
**Submission to the Environmental Assessment Office on the
Environmental Assessment Revitalization Discussion Paper**

July 30, 2018

Submission Prepared by
Musqueam Indian Band



Introduction

Musqueam Indian Band (“Musqueam”) makes this submission to the Government of British Columbia (“BC”) in response to the Environmental Assessment Revitalization Discussion Paper (“Discussion Paper”) that was released on June 18, 2018. Over the last several years, Musqueam has championed the need to conduct a full and thorough revitalization of EA legislation and associated regulations, policies, and guidance documents, and has shared many serious concerns with the BC Environmental Assessment Office (“EAO”) regarding the current Environmental Assessment (“EA”) process.

The Province of BC has committed to the full implementation of the United Nations Declaration on the Rights of the Indigenous Peoples¹ (“UNDRIP”) and the Truth and Reconciliation Commission (“TRC”) Calls to Action², and has published *Draft Principles that Guide the Province of British Columbia’s Relationship with Indigenous Peoples*³ (“Draft Principles”); the revision of provincial EA legislation is one important step towards bringing these commitments into action. Musqueam recognizes that significant work and engagement by the EA Advisory Committee, the EAO, and the First Nations Energy and Mining Council have shaped the content of the Discussion Paper. However, we note that to date, no direct engagement has taken place with Musqueam, nor has any capacity funding has been provided to support Musqueam’s participation in this important stage of the EA revitalization process.

Overall, the breadth and depth of the changes proposed in the Discussion Paper reflect a willingness on the part of the BC government to meaningfully reform EA. Nonetheless, Musqueam is concerned that some of the recommendations in the Discussion Paper limit or even prevent the objectives of the EA revitalization (enhancing public trust, advancing reconciliation with First Nations, and protecting the environment while offering clear pathways to sustainable project approvals), from being achieved. In our submission we provide 15 recommendations that acknowledge where the Discussion Paper proposes positive revisions, and identify solutions to address existing gaps.

It is our hope that the Government of BC will fully seize the opportunity to enact legislative changes to the *Environmental Assessment Act* that implement their commitment to reconciliation and the recognition of the rights of Indigenous People by enabling joint decision-making between BC and Indigenous Nations regarding the management of resources and stewardship of the environment.

¹ United Nations, 2008. *United Nations Declaration of the Rights of Indigenous Peoples*.
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

² Truth and Reconciliation Commission of Canada, 2012. *Truth and Reconciliation Commission of Canada: Calls to Action*.
http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

³ Government of British Columbia, 2018.
https://news.gov.bc.ca/files/6118_Reconciliation_Ten_Principles_Final_Draft.pdf?platform=hootsuite

Musqueam Comments on the Environmental Assessment Revitalization Discussion Paper

Positive changes to enshrine in future legislation

1. **Recognition of Indigenous peoples as decision-makers in their territories based on their inherent rights of self-government, self-determination, and to sustain and benefit from the wealth of their territories.** Musqueam welcomes the province's commitment to the full Implementation of the UNDRIP, TRC, and the Supreme Court of Canada's decision in *Tsilhqoth'in v. B.C.* Nonetheless, Musqueam has concerns that the EA process and associated decision-making structures are not adequate to fulfill the Crown's obligation to justify any *prima facie* infringement on the exercises of Aboriginal rights, as set out in *R v Sparrow (1990)*⁴.

Proposed solution: The Sparrow justification test should be integrated as part of the EA process. The Crown, and related agencies, should be required to address this obligation as per *Sparrow* whenever a certificate or permit is issued.

2. **Establishment of relevant regional and cumulative assessment, with an understanding of the influence of past, present, and future projects on total cumulative effects loading, replaces the previous "project contribution" model.** Musqueam is heartened to see that the Discussion Paper proposes the creation of management objectives and impact thresholds based on scientific and Indigenous knowledge. We understand that Indigenous knowledge will be central to the assessment of regional and cumulative effects as well. More often than not, attempts to integrate Indigenous knowledge are limited to mere contextual information. Assessment overlooks the validity of Indigenous knowledge in informing project-related recommendations.

For example, the use of a current, proponent-espoused baseline fundamentally underestimates the degree of change in the project area, and will continue to be an obstacle to conduct proper assessment of total cumulative effects loading. This happens often through the typical process of relying upon an impacted or "shifted" baseline, rather than a pre-contact or pre-development baseline.

Proposed solution: For this provision to be meaningful, the legislation should clearly identify ways to reconcile divergences between western science and Indigenous knowledge. We seek assurances in the drafted text of the legislation that Indigenous knowledge will not be brushed aside as "mere contextual information". For example, cumulative effects should be measured against meaningful baseline conditions to assess impacts on Aboriginal rights. Such baselines should reflect the following temporal depth: pre-contact where possible with Indigenous knowledge, or pre-industrial as a fallback position where data is unavailable and reconstruction is not possible, and impacted Indigenous nations agree.

Finally, Musqueam welcomes the recognition of regional management objectives and thresholds to limit regional impacts. Nonetheless, the new legislation should not restrict this capacity to determine

⁴ Supreme Court of Canada, 1990. *R. v. Sparrow*. Government of Canada, 2018 b. *Consultation Paper on Approach to Revising the Project List*. <https://www.impactassessmentregulations.ca/4929/documents/9504>

limit thresholds to regional assessments only. Mechanisms to develop these objectives need to be clear on how Indigenous knowledge will be used, as well as who will define and implement these. This process should be conducted in collaboration with Musqueam and the legislation should enable Indigenous knowledge to be used to set and prescribe thresholds. Determination of thresholds and management objectives are the linchpins in a cumulative effects management system to insure that planned mitigation measures or offsets do not automatically justify infringement on these limits.

- 3. The collaborative development of an Assessment Plan will give clear direction and establish requirements for the EA process.** This provision encourages all procedural details, information requirements, funding expectations, and concerns to be clearly identified prior to the start of an EA to increase the predictability of the process. Musqueam strongly supports this approach and believes the working group should lead the development of the Assessment Plan. Nonetheless, the discussion paper suggests fixing certain procedural aspects of the EA, such as timelines, and therefore already limits the purpose of the Assessment Plan.

Proposed solution: Musqueam supports the creation of Assessment Plan and understand this mechanism will provide opportunity for sufficient capacity funding. Cost-recovery can and should be legislated to reaffirm the EAO's intention to provided Indigenous nations with secure and timely funding for the EA process. For the Assessment Plan mechanism to be meaningful, the EA process needs to include a fair amount of flexibility to reflect the specificity for each project (i.e., scale, location, extent, etc.). For example, the planning phase leading to the development of the Assessment Plan should not be conducted under tight deadlines, as it will hinder the opportunity for meaningful collaboration. In the long run, allowing flexibility during the creation of the Assessment Plan will help to establish sufficient and rigorous procedures for project proponents and other interested parties to develop a clear, shared understanding over the EA process to come.

- 4. Moving from the “heritage pillar” of assessment to a more extensive and inclusive “cultural pillar”.** As Musqueam has stated in previous comments to BC EAO, the current “heritage pillar” focused assessment almost exclusively on physical heritage resources, thus requiring no assessment of the intangible and semi-tangible elements of culture. Musqueam heritage resources are understood as the tangible (physical) and intangible (intellectual (e.g. knowledge, teachings, language)) aspects of Musqueam culture, including those passed down from our ancestors, for which there is a responsibility to protect and maintain for future generations.

Proposed solution: The assessment requirements related to this new “cultural pillar” need to be developed in collaboration with Indigenous nations and include valued components (VCs) such as *cultural continuity* and *sense of place and identity*. The Assessment Plan, if proven to be an effective measure to address Indigenous nations' concerns and incorporate Indigenous worldviews in the EA process, would be the appropriate mechanism to determine on a case-by-case basis the requirements of the “cultural pillar”. Moving toward an extensive and inclusive assessment of the “cultural pillar” will require additional funding and resource allocation to ensure traditional use studies are conducted for each project, and are in accordance with the protocols and procedures of the impacted Indigenous nations.

Moving towards rights recognition and a government-to-government approach

5. **Inadequate guidance has been developed on how the missing “Sixth Pillar” of Aboriginal rights and title impact assessment should be conducted.** In the past, the EAO has made little effort to comprehend how information pertaining to Traditional Use, Indigenous Knowledge, and Aboriginal Interests can be assessed. Proponents are uniquely unsuited to conduct these types of assessments. Without strong guidance, what passes for an “Aboriginal Interests” assessment is in fact almost always totally inadequate. Such assessments commonly fall short in a number of regards:
- a. Lack of engagement of Indigenous Nations in the baseline data collection and, even more importantly, impact characterization and estimation of seriousness of effects;
 - b. The previously-noted “assessment by biophysical proxy” fallacy rather than the requirement to have a serious “sufficiency of resources” approach to determine the level of infringement on Aboriginal rights; and,
 - c. The pooling of assessment of impacts on all Aboriginal groups, rather than requiring that “per Nation” assessment be conducted.

Proposed Solution: The new legislation should require collaborative scoping of the EA to create meaningful rights-based assessment, and allow Nations to undertake part of or the entire EA. Accepting comments is not enough and “joint drafting” has proven to be costly and inefficient. A full revision of the draft guidance document on assessment of “Aboriginal Interests” needs to be conducted to include title, rights, and traditional use and occupancy impact assessments. A meaningful “Sixth pillar” to ensure a rights-based approach to the EA process needs to acknowledge the priority of Aboriginal rights over the other components being assessed and recognize Aboriginal law in the interpretation of these rights.

6. **Ministerial discretion over the EA process and decision-making undermines regulatory mechanisms and relegates Indigenous nations to a secondary role.** Proposals in the Discussion Paper include the designation of projects by the Minister at the request of Indigenous Peoples, and the opportunity for the Minister and Indigenous governing bodies to issue a decision that a project is clearly irreconcilable with existing law or define policy objectives. Nonetheless, such final decisions remain in the hands of the Minister. Placing Indigenous nations under the administrative supervision of the Minister is not consistent with the objective of moving towards a rights recognition and government-to-government approach. Finally, it is proposed that the Minister can make an early decision that a project should proceed directly to permitting. Giving the Minister the opportunity to by-pass the EA process constitutes a significant step back from achieving clarity and predictability over the EA process, as well as the consensus-based decision-making model grounded in a government-to-government approach, which is otherwise largely promoted by the Discussion Paper.

Proposed Solution: Although collaborative decision making is encouraged, Musqueam requires its rights and decisions to be respected during the EA process. The new legislation needs to lay out clear, transparent, and consistent decision-making criteria that recognizes Indigenous peoples as self-governing nations with rights to make decisions affecting their lands, territories, and resources (UNDRIP articles 26, 32). Indigenous nations should have the right to designate a project and to make

an early decision that a project is clearly irreconcilable with existing law or defined policy objectives, without having to be subjugated to the Minister. A decision by either governing bodies should trigger the EA, and no party should be given the power to by-pass the EA for a designated project.

- 7. Enabling a consensus-based decision-making approach with Indigenous nations and recognizing their role as co-regulators within the EA process should not be limited to a technical level.** As proposed in the Discussion Paper, this consensus-based decision-making approach will be enabled at the technical level. Musqueam is concerned that EAO chose not to mention consensus decision-making elsewhere to limit to limit the requirement for consensus outside of technical decisions. This falls short of the EA Advisory Committee's recommendation to include consensus decision-making at various stages of the process.

Proposed solution: Consensus-based decision-making needs to be the standard at every level and stage of the EA, not only to assess the validity of information or methodology. Once the recommendations over the approval and conditions related to the projects are been made to the Minister, the same consensus-based decision-making standard should apply to the final decision to issue a certificate. Finally, the independence of each Indigenous nation should be reflected in consensus-based decision-making, meaning that consensus between the Crown and each nation is on an individual nation-to-nation basis. Bundling Indigenous nations under one umbrella is not acceptable.

- 8. The proposed EA process fails to implement the EA Committee's recommendation to develop consensus decision making between the EAO and Indigenous nations.** The EA Advisory Committee's recommendation to develop consensus decision-making between the EAO and Indigenous nations at different stages of the process is stated at the beginning of the paper but not included in the proposed environmental assessment process. As proposed, the consensus decision making will occur only at the readiness gate to start an EA, and during the final recommendation stage.

Recommendation: A meaningful shift to consensus decision-making requires that Indigenous nations are involved in decision-making at every step of the process (e.g. including all exceptional circumstances, such as information requests or timeline extensions).

- 9. Musqueam is concerned that the alternative dispute resolution (ADR) as proposed will become a mere procedural step to justify moving forward without consensus decision-making.** Keeping in mind that one of the main objectives of this revitalization process is to increase predictability over the EA process, the ADR process as currently proposed may not provide for the necessary flexibility, regarding both timelines and nature of the outcomes, to successfully and consistently reach its goals.

Recommendation: The ADR mechanism should be co-developed with Indigenous Nations, and overseen by an independent, joint committee. Musqueam requests that this process be flexible and applied on a case-by-case approach to address project-specific or nation-specific concerns, protocols, and capacities in an adequate way. To be in line with UNDRIP, Indigenous nations' decisions throughout the ADR must be respected, including the decision not to enter into the process or to reject the proposed outcomes. For this provision to be meaningful, the new legislation should not assume that ADR will necessarily result in consensus decision-making and should clearly lay out

outcomes following failure to reach consensus. Musqueam requests the interruption/termination of the EA if ADR is not successful, as no project that impacts our rights and interests should move forward without Musqueam's consent.

Transparency and accountability

- 10. Professional reliance remains a major issue that undermines accountability and transparency throughout the EA process.** Major flaws have been identified with the current professional reliance model. As long as the Proponent has the ability to select and hire qualified professionals to conduct technical assessment studies without external oversight, there is a high potential for conflicts of interest to influence the assumptions and results of technical reports.

Proposed solutions: Musqueam requests that the current Professional Reliance Review and associated recommendations be integrated in the EA process. As suggested, the Proponent should provide the funds to conduct technical studies, but Indigenous nations or independent third parties should be responsible for selecting and contracting the qualified professional. Musqueam supports the proposed recommendation to *“have all of a proponent’s technical studies reviewed by independent experts either from inside or outside of the government”*⁵ and hopes to see this recommendation enshrined in the new legislation.

To avoid the selective use of technical reports, Proponents should seek qualified professional consent that their work and recommendations are used in their full context (such as an “as-built engineered” label). Finally, clear standards and requirements on how qualified professionals integrate Indigenous Knowledge (IK) need to be developed in collaboration with Indigenous nations.

- 11. Decision-making needs to be balanced by transparent decision-making processes.** Decision-making has to be based on clear multi-criteria analyses with known and consistent weighting associated to each criterion. This provision is mandatory to ensure predictability in the process when complex or controversial decision-making situations arise.
- 12. The Working Group system.** In the current EA system, working groups meet rarely, and members’ comments are frequently treated as eminently refusable advice by first the Proponent and then the EAO. In addition, working groups meetings tend to be very short and Proponent-presentation driven, and the EAO continues to have “closed door” meetings with Proponents at critical junctures in the EAs, without Working Group members present. These include during the review of comments on the dAIR, finalization of the AIR, and review of the EAO’s Assessment Report. This reduces confidence in the openness and transparency of the process.

Proposed solution: To reflect BC’s intention to move forward with consensus based decision-making, Working Groups should be the main body leading the EA process, and therefore be granted the authority to design and implement the Assessment Plan. Granting the working group greater authority over the EA process would shift the process from a proponent-driven approach to a stakeholder-driven approach. In addition, working groups should be held in camera and be free of the Proponent

⁵ Haddock, Mark (2018). Professional Reliance Review: The Final Report of the Review of Professional Reliance in Natural Resource Decision-Making.

https://engage.gov.bc.ca/app/uploads/sites/272/2018/06/Professional_Reliance_Review_Final_Report.pdf

more often to allow members to discuss their concerns and requirements freely. Whenever the EAO takes a phone from the Proponent outside of a Working Group setting, a note to file on issues discussed and resolutions/decisions made must be put on the public record. This is not an onerous task (e.g. Mackenzie Valley Review Board already does exactly this).

Timelines

13. **Promotion of speed over effectiveness in the EA process.** The proposed approach focuses on predictability by setting maximum timelines for each phase, and offers little flexibility to accommodate additional information requests or project-specific characteristics (e.g. size, extend, capacity). For many Indigenous nations with limited capacity, tight timelines create undue stress and stretch capacity to the point it may be impossible to meaningfully comment on an EA application. Under current practices, these tight timelines do not reflect the actual consultation timelines, as comments are sometimes required halfway through the process in order to prepare the EA report.

Proposed solution: Timelines should be project-specific and be developed collaboratively during the drafting of the Assessment Plan. Minimum timelines need to be laid out clearly to ensure the opportunity for nations to participate to their desired level (i.e., including conducting aspects of or all of the EA themselves.) Finally, Indigenous nations should be able to “stop the clock” in response to exceptional circumstances, such as additional information requests that call for further technical studies, to ensure that concerns are addressed adequately.

Mitigation and Conditions

14. **The existence of mitigation measures or offset plans should not be sufficient to rule out potential effects during the assessment review.** Under current practices, mitigation measures and environmental plans are suggested to “address” all potential effects related to the project. In most cases, this allows the Proponent to move forward in the assessment by claiming that there is no residual risk following the implementation of these environmental plans. Too often, these measures rely on a narrow understanding of complex ecosystems within temporal and spatial boundaries that are inadequate for the assessment of long cumulative impacts.

Proposed solution: Mitigation measures should be co-drafted with Indigenous nations and meaningfully integrate IK and Indigenous resource management practices, objectives, and plans, particularly when project risks include potential cumulative effects on traditional territories. The same standard for consensus decision-making should apply regarding the selection, the sufficiency, and the application of mitigation measures. Finally, funding should be allocated to build Indigenous nations’ capacities to develop, conduct, and monitor the success of their own mitigation measures associated with the effects of each project.

15. **Modernization of the compliance and enforcement regime continues to focus on financial penalties.** Compliance and enforcement regimes currently in place have proven to be insufficient to enforce EA certificate conditions. Regulators have limited capacity and/or willingness to ensure compliance, and sanctions do not adequately discourage Proponents’ infringement of certificate conditions. The ticketing system commodifies project impacts and does not address risks of further impacts or infringement of conditions.

Proposed solution: As suggested in the Discussion Paper, the legislation should provide Indigenous nations the authority to co-administer and participate in monitoring. Adequate funding mechanisms need to be established to support this opportunity. This authority and capacity building should also involve decision-making power over compliance and enforcement regimes. The new legislation must enable sanctions to include the interruption of activities and/or the revocation of certificates associated with the infringement. Furthermore, Proponents' previous infringements should inform the decision to grant future certificates or not. Finally, the new compliance and enforcement regime should also monitor all other commitments made by the proponent during the EA process.

Closure

In closing, changes to the BC *Environmental Assessment Act* must be in accordance with the Crown's fiduciary duty to respect Aboriginal rights, and uphold the Government of British Columbia's commitment to UNDRIP, the TRC Calls to Action, and the Draft Principles, all of which recognize Indigenous rights and jurisdictions. Musqueam has an Aboriginal right to fish that is protected under section 35 of *The Constitution Act*, and which has been consistently infringed by EA decisions that affect the waters of the Fraser River and the Salish Sea. In response to BC's request for comments on the Discussion Paper, Musqueam has proposed changes and additions that will help the Government of BC down the path of reconciliation.

In summary, Musqueam expects the new EA legislation to create a rights-based approach that will empower Indigenous nations as decision-makers in the EA process. We further recommend that the collaborative process of EA reform must include co-drafting of the Intention Paper and new legislation, regulations, and policies. Finally, Indigenous Nations' participation needs to be supported by adequate funding to alleviate the financial burden associated with each step of this revitalization process.

Musqueam looks forward to continuing to work with the Government of BC to develop a credible, effective, and defensible EA process that recognizes and respects the rights of Indigenous peoples.

Musqueam Indian Band is an Indigenous nation with traditional, ancestral, and unceded territory located in what is now the city of Vancouver and surrounding areas in the province of British Columbia.⁶ Musqueam retains Aboriginal rights and title across all lands and waters within Musqueam's core territory, as described in the 1976 Musqueam Declaration to include:

The lands, lakes and streams defined and included by a line commencing at Harvey Creek in Howe Sound and proceeding Eastward to the height of land and continuing on the height of land around the entire watershed draining into English Bar, Burrard Inlet and Indian Arm; South along the height of land between Coquitlam River and Brunette River to the Fraser River, across to the South or left bank of the Fraser River and proceeding downstream taking in the left bank of the main stream and the South Arm to the sea, including all those intervening lands, islands and waters back along the sea shore to Harvey Creek, and the sea, its reefs, flats, tidal lands and islands adjacent to the above described land and out to the center of Georgia Strait⁷.

Expert traditional ecological knowledge, refined and maintained over thousands of years through a sophisticated oral tradition, remains foundational to Musqueam's demonstrated resilience as a people. Musqueam continues to seek recognition and reconciliation of its continuing Aboriginal rights and title with the fact of Canadian settlement. A major step in this direction was the 1990 *Sparrow*⁸ decision, in which Supreme Court of Canada recognized that Musqueam has a proven Aboriginal Right to fish within our territory. Throughout its territory, Musqueam continues to assert our rights and title.



MUSQUEAM INDIAN BAND

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6735 Salish Drive

Vancouver, BC V6N 4C4

Telephone: 604 263 3261

Fax: 604 263 4212

Website: <http://www.musqueam.bc.ca/>

⁶ Wilson, Jordan P.H. 2015. Sq'eq'ip – Gathered Together. (Masters Thesis) Retrieved from the University of British Columbia.

⁷ Musqueam Indian Band. 1976. Musqueam Declaration. Vancouver, British Columbia.

⁸ <https://scc^csc.lexum.com/scc^csc/scc^csc/en/item/609/index.do>