreement**; best efforts are made to fully explore goals, interests, solutions, etc. But, if consensus cannot be reached with all parties, governments can proceed with whatever their next course of action might be. This could mean tabling the item (i.e. pausing the discussion, suspending the proposal) to be discussed at a time in the future more likely to reach political agreement (as routinely happens in federal/provincial/territorial tables). This involves weighing the diplomatic benefits and risks to the nation-to-nation relationship.

If decisions must proceed and consensus has not been achieved, governments can of course proceed. This may include s.35 consultation and accommodation, or litigation, as the case may be (if Indigenous rights might be impacted by the proposed action).

Given the long-term commitment to work together as partners under this process, the framework for discussion tends to be framed as being **part of the path of reconciliation**. Collaborative consent discussions are about restoring and building trust and respect.

3.4 The Legal Basis for Collaborative Consent

*"That is, how will **you** define yourselves as nations? What are the structures through which you will deliver programs and services? And then, what will your relationship with Canada, with your neighbours, and with other Indigenous nations look like? How will you resolve your differences between and amongst yourselves?"*

"And we need to get moving on developing these mechanisms as soon as possible. And yes, this work will be controversial. But it is absolutely necessary. And it cannot take multiple generations. We do not have time. Incredibly, by some accounts, at the current rate, negotiating our way out of the dysfunction of the Indian Act system using existing mechanisms would take 600 years. This is not acceptable."

"We simply cannot waste time on reinventing the wheel or replicating reports of yesterday – we must act with conviction and determination."

The Honourable Jody Wilson-Raybould, PC, QC, MP
Minister of Justice and Attorney General of Canada[30]

The question posed by the Minister of Justice is clear and an answer is imperative. However, the answer will not be found; *it will be created through nation-to-nation building*.

[30] The Honourable Jody Wilson-Raybould, *Address to the Chiefs in Assembly*, Assembly of First Nations Annual General Assembly, Niagara Falls, Ontario (July 12, 2016).

3.4.1 Nations, Governments, and Governing

Where do we begin? A critical first question is "Who is 'the nation'?" The NEBMP's "Indigenous Engagement and Consultation" discussion paper consistently refers to "Aboriginal groups", while acknowledging that the *Constitution Act, 1982* refers to "Aboriginal Peoples". The UNDRIP and the NEB Modernization Panel refers to "Indigenous Peoples". The Prime Minister refers to Indigenous peoples as 'nations'. What this variability in terminology betrays is, at best, confusion regarding the political and legal distinctions, and, at worst, a possible bias against recognizing Indigenous Peoples as entities that make decisions that contribute to Canada's governance. It seems to suggest that Indigenous peoples are many things, but not *governments*. This characterization, as a 'government', is the one that matters the most. Why? Because, nations are comprised of governments that 'govern'. Governments make decisions. Governments can be local, regional or national, but they are the decision-makers.

It could be that some hold the view that 'governing' is the purview of the Crown. And, yes, this is one way for governance to occur, founded on the thinking that the *Constitution Act 1867* defined the powers held and exercised by the Crown, and that governance is limited to those entities.

But, this thinking is erroneous for at least two reasons. First, there is no reference in the division of powers in the *Constitution 1867* to "water", "energy", or the "environment". This lack of reference regarding these jurisdictions is why there are departments that address the environment (and environmental assessment), energy, and water at *both* levels of Crown government. The MPMO reiterated this in their briefing to the NEB Panel on this matter.[31]

Further, the *Constitution Act 1982* recognizes and affirms Indigenous rights, which include governance rights. We have chosen to restrict the expression of those rights (unless the Crown decides otherwise through federal legislation, like the *First Nations Land Management Act*, or through negotiating self-government agreements, for example), but we could choose a different consent based collaborative approach that creates more options for reconciliation.

Despite a lack of complete constitutional clarity, the Crown has managed to find a way to determine *who* does *what* between the levels of government, and in particular, to cooperate to minimize overlaps, increase efficiencies and implement the programs and services that citizens expect. It has done this through the mechanism of cooperative federalism. This mechanism can and must include Indigenous governments.

The current government got elected in part because of its stated willingness to break with this past and move to a new nation-to-nation relationship with Indigenous governments. As Minister Raybould-Wilson stated, "…*this work will be controversial. But it is absolutely necessary*…*Time cannot be wasted," on reinventing the wheel or replicating the reports of yesterday*…" While nation-to-nation building occurs at multiple levels of government and in

[31] Major Projects Management Office Initiative, *Expert Panel - National Energy Board Modernization Briefing Binder*, slide 13.

numerous ways, addressing this issue this is one of the important governance elements of building nation-to-nation relationships that must be addressed.

3.4.2 A Challenge Created by the Indian Act, Including a Possible Response

To reiterate Minister Wilson-Raybould, "*…how will **you** define yourselves as nations? What are the structures through which you will deliver programs and services? And then, what will your relationship with Canada, with your neighbours, and with other Indigenous nations look like? How will you resolve your differences between and amongst yourselves?"*

The nexus between Indigenous peoples and the Crown has been the legal arena and focused mostly on Indigenous rights. This approach has certainly preserved the notion and sanctity of Crown sovereignty. The Crown has been the "decider/consulter" while the Indigenous peoples have been the "consultee". Maintaining this role was a clearly a very important goal to Canada in its first 150 years (or more) of development. Through this time-period, Indigenous peoples have not been recognized *as governments* in any consistent way so as to ensure that they participate as partners at the tables of cooperative federalism.

The reality is that the old, colonial federal system created hundreds of local Indigenous governments among First Nations (through the *Indian Act*), Métis and Inuit peoples. While jurisdiction over Indigenous peoples has been exercised by Canada since 1867, there was no plan for addressing the governance needs of Indigenous peoples as *nations*. After treaties were signed, Indigenous peoples seemed to cease exist in terms of being accepted as *nations with governments* in Canada.

Nor have Indigenous governments been recognized as having regional or national governments (unless they have been created through land claims agreements). The current structures, in terms of decision-making authority, are at the "band council" level, that is, the level created by and condoned under the Indian Act. Indigenous governments do not have decision-makers that could participate equally on behalf of themselves as nations in FPT forums, even if that opportunity was created.

Given that regional and national-level governments have not been acknowledged by Canada (except through land and self-government agreements), Indigenous governments must have some time to organize in a way that promotes reconciliation and ensures their equal participation in FPT tables.

3.5 An Opportunity: Collaborative Consent and Cooperative Federalism?

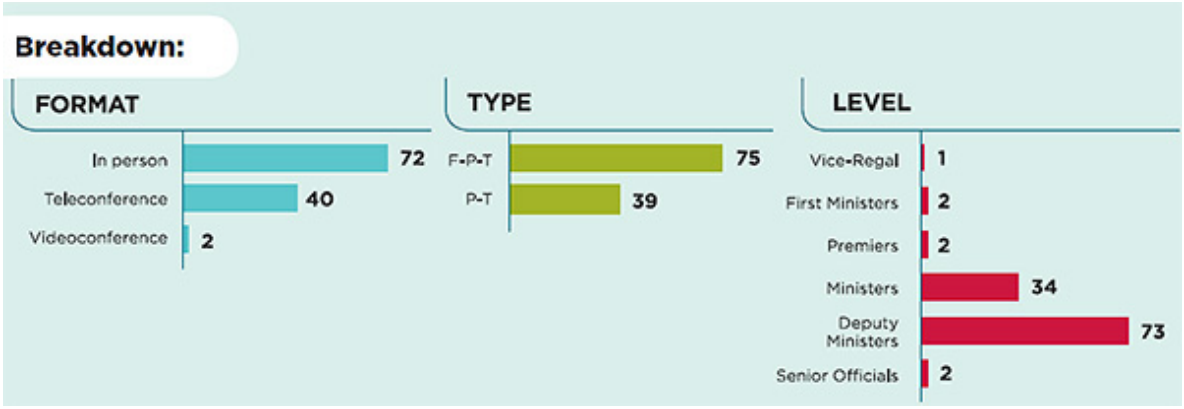
Cooperative federalism is a choice on how to govern given multiple levels and sources of governance authority. There are other paths we could take to govern, to clarify jurisdictional gaps (such as constitutional reform and litigation [resorted to on occasion]), but we tend, instead, to seek cooperation at common tables we create for that purpose. The First Ministers Meetings and the Canadian Council of Ministers of the Environment are well-known examples. These and other similar forums create agreements between the federal, provincial and territorial governments that then guide decision-making within each of those governments. While technically non-binding, they are 'cooperative' and are followed by consensus agreement.

These are governance tables. The federal, provincial and territorial governments choose to attend, the work to achieve each other's consent to the proposals being suggested, and then they choose to follow the agreements they make at these tables. No authorities are fettered in these agreements but neither are the jurisdictional gaps defined. However, governance occurs: policies are created, agreements are made, and paths are determined. As most important initiatives in Canada require the cooperation of, in not agreement by, other jurisdictions given the overlap in legal authorities, this process make eminent sense, as is relied upon with great frequency in Canada.

3.5.1 What FPT Intergovernmental Tables Exist?

FPT meetings are not occasional occurrences; they are the main mechanism of cooperative federalism. The Canadian Intergovernmental Conference Secretariat (CICS), which is the designated organizer of FPT meetings on behalf of these governments, reported (as shown in the two tables below) 114 senior-level intergovernmental conferences in 2015-2016.[32] The majority of these were federal-provincial-territorial level (75) rather than at the sub-national level without a federal presence (39). The majority was in-person Ministerial (34) or Deputy Ministerial level (73) meetings suggesting that in-person discussion and agreement and cooperation are needed and beneficial at both the political and program levels.

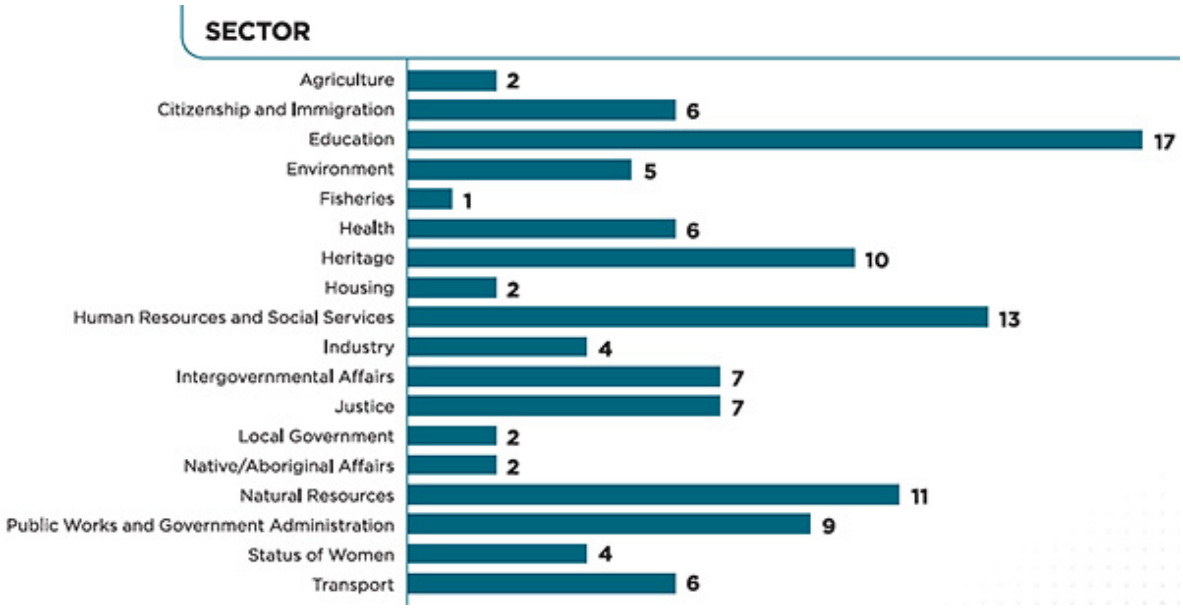
TABLE: CICS-SUPPORTED SENIOR INTERGOVERNMENTAL CONFERENCES



In many ways, Canadian governments operate independently within their own jurisdictional sphere. However, through cooperative federalism, provinces, territories and the federal government cooperate in areas of potential jurisdictional conflict or overlap or where a broad consensus is needed on major initiatives. Indeed, the 114 meetings of cooperative federalism addressed a wide variety of jurisdictional areas. Most or all of these areas are of direct interest to Indigenous governments, either in terms of their own constituency, or because they are a Canadian participating government.

TABLE: BREAKDOWN OF INTERGOVERNMENTAL MEETING SECTORS

[32] http://www.scics.ca/en/publication/report-to-governments-2015-2016/#tc5



3.5.2 Involving Indigenous Governments in FPT Intergovernmental Meetings

Clearly FPT approaches work as indicated by their frequent use as set out in the information in the last section. Here is the point: Canadian cooperative federalism should include Indigenous governments. Why? Because they are nations, they are peoples, they are holders of Indigenous title, they are possessors of unique rights, and they are signatories to treaties that founded Canada and land claim agreements that continue to define Canada. Also, they should be included for the same reason the FPT tables already exist: because they create better governance outcomes.

> Cooperative federalism, if it involves Indigenous governments as full participants, is a nation-to-nation process that can achieve key commitments intended by UNDRIP.

The solution to avoiding this zero sum problem identified in the first parts of the report is for Federal-Provincial-Territorial-Indigenous governance tables to be created that allow for the Crown and Indigenous governments to discuss, among other things, the broad policy goals, the scope and content of the public interest, and the elements of public interest that under consideration in a certain region or regarding a certain resource sector. These governance tables would allow for consideration of the issues in a way that considers pipelines in the context of the other policy goals that exist, and the goal of reconciliation. This approach represents a nation-to-nation approach to policy articulation and agreement in Canada. It occurs well before any project-specific decision-making, but would give clear direction and context to that decision-making. This is discussed in greater detail in Section 4 below.

There is no real barrier to including Indigenous governments in cooperative federalism except the ability and political willingness of:

- Indigenous governments to self-organize into regional or other units that, for this purpose, can occupy the decision-making chairs at governance tables, and,

- The Crown to acknowledge Indigenous governments as governments that sit as full partners at these governance tables.
- The Crown to be willing to adapt, reinvent or create new (i.e. decolonize) structures and processes so as to acknowledge and allow for the expression of Indigenous governance at all levels.

We need enhanced cooperative federalism governance tables, or possibly the existing ones will work if we just pull up a few more chairs for Indigenous governments. We may require both. Either way, Indigenous governments must be at the tables where governance occurs if NEB (and other environmental assessment) processes are ever to function well. The big picture, high-level discussions that set the vision for Canada (for energy, water, the environment, etc.), must be set with Indigenous governments at the table. Without this, these issues will continue to surface dramatically, contentiously, expensively and with little positive effect in project-specific decision-making (such as in environmental assessment and related section 35 consultation processes).

This process could also be seen as 'Indigenous governments in cooperative federalism' or, a Federal-Provincial-Territorial-Indigenous governance table.

3.5.3 FPTI Tables: a Mechanism to Depolarize "Consent vs Veto" and achieve UNDRIP

Prime Minister Trudeau has stated: "*The talk of veto or not veto is highlighting the failure of the process as it exists right now. It shouldn't ever even come to the decision, is it a veto or not a veto. We should be working together from the very beginning*."[33]

Elder, scholar and lawyer Willie Littlechild, who was extensively and directly involved in the drafting of the UNDRIP, agrees: *"[UNDRIP] has been mischaracterized, in my view, as being a veto and it's not, in my view. The Declaration, much like the Treaty, calls on us to work together. So free prior and informed consent is a big part of that working together, discussing a proposal – a proposed project, and maybe sometimes the discussion will take longer, but we also know that there is a legal requirement that on any matters that will directly impact indigenous peoples, they have the right to be at the table to participate in decision making. So when it's mischaracterized as a veto it prohibits, I think, genuine dialogue because immediately people will say and have said there is no way that a small group of indigenous peoples should be able to veto something in Canada. That's not what – that's a different perception or characterization, in my view, of free prior and informed consent. So it's a call on us to work together…*"[34]

Does any government in this process hold a veto? Very few think so, but in one sense, in terms of the decision to proceed without consensus, there may be a veto in a sense. A mutually held veto that flow from the limitations posed inherently by intergovernmental diplomacy. The FPT tables are created as a mechanism to reach a consensus, and if one is not reached, then each government can and does proceed how it feels it must. In doing so, it weighs all things in its decisions, including assessing benefits of proceeding against the possible long-term harm to its relationships with other governments should it choose to

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[33] http://aptn.ca/news/2016/05/09/trudeau-government-eyeing-nwts-collaborate-consent-model-as-part-of-undrip-implementation/

[34] *Supra*, note 22, page 13.

proceed unilaterally (which it has the power to do, presumably). This is the essence of diplomacy and is at the core of cooperative federalism.

The most important requirement of UNDRIP's 'free, prior, informed consent' requirement (which is found in a number of articles) is that Indigenous peoples must be involved as full partners in decision-making (rather than being "consulted").

3.6 Collaborative Consent is in Practice in Canada

While not widely known, jurisdictions within Canada are already engaged – very successfully – in consent-based governance tables with Indigenous peoples. It can be said that these processes meet UNDRIP and move the parties down the path of reconciliation. The GNWT is a leader in this area and has been for almost a decade.

These processes are implemented regardless of the existence of a settled land claim, self-government agreement, or treaty. They are not created based on authorities 'given' by the Crown or agreed through land or self-government claims. They exist independently of the land or governance status of an Indigenous government.

They are collaborative processes that are undertaken based on what each party sees as their *own* authority, regardless of whether others agree. If parties seek to participate and create a mutually acceptable agreement, then a solution has been found that is then 'ratified' or implemented in the legal and political systems of each party (whatever they may be).

The main governance process that illustrates this approach is the Intergovernmental Council. The "Northwest Territories Intergovernmental Agreement On Lands and Resources Management" established the Intergovernmental Council where "northern leaders [35] cooperate on land and resource management across jurisdictions, while respecting the autonomy and authority of each government over its own lands."[36] The agreement's purpose is to "formalize government to government relationships and allow the further development of agreements or other arrangements among the GNWT and Aboriginal governments for cooperative and coordinated Management of Lands and Resources, recognizing the rights, titles, jurisdiction and authority of each Party…"

This table represents an important shift in the way GNWT governs, not just the way Indigenous governments govern. Governments chose these processes because they are a politically respectful and expedient way to achieve consent of all participating parties, to build trust, and to achieve reconciliation of all interests.

3.7 A Transition is Already Underway

On March 24, 2017 the APTN reported an exciting commitment by Canada and the Assembly of First Nations to an April 2017 signing of a "Memorandum of Understanding to

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[35] All Indigenous governments in the NWT were offered the opportunity to participate in the agreement, but two, the Dehcho and the Akaitcho, declined citing concerns about possible impacts on their unsettled land claims. Neither Canada nor the GNWT required the land claims to be settled in order for any Indigenous government to participate in the agreement.

[36] http://devolution.gov.nt.ca/news/devolutionnews/public/intergovernmental-agreements

Support First Nations Jurisdiction and Sovereignty and a Renewed Crown-First Nations Relationship".[37] This is real progress and certainly represents the first step in the critical transition to true nation-to-nation relationships.

To continue the transition and further restructure the relationships between Indigenous Governments and the Crown, we must also explicitly create permanent Crown-Indigenous Governments governance tables.

These governance tables need to linked with the other existing Federal-Provincial-Territorial (FPT) governance tables to ensure Indigenous governments are engaged in all matters of Canadian governance not just the issues that directly affect them or that are under federal control (for example, the proposed AFN-Cabinet level meetings are quarterly where as Crown Ministers met at FPT tables 34 times in the 2015-2016 fiscal year to discuss many sectors of common concern).

Ultimately, true nation-to-nation governance will require a transition to Indigenous decision-makers being at all governance tables. Through the Canada-AFN MOU, Canada will participate through their Ministers (which are imbued with authority) but, as proposed, the Indigenous representatives are not Indigenous government decision-makers but are the leadership of Indigenous politically representative organisations (the MOU explicitly indicates "…individual First Nations are not bound by any outcome or recommendation developed under this MOU." **A final transition must include decision-making tables.**

These nation-to-nation governance tables should address all aspects of Canadian policy (rather than only topics that are "Indigenous only"). For example, discussions on energy and economic policy – the results of which eventually lead to the scope of pipeline licensing legislation and ultimately pipeline development – must be on these policy-setting agendas.

This is necessary for two reasons: first, to avoid Indigenous peoples being involved at the tail end – and as rights-holders but not as governments – when projects are being assessed and considered for approval by NEB. This approach represents a continuation of the colonial thinking that created many of the challenges we face today and creates the problem of 'out of scope' comments at NEB hearings.

Second, the NEB should be required to operate in-line with policy co-developed by the Crown and Indigenous governments.

3.8 Further Progress in the Transition

An NEB Modernization Panel member asked Elder Willie Littlechild, *"Is anything that you've described for us in terms of consent or the principles or fairness and working in partnership, any other insight to offer where – where along when your projects such as the NEB might be deciding on affect so many different communities?"*[38]

As Willie Littlechild responded, there is a natural nation-level structure that currently exists, and that is the Treaty Nation. They will be responsible for building support of their local

[37] http://aptnnews.ca/2017/03/22/budget-2017-prepares-groundwork-for-historic-ottawa-afn-deal-set-for-april-signing/
[38] *Supra*, note 22, page 14-15.

governments. The original treaties have existed for a very long time, and are the foundation of Canada, but the Crown has only recognized the *governance status* of those Indigenous governments with modern treaties. All levels of Indigenous governance should be recognized.

The need to be addressed is how to create a position(s) that would sit at a governance table (a nation-to-nation table of confederation) with the other First Ministers or Ministers, etc.

Using First Nations as an example, one approach to a nation-to-nation building transition could involve the treaties nations organizing themselves on a treaty basis (regardless of provincial or territorial overlap), and imbue a leader or leaders with a relevant scope of decision-making authority for the purpose of engaging with the Crown governance mechanisms.

The un-ceded areas would face a similar need, as all communities cannot be represented at all levels of governance. These leaders would need to organize from among themselves on a consensus basis and elect a leader(s) with the authority to sit at these governance tables.

For example, at one position per Indigenous national governance structure (Indian, Inuit, Métis) the current FPT tables of 13 could expand to 16.

It is logical to assume that the Assembly of First Nations could evolve to fill this new formal role at the national level, but the decision-making authority of regional and national chiefs would need to be commensurate with their participation at a governance table (rather than a consultative or "non-binding" discussion table). A similar process would need to be developed by the Métis and Inuit.

This will place a significant onus on the respective Indigenous governments to sort out their internal politics in order that they are able to send someone with authority to sit at these national tables. This will also place an onus on Canada to work with many potential options, not all of which might involve the current players and institutions. The evolution may require some difficult choices on all sides to shift the status quo. This can be done. The authors are aware, for example, that in Manitoba, the President of the Manitoba Metis Federation is possessed of authority to consult with the Crown on behalf of its member locals. This is an increased level of authority that was designated to the regional body by decision of the locals.

MOUs identifying which current FPT tables would become FPTI tables will be necessary.

This task needs to be prioritized by both Indigenous and non-Indigenous governments. A commitment to an expedited process of reform is needed. To address the Minister's concern about timeliness and recognizing that there are currently 943 days until the next federal election, it is recommended that a process with Indigenous governments be initiated to outline options and timelines for this transition. There would be a defined planning period to allow self-selection processes to be developed.[39]

[39] This would be similar to the resource revenue negotiations in the NWT where a total percentage of resource revenue was agreed to with the seven Indigenous governments, followed by the

A final report and recommendations should be completed within two years, for consideration by all the involved governments.

This kind of authority enhancement would finally bring the third order of government to the table of confederation, and make the current "discussion" tables actual governance tables.

3.9 Other Possible FPTI Structures

While the existing FPT tables are one possible approach to building nation-to-nation governance with Indigenous governments, there are other models as set out in the table provided at Appendix B. Of note is the Mackenzie River Basin Board, which includes one Indigenous representative per region. This creates a much broader Indigenous role, and is a move away from just one representative for each Indigenous national group.

Other models should also be developed, as governance happens from the community level through to the highest decision-making level (as with non-Indigenous governance). Governance structures need to be developed accordingly. This may involve joint, exclusive, or overlapping tables and institutions, depending on the need. They may involve changing or reinventing existing Canadian institutions, over time, as the Crown adjusts itself to Indigenous ways of governing. Much work can be done in this area.

4 Other Collaborative Consent Mechanisms

Collaborative consent occurs at all levels within governance structures if nation-to-nation relationships are the goal. There is no single solution, and the transition noted above aimed at restoring indigenous peoples as acknowledged nations within Canada will involve assessing opportunities at multiple political, bureaucratic and other decision-masking levels.

4.1 Regional Land Use Planning

The Pembina Institute has proposed an interesting model in its submission to the NEB Modernization Panel, as has Professor Robert Gibson in his paper on Sustainability Assessment submitted to the CEAA Panel. Both deal with matters that are beyond the scope of this paper, but represent innovative proposals to both panels. They are worthy of serious consideration.

Both proposals, and others, suggest that regional planning of some kind (regional environmental assessment, strategic environmental assessment) could address key challenges faced in the NEB (and CEAA) processes.

Prior planning and assessment at a regional scale is critical to setting a clear, higher level, longer-term goal for a region. It would assist greatly in ensuring that the actions undertaken by Indigenous, provincial, and federal government align and do not allow gaps or work at cross-purposes (as is currently the case regarding many cumulative effects

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Indigenous governments negotiating together how that percentage would divided up among themselves.

resulting from failure to integrate the impacts of previously approved provincial, Indigenous and federal projects).

This is similar to the approach used in the NWT where there are Land Use Planning Boards (LUPB). These boards have a number of functions, and they link with the environmental assessment process. Applications are forwarded by the relevant regulator (e.g. land and water board, GNWT, federal regulator) and will not be accepted unless they approved by the LUPB as being in-line with the relevant land use plan. After the LUPB indicates that the proposed project is in-line with the plan, then the remainder of the review process can proceed (preliminary screening, regulatory, environmental assessment, and environmental impact review, etc.)

A key element to note is that land use plans do not require a settled land claim. For example, the Deh Cho Land Use Plan (which has not yet been finalized) was commenced through the Deh Cho First Nations Interim Measures Agreement but it can be implemented without a final land claims agreement.[40] Other planning boards (Gwich'in Land Use Planning Board and Sahtu Land Use Planning Board) are created through settled claims and codified in the *Mackenzie Valley Resource Management Act*. A revised NEB Act (or a CEAA) could certainly indicate provide a similar requirement for a regional plan in locations where projects that fall within the purview of those Acts are contemplated. The NEB Act could avoid infringing on provincial jurisdiction by working together to develop collaborative planning boards involving federal, provincial and Indigenous governments.

Further, the Land Use Planning Boards are multi-party, with representatives from federal, territorial and Indigenous governments. In this way, they operate as collaborative consent tables because every party with some form of jurisdiction is represented (federal, territorial, land claims, or treaty), even if that jurisdiction is not clearly defined.

In the hearings for review of the *Canadian Environmental Assessment Act*, the Canadian Energy Pipelines Association proposed[41] a similar prior assessment, but with a slightly different purpose, focusing on the "Canadian public interest' determination. CEPA proposed:

- "Part-one of the review would be a type of sustainability assessment to determine whether the project is in the national interest"…and would include broad policy considerations such as "climate change, national energy policy, Indigenous matters including UNDRIP and FPIC, economic risks and rewards, and reconciling public interest with regional interests." This would be undertaken at the federal government level.
- "If the project is aligned with government policy and is found to be in the national interest, a Governor in Council decision with conditions from part-one would be made and the project would proceed to part-two."

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[40] Dehcho Land Use Planning Committee, *Presentation at Northern Planning Conference, February 17, 2016*, slide 3 available at http://www.planyukon.ca/index.php/documents-and-downloads-2/yukon-land-use-planning-council/workshop-proceedings/northern-planners-conference-2016/break-out-session-4/recent-plans/715-dehcho-land-use-plan-lessons-learned/file

[41] Presentation to CEAA Panel, *CEPA Speech: Expert Panel Review of Environmental Assessment Processes*, (undated), pages 3-4.

- "Part-two would be an independent, thorough project-specific EA performed by the NEB…"

As with prior regional planning, the intent behind this proposal has merit in that it would certainly benefit project-specific decision-making to conduct a preliminary assessment of the alignment of projects subject to a "Canadian public interest" determination with current policy and political commitments. This and other similar proposals make eminent sense, assuming all relevant parties, and in particular Indigenous governments and citizens, are *co-assessors* of the alignment of the proposed project with the policy (including Indigenous peoples' policies).

That said, the final Canadian public interest determination requires environmental assessment information to be able to properly evaluate the possible impacts, the nature and extent of mitigation measures, the significance of residual impacts, whether the proposed impacts on rights can be justified, and finally, whether all potential considerations would suggest these impacts are still outweighed by the Canadian public interest.

A final Canadian public interest determination that weighs the acceptability of the residual impacts (which would include impacts on Indigenous rights that were not accommodated) must still occur *after* the environmental assessment is complete. If this determination is made before the environmental assessment and recommendation process, then the environmental assessment process becomes a mere *approval* rather than *assessment* process. This is not appropriate. Discretionary decision-making (that includes Indigenous governments) must be maintained in terms of assessing the significance of impacts (where CEAA 2012 applies), Indigenous rights impacts justification (if required), and whether a project is in the Canadian public interest.

4.2 Land and Water Boards

The Land and Water Boards (LWBs) are multi-party entities, with representatives from federal, territorial and Indigenous governments. A few key hallmarks of these boards that are useful for consideration by the NEB Modernization Panel are:

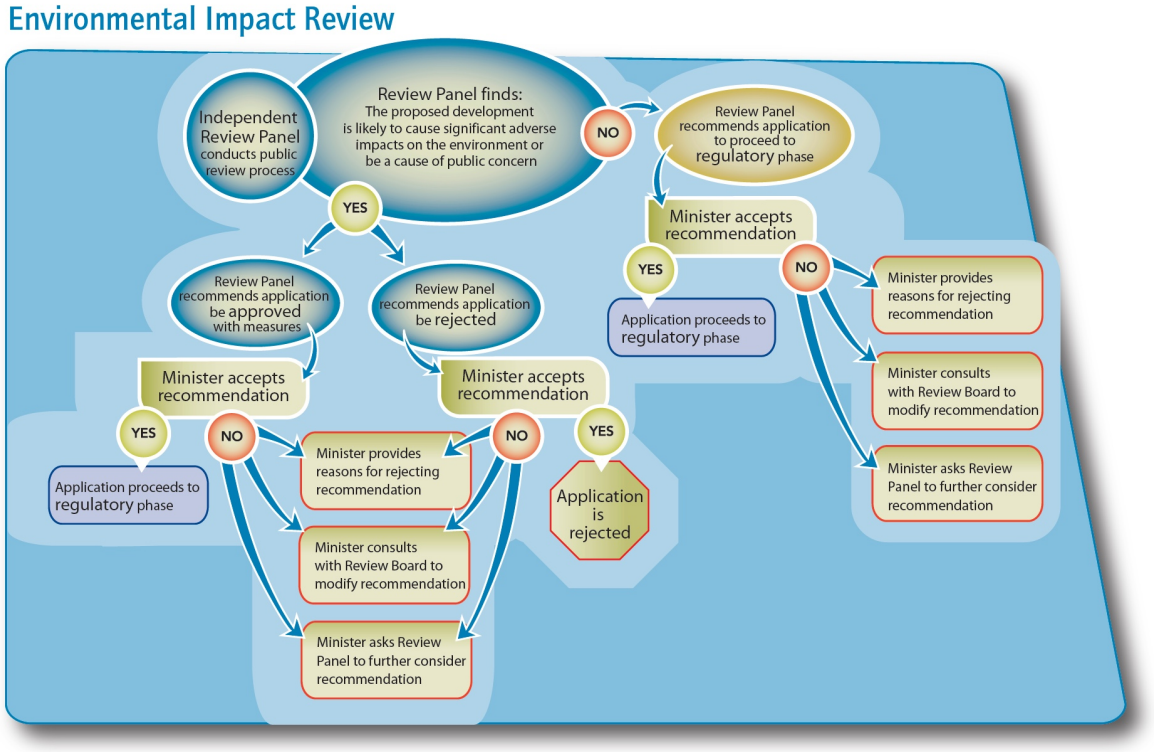
- The Boards are regional Boards of the overarching Mackenzie Valley Land and Water Board (MVLWB). The members of the LWBs are appointed by the federal minister upon recommendation by the First Nation and territorial government.[42]
- The regional Boards were agreed to under land claims, while, in areas where land claims do not exist, the Indigenous-Crown agreements in operation are Treaty 8 and Treaty 11.
- The Boards receive and assess license applications. They determine whether a proposed application warrants an environmental assessment, and if so, it proceeds to another Board, the Mackenzie Valley Environmental Impact Review Board (MVEIRB). If warranted, the MVEIRB can send the application to a deep level of

[42] Wekeezhii Land and Water Board, the membership consists of Tlicho representatives directly appointed by the Tlicho government, plus federal and territorial[42] representatives appointed by the federal Minister. The other two LWBs (Sahtu and Gwich'in) have "two members appointed on the nomination of" the First Nation.

assessment, called an "environmental impact review" (EIR). The federal minister has no decision-making role in this determination.

- However, the MVEIRB might not send the application to EIR, and instead might be comfortable recommending that the Minister accepts or rejects the application at this stage. If the Minister disagrees with the recommendation, the Minister implements a "consult to modify" approach with the MVEIRB until the Minister and the Board can arrive at a mutually acceptable recommendation.
- This "consult to modify" approach is also used where an EIR has been completed but the Board and the Minister do not agree on the Board's recommendation.
- The Minister maintains authority to reject the MVEIRB's recommendation (but extensive process is placed in front of the exercise of that power, as explained above).

The illustration below, provided by the MVEIRB[43] shows how this process unfolds. The full process (from LWB through to final EIR, when necessary) is attached as Appendix D.



They, very much like the NEB, have the authority to make licensing recommendations to the Minister. However, in recognition of the basis of the multi-party - and thus multi-jurisdictional - nature of the LWBs, a recommendation from a LWB carries with it a convention that the Minister will not overturn the recommendation.

Officials have explained that this results in an iterative, "consult and modify" type of approach to resolving the difference of view between the federal Minister and the Board. While the Minister maintains authority (i.e. the Minister's decision-making is not fettered), he/she chooses to exercise that authority in a way that achieves an ultimate consensus.

[43] http://www.reviewboard.ca/upload/ref_library/2011_EIA_process_diagrams_1318622721.pdf

This approach makes good sense because even though the Crown holds underlying title to NWT lands that are subject to land claims and treaties, the relationship is one of respect for the role of Indigenous governments in decision-making, and respect for the expertise of the various Boards (which include Indigenous government representatives).

It has further been explained that, similar to the NEB process, the Crown's duty to consult can be met through Board consultation processes. However, given that the Boards are in essence, collaborative consent mechanisms, failure of the Minister to agree to their recommendations would involve a very deep round of consultation and accommodation with Indigenous governments. This has never to date been necessary.

4.3 Co-Drafting

4.3.1 Crown Legislation

The GNWT first developed the *Species at Risk Act* in full partnership with Aboriginal governments. The model used was to create a working group that was tasked with co-drafting the legislation. The Working Group was comprised of high-ranking officials of the GNWT and all Indigenous governments, and all parties' legal counsels (including the GNWT's lawyers from the Department of Justice). The process, once defined, took approximately three years and negated the need for subsequent s.35 consultation and accommodation because Indigenous governments agreed (indeed, co-developed) all provisions. The draft bill went through regular public consultation processes after development.

Then, building on that successful experience, the governments moved to redevelop their wildlife legislation – a very controversial law that had not been amended for many decades, and that was linked to very complex land claim settlements. This law took four years, but given the sensitivity of the subject matter, avoided years of probable litigation.

The GNWT now – building on an established climate of trust and demonstrated collaboration – has five more laws they intend to develop in partnership (*Waters Act, Environmental Protection Act, the Environmental Rights Act, Territorial Parks Act, Forest Management Act*) in the 18th Legislative Assembly.

As the GNWT began this collaborative consent-based approach, there was an initial period of having to build trust, work through process issues, and overcome old ways of doing things. But now, with that foundation, each legislative development process is taking less time and is more efficient. Also, all governments move quickly through the review and enactment process because they have all been involved in the creation of laws that will apply to themselves (e.g. there is no Dept. of Justice review of a draft bill because they have been members of the working group throughout, Indigenous governments have already engaged their members as the drafting proceeds, etc.).

4.3.2 Policy Development

In much the same way as it has developed legislation, the GNWT has co-developed territory-wide policies such as the Water Stewardship Strategy. This policy and associated action plan sets the direction for the NWT regarding water use and protection, and after a similar process (with a working group and an additional Aboriginal Steering Committee)

was signed by Canada, the GNWT and all Indigenous governments in the NWT. It became a policy that was seen as jointly owned by all governments.

Given the extremely contentious and complex nature of water discussions (the NWT is downstream of Alberta and British Columbia, and also has significant oil and gas development opportunities), this policy is instrumental in continuing to build consensus as resource development proceeds (or does not).

4.3.3 Indigenous Laws and Policies

The articulation of Indigenous laws and policies is underway and has been for some time.[44] The authority of Indigenous nations was recognized from the very beginnings of Canada through the treaty-making process[45], and continues to this day. However, Crown legislation such as the *Indian Act* has greatly interfered with the expression of this authority. Despite this, numerous Indigenous nations are articulating and implementing their inherent legal foundations independent of whether the Crown recognizes those authorities.[46] Indigenous nations can and will proceed to articulate and implement their laws, and as they do so, there may be opportunities for Crown and Indigenous governments to work collaboratively to ensure that legal systems are harmonized to the extent possible (in much the same way the federal and provincial governments do as regards environmental assessment processes, for example).

4.4 Resource Revenue Sharing

The GNWT has developed and reached agreement with all Indigenous governments that have signed on to devolution – whether they have a settled land claim or not – on resource revenue sharing. Since devolution on April 1, 2014, the GNWT retains 50% of the revenues collected from resource development on public land (up to a maximum amount) and Canada keeps the remainder.

Of the GNWT's share, 25% is then shared with Indigenous governments[i] regardless of where in the NWT the revenue is generated.[47] This approach is evidence that the broad territorial landscape is part of numerous Indigenous governments' traditional territories (regardless of whether they have 'surrendered' their rights to that broad landscape in a land claim or treaty.) This approach further recognizes that both Indigenous and non-Indigenous governments have interest throughout the territory, and that the territory will be best served by cooperative approaches that recognize the importance, and contributions, of all to ongoing governance.

A modified approach, referred to as 'generalized interest', shares revenue from development occurring in any spot within an Indigenous government's broad land claim area. This is being considered as an aspect of possible land claim settlement and suggests a view that Indigenous governments are partners in the development of the

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[44] *Supra*, note 29.
[45] Tom Isaac, *Aboriginal Law*, (5th ed.), 2016.
[46] See for example the environmental assessment process and decision on the Ajax Mine Project rendered April 5, 2017 by the Stk'emlupsemc te Secwepemc. http://stkemlups.ca/process/
[47] http://devolution.gov.nt.ca/about-devolution/faq/frequently-asked-questions-about-resource-revenue-sharing

territory, broadly speaking, regardless of whether they have specific entitlements under a final land claim settlement area. This could be adapted to also share revenue from pipelines that pass through treaty territories.

This type of revenue-sharing is a shift away from zero-sum model to a win-win approach that recognizes Indigenous peoples important role as nations that collaborate in development. It also avoids the battle over sub-surface rights and moves to co-governance of the land.

These are critical consent-based approaches that respect the presence of Indigenous governments and may greatly enhance the likelihood of Indigenous government support for resource development projects. We recommend these approaches be adopted because they a means to recognize Indigenous governments and their nations' contributions to the successful governance of lands along pipeline projects.

This approach is not in lieu of impact-benefit agreements (IBAs). These are negotiated by specific communities as a result of adverse effects of specific projects, or financial payments due to Indigenous governments under land claims or treaties.

5 Specific Recommendations

5.1 Restoration of Three Founding Nations

There is a call for the restoration of the original role of Indigenous nations as one of the three founding nations of Canada.[48] Through constitutional recognition of their founding nation status, the full role of Indigenous nations as participants in Canadian governance would never again be optional, a temporary or expedient recognition that could be dismissed by future governments that are of a differing political perspective.

We support this recognition, as it paves the way for the long-term commitment to implementation of collaborative consent governance tables.

5.2 Create Collaborative Consent Governance Tables

As noted above, Canada and the Assembly of First Nations are leading to an April 2017 signing of a "Memorandum of Understanding to Support First Nations Jurisdiction and Sovereignty and a Renewed Crown-First Nations Relationship".[49] This is progress and certainly represents the first step in the critical transition to nation-to-nation relationships. Hopefully, in short order, similar MOUs will be signed with the Inuit and Métis. The foundation will then be firmly set to move to the hard work of nation rebuilding. As the Justice Minister noted *"And we need to get moving on developing these mechanisms as soon as possible. And yes, this work will be controversial. But it is absolutely necessary".*

To continue the transition to nation-to-nation relationships between Indigenous governments and the Crown, we must also explicitly create permanent Crown-Indigenous governments governance tables. These tables would engage in strategic policy

[48] Phil Fontaine, personal communication.
[49] http://aptnnews.ca/2017/03/22/budget-2017-prepares-groundwork-for-historic-ottawa-afn-deal-set-for-april-signing/

development and agreement-making that focuses on the high-level vision, paths and alternatives. One of these tables must focus on energy development in Canada

As an immediate step, an option is to work with the three national Indigenous organizations to identify the FPT tables that would be best positioned to become immediate FPTI tables. These existing tables can operate as collaborative consent mechanisms, but new governance tables that better meet the needs of a reconciliation process (e.g. it may be that treaty nations may devise a better structure, for example along treaty nation lines, or regional, tiered, or nested approaches).

This task needs to be prioritized by both Indigenous and non-Indigenous governments. A commitment to an expedited process of reform is needed. To address the Justice Minister's concern about timeliness, and recognizing that there are currently 943 days until the next federal election, it is recommended that a process with Indigenous governments be initiated to outline options and timelines for this transition. There would be a defined planning period to allow self-selection processes to be developed.[50]

A final report and recommendations should be completed within two years, for consideration by all the involved governments.

This kind of authority enhancement would finally bring the third order of government to the table of confederation, and make the current "discussion" tables actual governance tables.

5.3 Sustainability Assessment Regime

The NEB process should be an element (along with the CEAA) of a Sustainability Assessment regime where "every significant policy, plan, program, and project should be designed to deliver positive contributions to sustainability—multiple benefits, mutually reinforcing, fairly distributed, and lasting, while avoiding serious or persistent damage to ecosystems and communities."[51]

If Canada's assessment regime was aimed at sustainability rather than minimizing impacts, it is almost a given that Indigenous rights would, in great measure, be protected. Sustainable ecosystems support the implementation of Indigenous rights. Consultation focused on minimizing infringements on Indigenous rights would be much less frequently necessary, and the Canadian public interest would be much more clearly identifiable with fewer trade-offs.

5.4 Assessing the Canadian Public Interest

5.4.1 Defining the Canadian Public Interest

Assessing the Canadian public interest involves making an assessment of some kind, although the specifics of this assessment are not clear. As noted above, there are

[50] This would be similar to the resource revenue negotiations in the NWT where a total percentage of resource revenue was agreed to with the seven Indigenous governments, followed by the Indigenous governments negotiating together how that percentage would divided up among themselves.

[51] R. B. Gibson et al. 2005. *Sustainability Assessment: Criteria, Processes and Applications*. London: Earthscan

numerous terms, which would be eliminated and/or defined. For example, the "benefits versus burdens" approach used most recently in the TMX assessment should be discarded, as should the reference to the "public necessity and convenience" in the NEB Act. The sole term should be the "Canadian public interest" and the Act should set out both the factors to be considered and the guidelines for conducting the assessment.

5.4.2 Factors for Assessing the Canadian Public Interest

Sustainability Factors:

- A broad range of factors that touch on all elements of sustainability would be appropriate (but will not be addressed her as others have provided in depth, relevant and useful information on this subject as part of the CEAA review).
- The Canadian public interest assessment should include recognition and consideration of the public trust, particularly as regards water resources that might be impacted by the proposed project. This doctrine suggests that certain natural resources - especially air, freshwater and oceans - are central to our very existence; and that governments must exercise a continuing fiduciary duty to sustain the essence of those resources for the long-term use and enjoyment of the entire populace.[52]
- Where CEAA 2012 applies, the significance of adverse environmental effects should be a factor to be considered in determining the Canadian public interest (with a rebuttable presumption that significant adverse effects are not in the Canadian public interest).

Indigenous Rights: To be clear, it is the strong view of the authors that Indigenous rights should never be included in the possible interests that can be "traded off" as a project is being assessed. There are some rights that are so significant, so foundational to whom we are as a country, that we should not trade them off against other interests. There may be the very rare circumstance when impacting Indigenous rights might be necessary. If that were the case, then the Indigenous rights-holder must be involved in that decision (a co-decision maker, rather than a "consultee")

Additional Factors: There are additional Indigenous-related factors that must be considered by the NEB in the Canadian public interest assessment:

- Poverty levels of potentially impacted Indigenous communities affect not only the quality of life of Indigenous peoples, but is the main source of capacity challenges in terms of overarching governance and engagement in NEB and other resource development processes. The fact that they would be subject to a Canadian public interest determination shows their possible scale, scope, and extent of both positive and negative impact. These projects can cross through many dozens of Indigenous communities and their territories. Unless these projects significantly and directly move the needle positively in terms of poverty alleviation, they should never been seen as being in the Canadian public interest.

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[52] Ralph Pentland, *Public Trust Doctrine – Potential in Canadian Water and Environmental Management,* (POLIS, June 2009) available at http://poliswaterproject.org/sites/default/files/public_trust_doctrine.pdf

- Unfulfilled Treaty obligations, such as treaty land entitlements, should weigh heavily against a project being seen as being in the Canadian public interest. The Treaties that made Canada possible should be honoured, in particular the land conversion commitments, should be expedited should a project under NEB jurisdiction be considered. This applies also to ongoing Indigenous land negotiation processes, which signal lands and governments in transition. The timing and significance of these transitions should be respected.
- The existence of legal actions related specifically to protection of Indigenous lands and waters suggests that the territories that the project will pass through are subject to conflict and potentially unresolved disputes. Indigenous issues may or may not be successfully addressed through those legal mechanisms, but caution should be exercised in assessing proposed projects that proceed prior to these these disputes being addressed.
- Track record: Proponents that disregard Indigenous or human rights in other parts of the world should not be seen as credible actors in Canada, particularly in the sense of ensuring their commitment to building "Indigenous social license" in Canada is genuine. Track record or quality of any relationships of the proponent with other Indigenous nations (in Canada or the world) should be assessed as part of the Canadian public interest.

We note that many of these factors would fall within what NEB would likely consider to be "out of scope" matters. See Recommendation 5.5 below addressing this issue.

5.4.3 Guidelines for Assessing Canadian Public Interest

As resources become more scarce and interests more diverse, we must become much more sophisticated in our analysis and decision-making. We recommend the development of specific guidelines clarifying and evaluating the trade-offs inherent in determining the Canadian public interest.

In particular, these guidelines must rebalance the assessment to ensure that economic factors are weighed no more heavily than any other factor. It would make sense that an integrated approach to weighing trade-offs across the NEB Act (in terms of the Canadian public interest) and the CEAA be created, in partnership with Indigenous peoples, given what should be the common end goal of both processes (i.e. sustainability). We support Professor David Boyd who has suggested the following guidelines[53] to the CEAA Review Panel (which we have adapted to apply to the NEB Canadian public interest determination):

- ***Maximum net gains****:* to be in the Canadian public interest, any trade-off or set of trade-offs must deliver net progress towards meeting the requirements for sustainability; the Canadian public interest is met by mutually reinforcing, cumulative and lasting contributions and achieves the most positive feasible overall result while avoiding adverse effects.

[53] David R. Boyd, *From Environmental Assessment to Sustainability Assessment: A Way Forward for Canada, Submission to the Expert Panel Reviewing Canada's Federal Environmental Assessment Processes*, December 15, 2016, Appendix C.

- ***Burden of argument on trade-off proponent****:* Trade-off compromises that involve acceptance of adverse effects are assumed to be undesirable unless proven (or reasonably established) otherwise; the burden of justification falls on the proponent of the trade-off.
- ***Avoidance of significant adverse effects****:* the Canadian public interest cannot be met where an adverse effect on an aspect of sustainability (for example, any effect that might undermine the integrity of a viable socio-ecological system) exists unless the alternative is acceptance of an even more significant adverse effect.
- ***Protection of the future***: The Canadian public interest cannot be met if an adverse effect is displaced from the present to the future unless the alternative is displacement of an even more negative effect from the present to the future.
- ***Explicit justification****:* All trade-offs made in the assessment of the Canadian public interest must be accompanied by an explicit justification based on openly identified, context-specific priorities as well as the sustainability decision criteria and the general trade-off guidelines.
- ***Open process****:* Proposed compromises and articulation of trade-offs in the assessment of the Canadian public interest must be addressed and justified through processes that include open and effective involvement of all stakeholders."

In addition, we recommend guidelines focused on reconciliation and UNDRIP:

- ***Reconciliation*****:** to be in the Canadian public interest the proposed project must contribute towards the recognition, respect for and honouring of Indigenous rights and interests, and the respect and recognition of Indigenous governments and institutions. A project should assist with righting past wrongs, increasing the capacity of Indigenous peoples in permanent and meaningful ways, rebalancing the distribution of benefits, building community resilience. A proposed project that may impact Indigenous rights, governments or institutions would be presumed as not contributing to reconciliation unless it could be demonstrated otherwise.
- ***UNDRIP***: there would be a presumption that a proposed project is not in the Canadian public interest if engagement processes employed by the proponent, the NEB and the Crown were not identified as consent-based processes (i.e. specifically framed as trying to achieve the free, prior, informed consent of potentially impacted Indigenous communities).

5.4.4 Indigenous Peer Review

Where the NEB recommends that a project is in the Canadian public interest despite identifying the existence of unresolved Indigenous rights impacts, the recommendations should be required to go to an external independent review that is focused on articulating and assessing Indigenous legal perspectives, outstanding Indigenous inherent, treaty, rights obligations, and Indigenous views of the discharge of the honour of the Crown as regards the proposed project.

5.4.5 GIC-Indigenous Review

If, after the Indigenous peer review, the Crown recommends the project despite it being clear that Indigenous rights are likely to be impacted from a proposed project and no form of accommodation acceptable to Indigenous rights-holders was possible or made

available, then those Indigenous governments must be at the table with the GIC to make the final assessment of what is in the Canadian public interest. This conversation is necessary element of reconciliation, and represents the final step in a consent-based process that fulfills the intent of UNDRIP. It is only at this table that "out of scope" issues could be fully addressed.

These proposed factors, guidelines and reviews set out in these recommendations represent a much more justifiable process for evaluating the relative importance of impacts on critical interests, including and especially when those impacts are on Indigenous rights.

5.5 "Out of Scope" Matters

These matters should be dealt with in three ways:

- They should be included in the factors to be assessed in the Canadian public interest determination. While the Canadian public interest determination does not in itself address the out of scope matters (by definition, the NEB does not have the mandate to do so), the existence of these factors should weigh heavily against recommending the project.
- The NEB must list the "out of scope" concerns brought forward by Indigenous governments, indicate which federal department was made aware of each concern, and indicate any response provided to the NEB by the Crown.
- The Crown, in the Crown Consultation Report, must list the "out of scope" concerns and each specific response to these concerns, including next steps taken to address each concern.

5.6 Indigenous Institutional Development

Indigenous institutions have suffered greatly under colonization. Many institutions that might have been, do not exist. Many institutions that do exist have been created, directly or indirectly, by the Federal government. Restoration of trust in decision-making processes will occur if Indigenous peoples have institutions that can work alongside, and in partnership with, where needed, the institutions of other levels of government.

For example, the existence of an Indigenous Energy Institute with deep expertise in all aspects of energy development as it pertains to Indigenous interests could provide expertise to those Indigenous nations finding themselves in the path of an impending pipeline. This would be efficient, cost-effective, and, most importantly, would start to build an ongoing and increasing base of capacity within Indigenous nations (rather than predominantly in the consultants who work for them) to participate, or assist Indigenous communities in participating, meaningfully in NEB processes.

5.7 Resource Revenue Sharing

The NEB should have the power to impose conditions that mandate resource revenue sharing along the project route. This revenue, similar to resource revenue sharing in the NWT, would be based on the implicit recognition of the Indigenous nations role as a nation possessing governance and other interests to the lands required by the proposed project. This would most likely be at the treaty or other regional nation level, and may require Indigenous governments to determine how that general revenue will be shared.

This would be in addition to any Impact-Benefit Agreements or other financial measures that would be developed with local Indigenous governments that are directly affected as an accommodation or compensation measure.

5.8 A New Co-Drafted NEB Act

Given the demonstrated ability of the NEB to recommend projects that have residual impacts on Indigenous rights, a revised NEB Act should be co-drafted with Indigenous governments to ensure that the Act is as representative of Indigenous views of fair and just legislation as possible. This approach would satisfy UNDRIP-based approach.

5.9 Board Location and Membership

Headquarters:

The headquarters for the NEB be relocated to Ottawa as a much more neutral location that better reflects the quasi-judicial independence that is needed by the NEB.

NEB Membership:

- Diversity: The Board membership should reflect the diversity of the country, in every way possible, in order to be able to be able credibly assess their interests in a project (i.e. whether it is the Canadian public interest).
- Indigenous Membership: Approximately 1/3 of the seats on the NEB should be held by Indigenous representatives (First Nation, Inuit, Métis). These members should not be required to move away from the location of the exercise of their Indigenous rights in order to participate in the Board.
- Independent Commissioners: Where particularly at issue, the NEB should have ability to appoint Independent Commissioners charged with specifically assessing Indigenous rights elements in the context of reconciliation.

Member Skills:

- Mandatory Cross-cultural Skills: All members should be skilled in respectfully managing diversity-based, cross-cultural relationships and should not be considered for membership unless they already possess those skills.
- Range of Professional Skills: Professional skills of the Board as a whole should be determined through a matrix approach and should reflect all elements necessary to conduct a sustainability assessment (engineering, law, social sciences, financial, economic, health, multiple sciences plus ecology sciences, working with local and Indigenous knowledge.

5.10 Consultation and Accommodation

The federal government must work with Indigenous governments to co-design an improved Section 35 Consultation and Accommodation policy to address the current gaps (a number of which are outlined in this report) so that when it is used as a safety net process, it is effective for that purpose.

5.11 Transparency

As the Crown exercises its “duty to weigh impacts on Aboriginal interests with other interests”, it must share the analysis about how the principles were applied and how it is satisfied that these interests "outweigh" the impacts on Indigenous rights. This is critical given that the honour of the Crown is engaged with Indigenous rights, but not engaged as regards the other interests that the Crown is weighing them against. This places a very high burden on the Crown to clearly explain its decision-making.

This detailed information must be shared with Indigenous governments and the public.

6 Conclusion

"The unsettling is what drives us forward."

Elder Deniseanne Boissoneault
Anishnabe Kwe from Manitoulin Island

Seventeen years in to the 21st century, on the eve of Canada’s 150th birthday, the country is poised to finally step away from many of the negative aspects of its colonial past, especially as it relates to Indigenous peoples. While we cannot undo the past, we can make sure we do not continue blindly forward, unquestioning and unwilling to see our past as a call to action for our present and future. Canada is ready, the Prime Minister is ready, and Indigenous governments are ready. We know it will not be easy, and it will be controversial. It will dramatically change the status quo for the better for all Canadians. The great unsettling will drive us forward to get the job done.

We thank you for the opportunity to be part of that historic change.

Appendix A: CONSULTATION DECISION-MAKING PROCESS

Comparison between NEB Explanation of Indigenous Consultation and MPMO Briefing (slide 8) on "General Process for Integration of Indigenous Consultation with NEB Process"

Indigenous Consultation typically undertaken for NEB Project Reviews (Sections 52 and 58.16)
(subject to change according to the project)

	Project Pre-Application	Hearing Process	NEB Recommendation and GIC Decision	NEB Lifecycle Oversight
NEB Regulatory Process	• The NEB requires proponent to consult with Indigenous groups in accordance with the Filing Manual (section 3.4). The proponent notifies potentially impacted Indigenous groups, provides information and opportunities to discuss the project, and identifies concerns, potential impacts and mitigation measures to address impacts. • The NEB conducts traditional territory analysis and collaborates with MPMO and federal departments to identify potentially impacted Indigenous groups, sends letters explaining the NEB Process and appends MPMO letter. • The NEB conducts follow-up phone calls with Indigenous group • The NEB conducts meetings with Indigenous groups in their community upon request and explains its regulatory process and Participant Funding Program.	• NEB issues Hearing Order. Steps in the hearing often include an application to participate process, written evidence, Oral Traditional Evidence (OTE), Information Requests (IRs), cross-examination, comments on draft conditions, and final argument. • Process advisor support is provided for all hearing participants, including Indigenous people. • Participant funding is provided to assist potentially-impacted Indigenous groups participating in the hearing process. • The NEB hearing process is designed to obtain as much relevant evidence as possible on Indigenous concerns about the project, potential impacts on Indigenous interests, and possible mitigation measures to minimize adverse impacts on Indigenous interests.	• The NEB assesses all of the information provided to it, including information on project-related impacts on Indigenous interests and possible measures to mitigate impacts. • The NEB applies its technical expertise and regulatory experience to determine the residual impacts on Indigenous interests and balances those with the other societal interests at play when assessing a project. This is documented in the NEB's Recommendation Report. • The NEB's Recommendation Report is made public upon submission to GIC. • GIC has final decision on whether to approve, reject, or refer the recommendation, terms, or conditions, back to the NEB for reconsideration.	• If the GIC approves the project, the NEB enforces proponent compliance with conditions and other regulatory requirements (e.g. *NEB Onshore Pipeline Regulations, NEB Pipeline Damage Prevention Regulations*). • Proponent's consultation program must continue throughout the lifecycle of the project. • The NEB undertakes environmental and safety oversight throughout the lifecycle of the project (i.e., from construction, operation , through to abandonment). • Anyone with continuing concerns about impacts of the project, including Indigenous groups, can make those concerns known to the NEB, and the NEB can take remedial actions if warranted.
Whole of Government Approach Roles and responsibilities between Federal Authorities (ex: DFO, ECCC, TC, INAC, DOJ) are often established in written agreements* and/or best practices and coordinated through MPMO		May intervene in NEB process, submit evidence, prepare IRs to Intervenors (including Indigenous groups) and attend NEB's OTE sessions	NEB staff provides letter to MPMO on issues raised by Indigenous groups at close of record	
Processes undertaken by the Government of Canada **The Government relies on the NEB's process to the extent possible to meet the Crown's duty to consult and accommodate**	**Early Indigenous consultation** MPMO establishes framework/plan for the Government's Indigenous consultation and oversees consistency, transparency, accountability among multiple federal authorities MPMO sends letter to potentially impacted Indigenous groups explaining the Crown's approach to Indigenous consultation	**Participates in NEB Review Ongoing meetings** MPMO coordinates and provides updates to federal departments and agencies, as required MPMO assesses whether further action is required to address issues that may be beyond the proponent's control or the NEB's mandate. MPMO engages in necessary consultation, feeding relevant information back into the NEB process.	**Ongoing meetings if necessary** MPMO may consult on NEB Recommendation Report, seek input on Crown Consultation report and submit Crown Consultation report to Government. NEB staff may attend, if requested to provide process information.	**Ongoing meetings with Indigenous groups** If the project is approved, appropriate Government authorities (federal or provincial) consult on further regulatory permits, if necessary

*Examples of project agreements: *Project Agreement for the Trans Mountain Pipeline Expansion Project in Alberta and British Columbia*, *Agreement For The Line 3 Replacement Program In Alberta, Saskatchewan And Manitoba*

- It is uncertain what "to the extent possible" means, and which MPMO/ NEB responsibilities overlap or are distinct
- - Proponent consultation is scoped by Filing Manual (different standards and processes of consultation than MPMO and NEB)
  -Project agreements are confusing (see MX example)
  - MPMO framework for consultation developed without IGs (see slide 8 MPMO Briefing)
  - MPMO framework developed as NEB and proponent are consulting
- - MPMO consults on its framework during Hearings Process, after phase where proponent Filing Manual consultation occurs, even though Crown relies on NEB process
  - Both MPMO and NEB 'track issues' , 'consult', and appear to duplicate much of what the other does in terms of addressing IG concerns
- - MPMO is not required to consult on RR or CCR, unclear when it would do so
  - Relationship between RR and CCR is not clear (which has final conclusions?)
  - There are multiple reports without any clear indication ion how they relate and which ones are used in final decision-making
  - GiC decision does not appear to include those IGs who will have residual impacts
  - Unknown GiC decision-making criteria when assessing if project should be allowed even if impacts remain on rights
  -NR Can prepares a report to Cabinet, but IGs do not see that report nor are they able to discuss its conclusions
- - How does GiC become aware and address issues if their final decision was shown to be not appropriate (national interest was not served, or impacts on rights were greater than expected)?

Appendix B: Uncertainties with the Federal Consultation Policy

Which Indigenous Rights?

The TMX Final Report[49] indicates that after a request made in early 2012, the proponent was provided with three different instructions regarding which Indigenous groups required consultation. Alberta appeared to use a distance test (Indigenous groups within 100 km from either side of the line), BC also used a distance test (advising on a much restricted 10 km distance) and the federal government used a combined distance (50 km) and potential zone of impact test. After this, there were three more refinements based on the nature of an Indigenous group, the potential for adverse impact, and the refinement process undertaken by BC as a result of a legal decision. The final list of Indigenous groups was provided over four years later, in mid-April, 2016.

In this situation, Indigenous governments seeking to understand the Crown's approach and plan for consultation would have been unable to do so. Further, this lack of clarity puts those without clearly definable rights at a disadvantage (as the various tests used could be arbitrary, changing, incorrect or inadequate).

As illustrated by the TMX example, the federal *Aboriginal Consultation and Accommodation – Updated Guidelines* ("the federal policy") indicate that one of the first steps is for federal officials to determine the potential for "adverse impacts on the rights of Aboriginal groups *living in the area*", and to determine whether there is "any potential adverse impacts on potential or established aboriginal or treaty *rights in the area(s)*"[50]. Just on this matter alone, two different approaches to a distance test are suggested: one being location of residence, and the other being location of rights implementation. And, as again illustrated above, the distance test is not the only mechanism used to determine with whom to consult. Indeed, the tests appear quite varied.

When to Delegate to the Third Party?

The federal policy indicates that "The Crown is ultimately responsible for ensuring that the duty to consult and, where appropriate, accommodate is fulfilled. Therefore, it will need to evaluate whether the proponent has adequately consulted with Indigenous groups and whether further consultations are required to be undertaken by the Crown to fulfill its consultation obligations." The approach and factors it will use to determine adequacy are not indicated, nor is any direction given as to when, why, and how third party consultations should be allowed. It's not as if the Crown is incapable of that detail; to continue with the TMX example, the final Crown consultation report explained the approach taken and the conclusions reached. However, there is no federal policy that explains many of the key elements and how they will be addressed (the policy lists the 'what' but not the 'how').

What is a Serious Impact and Strength of Claim?

The federal policy provides a basic test that gives guidance as to the extent of consultation required based on "seriousness of impact" and "strength of claim". However, there are no

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[49] National Energy Board, "*Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project*" dated November 2016, pages 12-13. Available at https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/TMX_Final_report_en.pdf

[50] *Ibid*, pages 36-37.

explanations in the federal policy (beyond the labels of "low, medium, and high", or "weak, moderate and established") of what conditions or attributes might characterize or be present to determine the seriousness of impact or the depth of the strength of claim. It is uncertain, without more direction, how Crown officials are able be both consistent and transparent in this assessment. Also, an Indigenous rights-holder would have no sense of the extent of duty they could expect until after the decision had been made by Crown officials.

How to Manage Overlapping Claims?

The federal policy provides no direction on how to address, balance, or achieve some weighing of fairness in the situation of overlapping claims of various Indigenous rights holders in an area. Given that there are often both Métis and First Nation rights holders in most regions of Canada, this lack of clarity greatly disadvantages those Indigenous peoples by placing the decision-making about which rights are more or less significant. If a proposed project was going to greatly impact Métis gathering rights but minimally impact First Nation fishing rights, it is unclear how the Crown would balance these impacts, and factor them into the 'Canadian public interest' determination.

When is Accommodation Appropriate?

The federal policy indicates: "Where it is not possible to avoid, eliminate, or substantially reduce adverse impacts, it may be appropriate to compensate the Aboriginal group for any adverse impacts on their potential or established Aboriginal or Treaty rights." The policy provides no indication as to how a Crown official would determine whether it is "appropriate" to discuss accommodation in a situation where there are adverse impacts, nor what accommodation is appropriate. The policy suggests that there is a further consideration that is required but gives no direction as to the nature or factors in that consideration. In the TMX case, if accommodation was in the form of license conditions, this was indicated, but any other specific accommodation, or lack of accommodation, was not explained in the NEB or Crown Consultation reports.

Appendix C: VARIOUS TABLES OF COOPERATIVE FEDERALISM IN CANADA

	First Minister Model	FPT Model (CCME)	Intergovernmental Council (NWT)	Mackenzie River Basin Board Model	Council of Federation Model
Purpose	Cooperative decision-making, especially as regards financial and jurisdictional overlap initiatives	Cooperative decision-making on environmental matters of common interest	Formalize government to government relationships and allow the further development of agreements or other arrangements among the GNWT and Aboriginal governments for cooperative and coordinated management of lands and resources	Cooperative decision-making on all matters under the Mackenzie River Basin Master agreement	Interprovincial-territorial cooperation between Premiers Relations between governments based on respect for the Constitution and recognition of the diversity within the federation
Current Membership	Prime Minister Provincial Premiers Territorial Premiers	All Environment Ministers of Canada	Premier and Ministers of GNWT Leadership of all Indigenous signatory governments	Federal, the five (5) Provincial and Territorial governments of the Mackenzie River Basin, and 5 Indigenous members	Provincial Premiers Territorial Premiers
Indigenous Membership	No permanent Indigenous government or organisation participants, sometimes by invite if Indigenous issues on Agenda	No permanent Indigenous government or organisation participants, sometimes by invite if Indigenous issues on Agenda	Leadership of all Indigenous signatory governments	One Indigenous representative appointed by each provincial and territorial government (5 in total)	No Indigenous government or organisation participants
Considerations	Could be a specific forum for high-level N2N deliberations Assumes all participants translate N2N agreements / outcomes within their jurisdictions	N2N matters would be addressed in relation to subject matter (e.g. environmental matters)	N2N decision-making forum No federal representatives	Sector specific agreement between FPT governments Indigenous representatives chosen by Provincial governments except in NWT where they are selected by Indigenous governments	No federal representatives

Appendix D: Process chart - Mackenzie Valley Environmental Impact Review Board