

Final Report of the Environmental Assessment Advisory Committee

May 2, 2018



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2.0 EXECUTIVE SUMMARY

The Environmental Assessment (EA) process in British Columbia (BC) is already well established but is now challenged by the need to address significant improvements. The Environmental Assessment Advisory Committee (EAAC) has found a high integrity process in place that is well managed, thorough and functionally independent. In the course of our discussions, we have worked with a dedicated senior staff of the Environmental Assessment Office (EAO) who professionally and enthusiastically embraced the challenges delivered by the Minister of Environment and Climate Change Strategy. The committee has also been ably supported by staff of the First Nations Energy and Mining Council (FNEMC) who form part of our supporting secretariat.

The most significant challenge facing the EAO is that the EA process is to embody the principles and standards of the UN Declaration. This propels the agency from its currently substantial engagement efforts to a much more rigorous level of recognition, respect for and inclusion of indigenous governments. The UN Declaration implies a formal place in decision making that is transformative and goes far beyond the established practices of assessing “strength of claim” and “duty to consult” in deciding the means, level and adequacy of engagement with indigenous people.

Reconciliation is about unwinding the pervasive, constraining results of colonial administration that involved exclusion from representative government, compression into areas that represent a small fraction of traditional territories, suppression of language and culture, and the egregious removal of children to residential schools in the attempt at assimilation. The larger purpose cannot be fully accomplished within a single agency and a single administrative process. The EAAC understands that the EA revisions can contribute to the overall reconciliation agenda and makes recommendations to that effect. It also addresses supporting conditions that need to be provided by the Provincial Government to facilitate the revitalization work of the EAO by providing a formal place for recognition of the UN Declaration principles.

As well as the goal of reconciliation, the objectives of revitalization of the EA process include improvements to the level of public trust in the process, clarity of process for proponents, timeliness of decision making, sufficiency of funding, and effective participation of local government and the public. All of this is to ensure that the results lead to the success of worthwhile projects that produce sustainable results based upon environmental, economic, social, health and cultural standards – the “five pillars”. Projects that cannot meet these standards will need to be substantially revised or fall by the wayside. The EAAC makes recommendations in this regard, with comments about how they might be achieved in practice.

This advisory report represents work of the committee completed between March 14 and April 30, 2018. It is one of three lines of review under separate consideration by government that also included:

- Province-wide workshops and a provincial conference with First Nations conducted by the FNEMC on behalf of First Nations Leadership Council; and,

- Individual consultations with local government, industry associations and public stakeholders conducted by the EAO.

Summary of Recommendations

The EAAC makes 33 recommendations that deal with reconciliation, public trust, process clarity, participant funding, the nature of consent, independence of decision making, elements of sustainability and process certainty for project proponents. We make the distinction between those actions that should be taken within the EA process administered by the EAO and those that should be taken by the provincial government to create supporting conditions. Each topic is supported by considerations that help to illustrate the discussions among committee members that gave rise to the recommendations. We have tried to limit the number of recommendations to ensure reasonable brevity, but recognize that our time limits will leave many important considerations for the group that will create the comprehensive discussion and intentions papers, due later this year, that will go for public review before enabling legislation is prepared.

We have not had the time needed to prepare a fully consensus based report. What we have done is to ensure that all voices around the table were heard, recorded and featured accurately in our report. Each committee member has been provided the opportunity to express ideas and cautions to augment the main report and these are summarized in the last chapter.

2.1 RECOMMENDATIONS ADDRESSING RECONCILIATION

R1: Legislation should be introduced to ensure that engagement of indigenous peoples in EA processes is based on formal recognition for jurisdiction arising from Title and Rights and respect for traditional indigenous governance models, indigenous law and indigenous culture.

R2: The Province should establish a mechanism such as a Reconciliation Commission to provide constructive direction and support for reconciliation initiatives within the EA process and to address disputes arising from implementation of the UN Declaration within the EA revitalization initiative.

R3: Provision should be made in EA legislation to recognize that there are options for the level of engagement of indigenous governments in the EA process that range from co-administration with the EAO to taking on full responsibility for conducting and managing an Environmental Assessment. Each option will need to be provided with the necessary advisory and funding resources.

R4: It should be recognized that Consent granted by indigenous governments must meet indigenous environmental and cultural standards and must include economic benefits. Consent would arise when indigenous people believe that the EA process has consistently met the requirements of reconciliation, conflicts have been resolved by recourse to a Reconciliation Commission and that, if necessary, discretionary recourse to judicial review and court decisions have been rendered.

R5: Where more than one group of indigenous people is likely to be affected by the implications of a project; the relationship among them should be decided by the indigenous peoples themselves and not be imposed by an external party.

R6: Government to Government agreements should be put in place that establish overarching protocols for sharing the economic benefits of resource development with the indigenous peoples in whose traditional territory projects are being undertaken.

2.2 RECOMMENDATIONS ADDRESSING THE OVERALL EA PROCESS

R7: Steps in the EA process that require decisions to allow a project to pass to the next stage of assessment should be seen as gates where incremental agreements are reached that provide increasing degrees of certainty for all participants that the process is proceeding in an orderly manner. The gate structure should be reflected in EA legislation.

R8: Resources should be made available to conduct project specific government to government collaboration agreements with indigenous governments that would specify the internal dispute resolution process to be used in an EA process.

R9: While the final decision is being developed, and certificate conditions finalized in the light of the Assessment Report, the EAO should provide an opportunity for the indigenous governments to review the adequacy of reconciliation initiatives and to share any independent conclusions; to acknowledge any residual concerns of local government and public interest stakeholders; and for the public to comment on the answers provided to plain language public questions.

2.3 RECOMMENDATIONS FOR DETAILED EA REVITALIZATION

R10: The Reviewable Projects Regulation needs to be revised to move away from strictly production capacity-based outputs, to criteria that more accurately reflect the potential for a given project to result in adverse impacts. A strong rationale needs to be provided to justify why certain project types that contribute to cumulative effects may be exempted from EA review.

R11: Funding for indigenous governments should be scaled to promote the capacity for full participation throughout all the stages of the EA process including the ability to promote opportunities for joint and/or independent decision making. Funding for local governments and public interest parties should be scaled to promote increased confidence and trust in the objectivity by seeking informed input at all stages of the EA process.

R12: Dispute resolution mechanisms should be established within an EA process to deal with the day to day issues for which the consensus proves to be difficult. Major conflict issues should be referred to the dispute resolution function of the Reconciliation Commission. This does not exclude resort to judicial review but is intended to provide timely and less expensive avenues.

R13: Dispute resolution should conclude at a decision gate and not be open to re-examining previous dispute decisions unless there are major revisions to the project undergoing the EA.

R14 Efforts should be made within the EA process conducted by the EAO for technical discussions and decisions to be communicated publicly in plain language.

R15: Information assembled during the EA process should be made publically available for reference during a specific EA, and then archived for the public record of all EAs to enable study of the growing record of EA information, analysis, best practices, and conclusions.

R16: The EA process should recognize the need to provide broadly accepted independent verification of project information and analyses. This may best be served by common agreement on the means of verification but may have to enable parties to conduct some of their own independent work to ensure confidence in the impartiality of information used to support EA decision making steps.

R17: Evidence derived by indigenous communities by traditional means that reflect culturally distinct and holistic relations with the land and are conveyed through indigenous peoples' languages and traditional means of oral communication among generations needs to be recognized as valid equivalents to western science in consideration of values to be assessed in EA procedures and the formal decisions that are made.

R18: The EA process should bring forward both the positive and the negative effects of a project and not place most of the emphasis on identifying and dealing with adverse impacts.

R19: Public Education on the implications of reconciliation in making project decisions with an EA should be one of the purposes of the Reconciliation Commission.

R20: Clarity of public engagement opportunities and their place in the EA process should be published by the EAO in a plain language brochure showing how concerns raised by the public are to be addressed within project decision gates.

R21: Public opportunities for early engagement in the EA process and continuing opportunities for review and comment on decisions at the EA process gates should be legislated.

R22: Consistent with the federal initiative to provide a gender lens in project assessment, the provincial EA process should establish a means to provide a lens dedicated to vulnerable populations potentially affected by projects undergoing assessment, focusing on the impacts and benefits arising across the five pillars.

R23: Participants in an EA process should be advised in an understandable and timely manner about the progress of the subsequent compliance and enforcement monitoring of proponent adherence to certificate conditions and informed of the outcomes of the permitting processes that involve subsequent agency based permitting and their compliance and enforcement procedures.

R24: Indigenous assessment of compliance and enforcement with certificate conditions should engage indigenous people directly through employment as monitors or guardians consistent with the professional requirements of on-site activity.

R25: Provision should be made by the province for the EAO and the Reconciliation Commission to respond to indigenous peoples' and public complaints arising from project operations and to conduct special investigations where the reasons for complaints begin to show patterns of non-compliance or distinct classes of impacts that need attention.

R26: Administrative sanctions to be employed by the EAO need to be enhanced by - enabling use of prevention orders and providing for substantially increased administrative financial penalties.

R27: Auditing of adherence to certificate conditions should include examination of those that specify construction integrity, work forces skill standards and provision of employment.

2.4 RECOMMENDATIONS ADDRESSING PROVINCIAL SUPPORTING CONDITIONS

R28: Capacity building, including advisory services and stable sources of funding should be provided not only by proponents, but also by the province, to enable independent judgments to be made by indigenous governments, local governments and public interest organizations.

R29: Resources should be made available to conduct regional and strategic level impact assessments to provide essential context for individual project assessments.

R30: Regional EAs should be initiated on a priority basis. These may be tested in areas of limited controversy or areas where natural disasters have had major impacts on biophysical carrying capacity, economic, social, health and cultural conditions. The process could then move on into more complex areas of intense resource development activity. While these assessments can provide necessary context for individual projects when the regional work is done, the continuing work of project proposals and assessments should not be suspended in the meantime.

R31: The Provincial Government, at the earliest possible date, should initiate information sharing and collaboration among the teams assessing revitalization of Land Use Planning, Rural Development, species at Risk, Climate Change Strategy, Professional Reliance and Project Impact Assessment.

R32: Regional "Reconciliation" or "Sustainability" Offices should be put in place to "house" Government-to-Government agreements, the multi-agency regional and strategic assessments and related initiatives and to enable local curators of information to be acknowledged and engaged.

R33: Formal arrangements should be made to have funding earmarked and a process established to request continuing research into the effectiveness of EA processes and related project outcomes on indigenous people and other participant interests across the five pillars.

3.0 CHARGE TO THE EA ADVISORY COMMITTEE

The EAAC is tasked with advising the Minister of Environment and Climate Change Strategy on changes to the current EA Process and legislative framework that could achieve a trusted, technically robust, sufficiently financed EA process that embodies the standards of the UN Declaration, and achieves sustainability and reconciliation goals. The final process should result in clarity of conditions and expectations for all proponents, leading to an effective process that result in both timely approval of good projects and a clear understanding of potential impacts that would require mitigation efforts.

Revitalization of the environmental process will focus on three key outcomes:

- Advancing reconciliation with First Nations;
- Enhancing public confidence, transparency and meaningful participation; and,
- Protecting the environment while supporting sustainable economic development.

4.0 GOVERNING PRINCIPLES

Indigenous people understand that reconciliation requires recognition that the integrity and health of “Mother Earth”, the land of their territories, is fundamental to their history, culture, and language. Indigenous people are not healthy unless their territories are healthy.

The principles embedded in the UN Declaration, the Truth and Reconciliation Commission and the Tsilqot’in decision form the basis for a reconciliation agenda within the EA Process. While there is an existing body of requirements associated with “strength of claim” and “duty to consult” considerations, the requirements of the UN Declaration may be interpreted to go well beyond those that already exist.

Public trust in the transparency, objectivity and completeness of project assessment requires early and thorough identification of public interests and meaningful engagement throughout the decision-making steps in the assessment process.

Sustainability is approached by ensuring the project review process fully addresses project effects across all five “pillars of sustainability”, environment, economy, social, health and culture. Project reviews need to give robust consideration to both positive and negative effects. Thus, this document uses the term EA to encompass all five pillars, not just the biophysical one.

Sustainability also requires that a system is put in place to estimate the cumulative effects of the pre-existing human footprint and the occurrence of natural disasters on carrying capacity in the area of influence of individual projects that are to be considered in the EA process.

Proponent certainty is to be addressed by ensuring that the environmental assessments have clear requirements for passage through the decision-making stages of the process and that commitments made at these “gates” are secure. The EA process must be efficient and include mechanisms for timely resolution of disputes.

Overall confidence in the integrity of the EA process for all parties will be enhanced through incorporation of its processes, decision steps, and decision criteria in EA legislation.

5.0 SUMMARY CHARTS OF EA PROCESS REVITALIZATION

This report presents two summary charts of the revitalized EA process envisioned by the EAAC. The charts help to show how the recommendations of the EAAC fit into the full EA process.

Chart 1. The Conceptual Model outlines the stepwise progression of the decision gates and the time that is expected to be given to each. The intention is that the gates are “one-way valves” in the process to give indigenous peoples’, proponents and their investors, and participating stakeholders a degree of certainty that the EA process will proceed in an orderly manner. Decisions to be made by parties to the EA at each gate are illustrated.

It remains possible that a proponent may suspend the clock at any time to reflect market conditions, altered financing arrangements or other factors that pertain to the project or their decision to make significant adjustments to project design. Again, the intention is to ensure an orderly process not to create a “lock step” one.

Chart 2. The Decision Gates provides more detail on the nature of the decisions to be made at each process gate, the criteria to be applied, and who is engaged in applying them, including the use of conflict resolution mechanisms when required.

6.0 ADDRESSING RECONCILIATION

6.1 RECOGNITION IS THE BASIS FOR ENGAGEMENT

R1: Legislation should be introduced to ensure that engagement of indigenous peoples in EA processes is based on formal recognition for jurisdiction arising from Title and Rights and respect for traditional indigenous governance models, indigenous law and indigenous culture.

Article 32 of the UN Declaration reads:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

The UN Declaration is foundational and clearly different from treating indigenous people as a “stakeholder with interests” among many. It means that indigenous communities should be engaged in co-administering EA decision-making processes as independent indigenous governments and that they should be able to self-identify rather than having their participation decided externally. It is also necessary to recognize that indigenous governments are undergoing continuous evolution with recovery from colonial impositions and must be seen as internally validated responses to the modern world, not ones imposed from outside. They may also be modified by emerging or concluded treaty settlements.

“Strength of claim”, though often used to assess the right to be engaged, can appear to be a measure intended to limit the level of engagement that is due to indigenous people in an EA or other process. Recognition of indigenous peoples’ rights of engagement needs to emphasize strong working partnerships and the means of doing so might effectively be detailed in Government to Government Agreements at the regional level or in collaboration agreements at the project level.

“Duty to consult”, established by the courts, is likewise a measure of the need for engagement. However, the idea that some form of capacity support or financial benefit that is accepted by an indigenous government can be interpreted to constitute adequate resolution of the duty to consult needs to be augmented by the concept of material partnership in decision making throughout the EA process. This is a distinct level of decision making as a government and requires independent financial and technical capacity to conduct the collection and assessment of independently derived information in support of their own decision-making. This independence and material engagement should appear at every decision-making stage in the process.

At best, strength of claim and duty to consult should be considered the “floor” requirements from which the more far reaching reconciliation requirements of the UN Declaration proceed.

6.2 A RECONCILIATION COMMISSION

R2: The Province should establish a mechanism such as a Reconciliation Commission to provide constructive direction and support for reconciliation initiatives within the EA process and to address disputes arising from implementation of the UN Declaration within the EA revitalization initiative.

Implementation of the UN Declaration in the EA revitalization process will be a complex and lengthy matter that would benefit from a source of highly qualified and respected information and advice that is oriented to positive improvements in process. A Reconciliation Commission could promote consistency in the application of the UN Declaration principles and flexible use of facilitative alternative dispute resolution processes more in tune with traditional indigenous governance and laws. Issues of recognition, capacity funding, engagement in decision making, the interplay of scientific and indigenous information, independence of information verification, addressing of shared territories and regional sensitivity are among the areas of knowledge that will grow over time.

Issues of procedural fairness, recognition of independent decision making authority, adequacy of indigenous peoples' engagement, use of traditional knowledge, acceptance of the final results of a government process or the adequacy of compliance and enforcement can first be addressed internally in the EA process. The objective is to avoid having parties waiting in frustration, saving up grievances to invoke the default option of judicial review at the time of a major process step or final decision.

Judicial review is an expensive and time consuming venue that can restrict the standing of some participants and create delays in process decisions that frustrate all parties. It appears that a less formal means of settling reconciliation generated disputes would lessen the cost and time burdens and be more sensitive to the needs of all parties to understand the implications of the UN Declaration as it is being implemented.

A dispute resolution function within the Commission serving reconciliation matters as its main purpose is necessary, but the Commission could include within its mandate a function to serve as the dispute resolution venue for a broader variety of issues arising within a specific EA process. This would provide an intermediate and timely step between the internal dispute resolution agreements within a particular EA process and resort to Judicial Review and beyond. Establishment of the Commission could be piloted as a function within the EA process to assess its effectiveness and later expanded provincially to other revitalization processes as appropriate.

Membership on the commission should be a balance of non-political indigenous and other appointments that reflect broad experience with the revitalization process and the engagement of indigenous people in collaborative decision making and could reflect regional variation by reference to Government-to-Government (G2G) agreements and regional/strategic assessments.

6.3 INDIGENOUS GOVERNMENT LED ASSESSMENTS

R3: Provision should be made in EA legislation to recognize that there are options for the level of engagement of indigenous governments in the EA process that range from co-administration with the EAO to taking on full responsibility for conducting and managing an Environmental Assessment. Each option will need to be provided with the necessary advisory and funding resources.

A number of alternatives exist for the character of indigenous engagement in an EA process: co-administration with the EAO, independent indigenous government led investigations and information interpretations linking into the EA process at decision gates or conducting a full EA process on behalf of all parties. If full responsibility were to be assumed, objective standards of adequate capacity will need to be articulated to provide confidence and certainty that the general requirements for inclusion of all other parties, transparency, information access and capacity supports will apply as for one led by the EAO or federally. Each of these options is dependent on having sufficient capacity to take on the implied responsibilities. Each requires respect for the unique nature of indigenous information gathering, analysis, interpretation and decision-making as to how impacts on indigenous interests are defined. These cannot be delegated to proponents or the EAO. Despite the potential for parallel decision-making tracks within a single EA, there remains a strong potential for sharing basic information derived from mutually agreed

upon methods that would avoid full and costly duplication of effort and increased uncertainty for participants.

An indigenous government led EA, all or part, could be fundamentally more connected to aboriginal perspectives on their whole traditional territory and more reflective of their jurisdiction arising from Title and Rights, indigenous governance, indigenous law, ancestral knowledge, and cultural relationship with the land.

6.4 FREE PRIOR AND INFORMED CONSENT

R4: It should be recognized that Consent granted by indigenous governments must meet indigenous peoples' environmental and cultural standards and must include economic benefits. Consent would arise when indigenous participants believe that the EA process has consistently met the requirements of reconciliation, conflicts have been resolved by recourse to a Reconciliation Commission and that, if necessary, discretionary recourse to judicial review and court decisions have been rendered.

Free, prior and informed consent, a key requirement of the UN Declaration, is a complex of commitments that is defined and strengthened throughout the steps of the EA process, not achieved at a single point in time. Eventual consent to certify and permit a project is derived from the integrity of the process as it proceeds and the independence of the indigenous people's decision making alongside provincial and federal governments.

Consensus to proceed needs to be established at each process gate as it is reached, thus building trust that the EA process is accurately addressing indigenous interests and incorporating the information that is being provided to support those interests. If consensus cannot be achieved in this manner then disagreements need to have access to formal dispute resolution. This is interpreted by the EAAC as distinct from the concept of veto which no party should be able to invoke unilaterally. Dispute resolution can begin with internal process agreements, escalate to dispute resolution at the Reconciliation Commission, and resort finally to Judicial Review and the courts. At the last step of the EA process, the right still remains with a participating indigenous government to make their own independently derived decisions on a project known to the Minister before a final decision is rendered and to seek redress if not satisfied.

6.5 SHARED TERRITORIES

R5: Where more than one group of indigenous people is likely to be affected by the implications of a project; the relationship among them should be decided by the indigenous peoples themselves and not be imposed by an external party.

Recognition needs to be given that while some areas may be exclusively titled, some sections or portions of territories are traditionally shared, based upon indigenous consensus, agreement, and dispute resolution processes, and not treated as exclusive to one Nation. It also needs to be recognized that well integrated indigenous nations that functioned before colonial administration were fragmented by the creation of small "bands" with restricted territories and that these larger national level entities are in some cases in the process of being reconstituted. Agreement on how shared territories are to be managed by

indigenous people is best established in the Early Engagement phase of an EA so the proponents have some certainty of who must be engaged. Disputes on this could be resolved early by reference to the Reconciliation Commission.

6.6 GOVERNMENT TO GOVERNMENT AGREEMENTS

R6: Government to Government agreements should be put in place that establish overarching protocols for sharing the economic benefits of resource development with the indigenous peoples in whose traditional territory projects are being undertaken.

G2G Agreements in BC must be based on the principles of recognition and respect articulated in Article 32 of the UN Declaration. Agreements need to establish main tables between indigenous groups and BC Ministries. At the provincial scale, these are typically coordinated by the Ministry of Indigenous Relations and Reconciliation. They can be funded through Ministry of Indigenous Relations and Reconciliation and other Ministries that may eventually have projects or proposed “impacts” on the landscape, and provided with sufficient scope to allow both for higher level discussions and to advise the more technical or focused tables and discussions at the local level.

Overarching agreement on economic benefits, including such specific matters as revenue sharing or indigenous resource taxes, need to be established, that are not linked to individual projects but set standards that apply broadly and emphasize the wider reconciliation responsibilities of the Crown rather than those that might be expected of a proponent in a specific instance. In particular, this could help to establish stable sources of capacity building funding. This would also help to ensure more certainty indicating the reasonable bounds of the responsibility of proponents in dealing with accommodation to the direct impacts of a specific project.

G2G agreements need to be supported by dispute resolution processes that must connect provincially legislated decision makers with their indigenous counterparts so that agreements reached can actually be implemented. Where proposed projects are designated for an EA process, this should be done collaboratively. The EAO should be included in the approved reference agencies to enable G2G provisions to be applied to the EA process.

G2G Collaboration Agreements for specific projects at the EA scale should be developed to reflect what has been decided at the provincial scale. G2G collaboration agreements should cover basic technical and financial capacity, internal dispute resolution, benefits sharing and engagement in all aspects of a specific EA process through the stepwise decision gates to compliance and enforcement of certificate conditions.

7.0 ESTABLISHING CLEAR DECISION GATES IN THE EA PROCESS

A robust process with explicit legislated requirements, clearly defined gate decisions and well verified information are among the elements required for a trustworthy EA outcome. A clear and informed project

decision by a proponent at an early stage is seen to be preferable to a prolonged process that is inconclusive until a great deal of money, time and effort has been spent. The idea that good projects should succeed and lesser ones be discarded is based upon having rigorous and objective assessments to support this decision. In the EA process, this means that clear, informed and documented decisions to proceed, revise or stop should be made at each formally required step and that recourse to dispute resolution is provided when parties cannot agree.

7.1 THE SYSTEM OF EA DECISION GATES

R7: Steps in the EA process that require decisions to allow a project to pass to the next stage of assessment should be seen as gates where incremental agreement is reached that provides increasing degrees of certainty for all participants that the process is proceeding in an orderly manner. The gate structure and the criteria for successful passage should be reflected in EA legislation.

The accompanying charts of the EA process illustrate formal decision points that act as gates, and the time that should be allotted to reaching each one. The overall service standards for time commitments could be legislated but remain flexible enough to reflect the circumstances of specific EAs and the market or financing conditions faced by proponents. It is in everyone's interest that the development of agreement that a project is ready to move through a gate be thorough, to the best extent possible based on consensus, well documented and secure.

Gate 1. Reviewability

The first gate decision to be made is on whether or not an EA is required for the proposed project based on project review thresholds. This decision should be made no later than the end of the early engagement phase when the initial project description becomes available and is tested among the key parties involved. This gate is also the place to ensure that a project is consistent with clearly articulated and relevant government policies for such overarching matters as Climate Change Strategy and thus has no conflict with the public interest.

Gate 2. Readiness

The “**readiness gate**”, assesses whether the project is prepared to embark on the full EA process. It is based on the project being at a stage of detail where indigenous people and all stakeholders are able to understand the implications of the project and the proponent has a plan for appropriate engagement with indigenous people and stakeholders, a clear statement of anticipated impacts that will need to be addressed and interactions with the EAO. The readiness gate allows for a summary of the early engagement conducted with indigenous governments, local municipal and regional district governments and representatives of public interests at a time when the project is still susceptible to options and design changes. The EAO could provide an independent neutral facilitator to consolidate and summarize what is learned from participants at this stage, thus making the readiness decision more transparent and acceptable. The more comprehensive and responsive the early engagement initiatives are, the more likely conflict over the length of time needed for later EA stages will be reduced. The readiness gate is the first formal test of what the UN Declaration terms free, prior and informed consent. This is not absolute

agreement with the project, but the agreement that it should proceed to the formal EA process for a full assessment of its positive and adverse impacts.

Subsequent gates include:

- **Gate 3. Process Planning:** acceptance by the EAO of the proponents detailed project plan resulting in an EAO Process Order outlining the information gathering and analysis requirements
- **Gate 4. Impact Assessment:** An impact assessment is conducted by a Technical Working Group, using the Application provided by the proponent and the analysis of the technical information gathered to support it, leading to a Final Application for the project. Substantial re-design of a project by a proponent at this time when impact and mitigation issues are being addressed could require time for additional information collection and analysis.
- **Gate 5. Recommendations** are prepared, for transmission to the Minister, indicating whether the project should proceed or be rejected based upon the final Application, key decision factors and where the recommendation is to proceed, includes proposed certificate conditions.

Key Decision Factors include that:

- the EA Recommendations are consistent with the principles of reconciliation, reflect constitutional obligations and include explicit economic benefits
- the EA process is consistent with requirements of administrative fairness
- positive contributions have been made to sustainability across the five pillars
- adverse effects have been fully identified and that mitigation of adverse effects is effective
- residual adverse impacts are reasonable in relation to positive benefits
- the recommendations are consistent with overarching government policies.

R8: Resources should be made available to conduct project specific G2G collaboration agreements with indigenous governments that would specify the internal dispute resolution process to be used in an EA process.

It is at the entry and final decision gates in the EA process, Gates 2 and 6, that significant disagreements could at first be addressed by G2G collaboration agreements that would specify dispute resolution steps internal to the EA process. More contentious ones could be forwarded to the **Reconciliation Commission** for consideration before any party seeks a judicial review or resort to the courts.

7.2 GATE 6: THE FINAL DECISION GATE

R9: While the final decision is being developed, and certificate conditions finalized in the light of the Assessment Report, the EAO should provide an opportunity for the indigenous people to review the adequacy of reconciliation initiatives and to share any independent conclusions; to acknowledge any residual concerns of local government and public interest stakeholders; and for the public to comment on the answers provided to plain language public questions.

A last opportunity within the EA process to assess areas of common ground and consensus exists at the recommendation gate before transmission to the Minister(s). It is worth taking the time at this point to have the parties meet to review their conclusions together and to ensure understanding of any residual disagreements between indigenous governments and the EAO.

Where divergence is evident from the conclusions of indigenous governments, this is an important time for reference to the Reconciliation Commission given the overall objective of making a truly useful contribution to reconciliation.

Indigenous people must be given the opportunity to submit to the Minister, under separate cover, a statement of their conclusions for consideration.

The Minister must prepare the final decision, providing reasons supported by evidence, based on assessment of the balance of public interest employing defined criteria that are then published.

8.0 DETAILED RECOMMENDATIONS FOR EA PROCESS REVITALIZATION

8.1 PROJECT REVIEW CRITERIA

R10: The Reviewable Projects Regulation needs to be revised to move away from strictly production capacity-based outputs, to criteria that more accurately reflect the potential for a given project to result in adverse impacts. A strong rationale needs to be provided to justify why certain project types that contribute to cumulative effects may be exempted from EAO review.

In 2002, revisions to the Reviewable Projects Regulation roughly doubled the threshold for production levels of projects that would qualify a project for review. The effect of that change was to cut in half the number of reviewable projects entering the EA process and obscuring their potential for contribution to cumulative effects.

The current system for deciding which proposed projects meet the reviewability threshold, based on potential production capacity or other quantitative measures of the output of a project do not necessarily

correspond to impacts. The Reviewable Projects Regulation needs to be revised to reflect that size alone is not a reliable indicator of potential adverse effects.

Instead, the reviewable project list should be based on criteria that are quantifiable, lie on the pathway between project activities and impacts on environmental, social, economic, health and indigenous values, and are easily knowable at the time the project description is being developed. Some examples of these are:

- Size of project footprint
- Size of construction / operations workforces
- Projected emission volumes
- GHG emission levels
- Km of new road construction
- Extent of deforestation
- Location: urban, remote vs. rural area, brownfield vs. greenfield
- Water take
- Occurring in a designated sensitive area
- Extent of site clearance
- Presence of species-at-risk
- Considerations that reflect the potential for a project to impact indigenous sites, activities and relationship with the land

Moving to a system based on such criteria will require addressing a number of issues, including: exactly what criteria should be used; what threshold should be set for each criterion; and how to allow for adjustment of thresholds in specific instances or regions based on cumulative effects or the results of regional or strategic assessment or indigenous reconciliation objectives.

Revisions to the Reviewable Project Regulation must also take into consideration provisions to ensure that reviewability thresholds are not avoided through project splitting, scope and size creep, or other mechanisms that allow a project to meet the letter but not the spirit of the regulation. There need to be mechanisms in place, ideally in legislation, to ensure that projects are designed to be consistent with the actual magnitude of the needed operations. These mechanisms could also establish time limits that must pass prior to the same proponent seeking to expand production or extend the reach of a project that would lift it above the review threshold after the permit process had been completed. It will also require considering how to capture projects that individually are small but have a long-term diffuse impact over the landscape for many years.

There is a range of activities and projects that are not currently reviewable that have substantial environmental and social impacts, contribute to cumulative effects, and could meet the thresholds for reviewability based on the above criteria – such as some forms of agricultural forestry, tourism and recreation projects activities. Manufacturing facilities, suburban developments, and hospitals of major scale or impact could also trigger review. There needs to be an explicit consideration of whether or not these project types should be reviewable; and if they are exempted, there needs to be a strong rationale

provided to justify that decision. If this rationale is not provided, it contributes to the continued public perception that certain industries, for example those related to energy and mining, are uniquely harmful. This does not help the discourse that is already highly polarized across BC.

Revised regulations should describe how other processes will be used to complement the impact assessment process and allow for some projects to be assessed or regulated through permitting conducted by other agencies. Where indigenous people see that reconciliation objectives are being effectively addressed in other processes such as land use planning, G2G agreements, regional and strategic EAs or ministerial permitting there may be fewer reasons to demand that a particular project be forced into the full EA process. The decision around the various routes to permitting needs to be supported by systematic criteria that address timelines.

8.2 EXEMPTIONS

Under Section 10(1)(b) of the *Environmental Assessment Act*, if the executive director considers that a reviewable project will not have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, the executive director may determine that (i) an EA certificate is not required for the project, and (ii) the proponent may proceed with the project without an assessment. The current frequency of exemption requests is about 2 per year, with some 41 granted by the EAO since 1999.

An exemption order typically includes conditions that are enforceable by EAO.

Recent examples of projects that received exemptions include:

- Several habitat banking projects proposed by the Vancouver Fraser Port Authority, which triggered under the shoreline modification criteria.
- Campbell River water supply, a municipal water diversion/treatment project.

When exemptions from review are provided by the Minister or the EAO, the full reasoning for such decisions should be made public.

8.3 PARTICIPANT CAPACITY FUNDING

R11: Funding for indigenous governments should be scaled to promote the capacity for full participation throughout all the stages of the EA process; including the ability promote opportunities for joint and/or independent decision making. Funding for local governments and public interest parties should be scaled to promote increased confidence and trust in the objectivity by seeking informed input at all stages of the EA process.

For indigenous governments, capacity support is intended to enable them to fulfil their role as a government level decision maker. For local governments or public interest groups to be satisfied that decisions made at the EA process gates represents a robust assessment that clearly addresses their interests, each will need sufficient technical and funding support. This would be particularly the case

where confidence and trust in the process is weak, independent verification of information and analyses are required, and independent decisions are desired. The principal caution is the need to avoid setting up a costly process of “dueling experts”. The objective of achieving confidence and trust in professional work through access to separately engaged experts might better be served by collaborative agreement on how verification could be achieved by independent experts jointly appointed.

Opportunities for public review and comment should reflect the financial scale of the project, be sufficient to allow independent verification of studies, and sufficient to allow participation across all stages of the EA process. While there is a legitimate avenue for capacity building and participant funding to come directly from proponents, this should not be the exclusive means. Funds should also be available through an independent source that can be seen to be objective about allocations based on an assessment of need. Funding for public participants needs to be sufficient to enable engagement from the early stages of project definition through to the management of compliance and enforcement (that illustrates that a project is living up to the conditions required in its EA certificate and those further required by subsequent permitting conditions).

The imposition of EA process step fees and the expectations for direct contributions of supports to EA participants from proponents needs to have reasonable bounds to respect tolerance for up-front costs and to ensure that expectations are realistic. In general, they could expect to be scaled in proportion to the complexity and size of the proposed project. Proponents should expect to achieve something tangible at each process gate that can be used to provide a record of process accomplishments that can be provided to their investors.

Capacity funding generally should be proportional to the financial scale of the proposed project but it should also recognize that large projects could have small impacts while smaller projects could have larger ones that require more attention. Capacity funding should be designed to conduct the studies and analysis needed to support indigenous peoples’ decision making. It may also be needed to ensure that public and local government concerns can be independently addressed. While it likely in everyone’s best interest to agree to a mutually acceptable information and verification process and avoid competing professionals, there will be cases where trust is wanting and some independence will be required to rebuild confidence. Baseline information could be funded primarily by government and provided to all interested parties thus creating more trust in the objectivity of the EA process.

8.4 DISPUTE RESOLUTION WITHIN THE EA PROCESS

R12: Dispute resolution mechanisms should be established within an EA process to deal with the day to day issues for which the consensus proves to be difficult. Major conflict issues should be referred to the dispute resolution function of the Reconciliation Commission. This does not exclude resort to judicial review but is intended to provide timely and less expensive avenues.

R13: Dispute resolution should conclude at a decision gate and not be open to re-examining previous dispute decisions unless there are major revisions to the project undergoing the EA.

In the normal course of project review, there is always the potential for disagreements over the detailed steps involved in the process leading up to decision gates or the substance of the decisions to be made at those gates. The majority are usually dealt with by the staff of the EAO in discussions with the parties and changes made to reflect the necessary improvements, with final decisions being made at the level of Executive Director. In technical matters of information collection and analysis, such matters are dealt with in the discussions of the technical working group during the information gathering and analysis step in the process. Where G2G collaboration agreements are in place, they could set up internal dispute resolution procedures enabled to mediate disputes within the EA process.

For issues arising from fundamental reconciliation matters, public communications and public engagement in the overall EA process or for issues of the integrity of the overall EA process itself, reference can be made to a dispute resolution function of the Reconciliation Commission set up to provide a safe forum for conflict resolution.

These intermediate steps are preferable to the more expensive and time consuming process of judicial review where participant standing is more likely to be restricted. This would most clearly be needed at the Readiness Gate in which a decision has to be made to pass a project formally into the EA, return it for further work or divert it to permitting and at the final decision gate. In any case, referral to the Commission should be for significant matters and not used as a surrogate mechanism to delay or derail projects under review. This could in part be assured by having assessments of outstanding significant disputes first addressed by all party discussions at decision gates facilitated by the EAO.

8.5 TRANSPARENCY OF DECISIONS AND THE NEED FOR PLAIN LANGUAGE SUMMARIES

R14: Efforts should be made within the EA process conducted by the EAO for technical discussions and decisions that address public concerns to be communicated publicly in plain language.

Expert driven processes inherent in the EA methodology are not easily understood by members of the lay public. Example of topics that EAs are typically built around include fish and fish habitat, hydrology, hydrogeology, soils, air emissions, economic influences, ungulates, infrastructure and services that are dealt with in technical terms.

An EA also has to address the questions that are immediately meaningful to people in the language in which they are presented in the first place. Examples of questions people might ask include: The land is my food basket. How will this be protected? How will the project affect the character of my community? How will the project affect my ability to earn a living? How will the project affect the healthfulness of my environment? Will the project make me sick? Will the project limit my enjoyment of favourite or sacred places? These are the kinds of Issues that beg for answers in plain language.

Decisions to proceed between steps in the EA process should be made public at the time that they are made, and the reasons behind them provided. Summaries should be provided that are in plain language, making them easily understood and accessible to the general public beyond the technical professionals

engaged in the EA. The technical decisions and the plain language summaries should form a permanent record of the process.

8.6 PERMANENT INFORMATION ACCESS

R15: Information assembled during the EA process should be archived and made available for reference during a specific EA and for the public record of all EAs to enable study of the growing record of information, analysis, best practices and conclusions.

Information relevant to an EA needs to be documented in easily accessible forms and archived appropriately to allow for referral during a current process and for review of past project decisions for relevance. While information collected under contract to proponents for introduction in a public EA process is their property it should remain available to the public as part of the permanent record. This should include information from the EA, compliance and enforcement (C&E) monitoring and the relevant material arising from subsequent monitoring that takes place in agency specific permitting. It should be recognized that socially derived information will need to respect privacy provisions. Adopting available standard data collection methods and the compatibility of geographic information systems and other representation systems will improve accessibility. The existing documentation by the EAO already goes a long way to providing this material within the current EA system.

8.7 PROJECT INFORMATION SOURCES

R16: The EA process should recognize the need to provide broadly accepted independent verification of project information and analyses. This may best be served by common agreement on the means of verification but may have to enable parties to conduct some of their own independent work to ensure confidence in the impartiality of information used to support EA decision making steps.

R17: Evidence derived by indigenous peoples from traditional means that reflect culturally distinct and holistic relations with the land and are conveyed through indigenous languages and traditional means of oral communication among generations needs to be recognized as valid equivalents to western science in consideration of values to be assessed in EA procedures and the formal decisions that are made.

R18: The EA process should bring forward both the positive and the negative effects of a project and not place most of the emphasis on identifying and dealing with adverse impacts.

The EA process tends to emphasize identifying and dealing with negative effects. This leads to a lopsided discussion that focuses only on the adverse effects of a project and can miss the opportunity for a proponent to identify and undertake enhancement measures to provide co-benefits that could benefit society across all five pillars of sustainability.

Information begins with the early identification of proponent intentions, assessment of potential negative and positive benefits across the five pillars and upon whom they may fall. It continues with the detailed investigations of baseline conditions, changes expected as a result of project activity, the means of accentuating positive impacts and mitigating negative ones and the analyses and interpretations that are

made to reject a project, modify it, approve it, set conditions, and monitor it if it proceeds. In all these stages participant acceptance of the veracity of the information matters and is sensitive to who provides it, who pays for it and who verifies its accuracy and relevance.

EA processes are characterized as “proponent driven” and the current regulations ensure that proponents are expected to carry the main burden of efforts and costs associated with providing project information. As a result, most of the information is provided by professionals contracted by proponents. Inevitably there is concern, justified or not, that “he who pays the piper calls the tune”. This raises the key questions surrounding all project information and the decisions arising from it: “How can we trust that the data and conclusions are unbiased and independently verified?” “How can we ensure that information provided accurately addresses the expressed concerns of each of the participants?” “How can we make sure that the evidence derived from orthodox “science” is not overwhelmingly favoured over evidence that is derived from traditional knowledge conveyed by cultural means and the direct experience of people who live on the land and in local communities?”

Indigenous evidence may take forms that do not lend themselves to the procedures and tests of western science. EA information gathering and assessment needs to respect indigenous ecological and cultural knowledge that is transmitted in their own language by traditional oral and storytelling means. Indigenous people have the right to establish their own transparent information quality assurance standards consistent with their traditional indigenous governance and societal maintenance processes.

There should be recognition that there is an economy surrounding EA practice that engages consultants, lawyers, and scientists, and their accumulated knowledge that needs to be matched by an economy of indigenous practitioners, including the engagement of elders, knowledge keepers, stewardship monitors, indigenous social health, and cultural agencies and their body of knowledge. With this recognition, indigenous contributions to EA can be given equivalent levels of attention as that which is given to the means and information assembled by western environmental and social science.

Some aspects of traditional cultural, artistic, religious and site specific information are necessarily kept as confidential by a First Nation because of the potential of destruction or appropriation. This needs to be respected within the rules of information transparency of normal EA processes.

Ideas that can assist in making the information part of the EA process more effective and satisfying to all parties include:

- Baseline data could be housed by government, kept current and supplied to all parties as projects emerge thus reducing the need to reproduce information that has already been collected;
- Focus on values that are most sensitive to impact so that there are some reasonable bounds to the time and cost of information requirements;
- Early acknowledgement of “fears and concerns” will help to identify information requirements;
- Standardized information collection and presentation methods can be agreed upon early to avoid arguments over adequacy later in the process. This includes recognition that indigenous research methodology will be used to address uniquely indigenous values according to traditional cultural norms and will require effort to include appropriately throughout the EA process stages. Failure to

respect this can lead to reluctance to provide important information because it is seen to be of lesser value;

- Verification standards for indigenous information are also more likely to be culturally derived by traditional decision making means and socially constructed rather than “measured” as might be required for scientifically derived information;
- It will be seen as respectful for government to give indigenous communities the space and time to develop their own information collection, analysis, conclusions, mitigations and project conditions. The time spent is valuable and can lead to more balanced and durable conclusions consistent with reconciliation objectives;
- Collaborative baseline and other field data collection between proponent professionals and other groups can help to create confidence in the information developed;
- Sharing of working drafts of conclusions derived from collected information and analyses would be useful before they are finalized for introduction into the EA process;
- Use of a Community Advisory Committee may help in the process of setting information gathering standards and conveying results to the lay public;
- Peer review can be used in verification;
- Oral hearing procedures should provide for public engagement that occurs in the language of participants and provides opportunity for many to hear both the questions and responses first hand;
- The EA process should be able to bring forward both the positive and the negative effects. It is not that way now – only negative gets carried forward. This leads to a lopsided discussion that focuses only on the adverse effects of a project and can miss the opportunity for a proponent to identify and undertake enhancement measures to provide co-benefits that could benefit society. We provide jobs and our project is important to society, misses for example, the opportunity to consider how to use the building of an access road to improve conditions for emergency response access; and,
- One of the perceptions of how proponent’s EA are conducted is that a huge volume of baseline data is amassed and presented, but there may be insufficient explanation provided as to how the impact conclusions were reached. Extensive baseline data is presented but then ‘no adverse effect’ conclusions can be provided with insufficient explanation as to why not. In practice, an EA normally provides a section that details the procedures that will be used to reach conclusions about impacts and the categorization of any residual impacts remaining after mitigation. This is an area where perception and reality needs illumination in the public education material provided by the EAO.

8.8 PUBLIC EDUCATION ENGAGEMENT AND COMMUNICATIONS

R19: Public Education on the implications of reconciliation in making project decisions with an EA should be one of the purposes of the Reconciliation Commission.

R20: Clarity of public engagement opportunities and their place in the EA process should be published by the EAO in a plain language brochure showing how concerns raised by the public are to be addressed within project decision gates.

The overwhelming importance of the reconciliation agenda requires a concerted effort to educate the public about the reasons why reconciliation has been endorsed by government, what the implications are for revised practices in decision making and how these are to be reflected specifically in the EA process.

Early engagement in EA processes is essential, but as well as early and easy access to project information, there needs to be attention paid to communications in plain language terms that lay persons can be expected to understand. Community engagement can be made more reflective of local interests by hiring trusted local individuals to conduct consultations about what project implications raise as important issues. Public sessions need to be held that are fully open to questions and dialogue and not just presentations from government or proponents in “open house” type occasions. Statements of concern from members of the public should be recorded, published and treated seriously, with careful responses prepared to express fears of project impact, so that people can be assured that their concerns have been heard and will actually be addressed. The tracking mechanism already in use by the EAO can help to serve this purpose.

While being sensitive to the additional expense, public trust in technical studies commissioned by proponents can be aided if there are opportunities and necessary funding support for independent analyses that are conducted by local government or key non-governmental organizations. These could help to verify results and modify approaches to adverse impact mitigation, or to identify opportunities for positive contributions to local concerns across the five pillars.

Proponent responsibilities for public engagement and communications, particularly in the early stages of project formulation, could be informed by best practices research and experience provided by the Reconciliation Commission, the EAO and other research conducting organizations. This could be standardized and published in advisory handbook form.

Efforts are needed to inform the public about the nature of obligations arising from indigenous peoples’ title and rights, their cultural history and their traditional governance and legal systems. This should include clarity about the interpretation of consent vs veto.

Education is also required about the EA process, what it can and cannot do, including information verification procedures that already exist, and where the opportunities lie for continued engagement throughout the process gates from early notification to compliance and enforcement. Historical examples of the design changes that projects have undergone as a result of the EA process, along with examples of ones that were withdrawn by a proponent, would be a useful addition to educational material.

Clear indications about public access to the decision-making procedures at each EA process gate need to be provided, including review and comment options. It is also necessary to provide a thorough description of the role and scope of EA certificate conditions along with their C&E monitoring and the role and scope of conditions that arise from permitting agencies and their components of C&E monitoring.

Input from the public needs to be systematically acknowledged by both the proponent in project design and description and in the deliberations of the technical working group. It must be demonstrated how

community and public interest group information and concerns were used or explanation given as to why not.

As the EAO is the custodian of the EA process it is incumbent on the office to communicate the substance of its independence in conducting a review and that the outcome is based on the considerations brought forward by all parties and independent verification of information, not pre-ordained by proponent influence or government policy. In this vein, it is important to inform people where the recommendations of the EAO end and that the responsibility for ultimate decisions rests with elected Ministers. Case histories of past project reviews would be helpful by illustrating the actual fate of past proposals: withdrawn, modified to meet inputs, sent back for further work, rejected, systematically monitored and the subsequent outcomes of agency based permitting.

Evidence of respect for the confidentiality of some indigenous cultural information could be reflected in respect for some proprietary information of proponents. While some information could be proprietary, much of the baseline data collected, impact studies and analyses completed to fulfil the EA process steps should be contributed by those conducting them to a record archive that remains permanently accessible to interested parties.

Training of Others

Proponents and their workers would benefit from explicit education in indigenous culture and the implications of respecting title and rights, indigenous governance models and indigenous law as reconciliation proceeds.

8.9 PUBLIC TRUST

R21: Public opportunities for early engagement in the EA process and continuing opportunities for review and comment on decisions at the EA process gates should be legislated.

Legislated means of ensuring process transparency are important for building public trust. Presently a good deal of the response to both local government and public concerns is administratively discretionary rather than mandatory. This can leave the impression that the engagement rules are susceptible to political influence rather than being independently established and administered. It is the thorough discussion of issues, the public review and comment steps provided, the resort to plain language summaries, the archiving of information, efforts to achieve consensus and opportunity to refer disputes to the Reconciliation Commission that lead to increased public trust in the EA process.

In some cases, establishment of a Community Advisory Committee within the EA process could be used as a visible device for gathering public feedback, again with the objective of increasing the trust of less technically prepared participants in what is being undertaken at the various process stages and their decision gates.

There may be a need, at a more general level, for ongoing examination of the effectiveness of the overall EA process. At present this is likely to be undertaken periodically by the Auditor General but may require a

function that focuses on process and outcome auditing on a more continuous basis and examination of the role of provincial EAs within the large number of agency based permitting processes and interplay with federal requirements.

8.10 ADDRESSING THE NEEDS OF VULNERABLE POPULATIONS

R22: Consistent with the federal initiative to provide a gender lens in project assessment, the provincial EA process should establish a means to provide a lens dedicated to vulnerable populations potentially affected by projects undergoing assessment, focusing on the impacts and benefits arising across the five pillars.

It is important for an EA to identify not only the potential impacts and benefits that would be experienced in the aggregate, but how specific sub-populations, including those differentiated by gender, ethnicity, socio-economic status, or health may be differently affected.

Vulnerable population considerations could, in some cases, be identified by G2G agreements, Regional EA studies, and from the consultations within a particular project EA. This could ensure that vulnerable populations are explicitly identified and their needs addressed across the five sustainability pillars. Considerations of this nature could be supported by existing socioeconomic methodologies or specific investigations relevant to the nature of projects entering into the EA process, and the circumstances of a particular area and its communities.

It would be helpful for the province to develop guidance and methods documents to support proponents in the development and use of such studies.

8.11 POST CERTIFICATE COMPLIANCE AND ENFORCEMENT

R23: Participants in an EA process should be advised in an understandable and timely manner about the progress of the subsequent C&E monitoring of proponent adherence to certificate conditions and informed of the outcomes of the permitting processes that involve subsequent agency based permitting and their C&E procedures.

R24: Indigenous assessment of compliance and enforcement with certificate conditions should engage indigenous people directly through employment as monitors or guardians consistent with the professional requirements of on-site activity.

R25: Provision should be made by the province for the EAO and the Reconciliation Commission to respond to indigenous peoples' and public complaints arising from project operations and to conduct special investigations where the reasons for complaints begin to show patterns of non-compliance or distinct classes of impacts that need attention.

Participants in an EA process should continue to be engaged in the compliance and enforcement process that monitors adherence to the conditions required in the EA certificate. This includes assessment on the delivery of benefit agreements and work force standards. Recognition is important in this phase that

monitoring adherence to comprehensive project management plans is becoming a more common certificate requirement. This will likely involve engagement in the collaborative multi-agency coordination process that the EAO finds necessary in conducting effective C&E, that ensures that permit related monitoring deals with residual issues and not duplicate what is done through the EA process.

Capacity to conduct monitoring is characteristically limited and could be augmented by including the professional staff of local government and socio-economic oriented agencies.

For monitoring of compliance with indigenous interests, technical and financial support for independent environmental monitoring, and stewardship guardians, including provision of the necessary authority to conduct investigations would ensure that monitoring is being conducted by people who actually live on the land. This could involve actions at both the individual project level and the regional level where guardianship would likely be dealing with a larger estimate of cumulative effects on indigenous interests. It is also necessary to consider commitments made across the five pillars and not just biophysical environmental effects.

The effectiveness of post-certificate compliance and enforcement monitoring could be the subject of ongoing EA research and accumulation of best practice advice by the Reconciliation Commission in order to inform future certificate condition requirements.

8.12 ENHANCING THE EAO ENFORCEMENT CAPACITY

R26: Administrative sanctions to be employed by the EAO needs to be enhanced by enabling use of prevention orders and providing for substantially increased administrative financial penalties.

The EAO can presently issue warnings, orders to remedy, orders to cease operations and recommendations for prosecution where proponents are in non-compliance with a certificate condition. While these are useful, they do not effectively prevent non-compliances where the sanction cost is minor in comparison with the scale of the project. The current upper limit of court imposed penalties is \$200,000 and is not proportional to the size of projects normally reviewed under the EA process.

8.13 MONITORING ADHERENCE TO CONSTRUCTION AND WORK FORCE STANDARDS

R27: Auditing of adherence to certificate conditions should include examination of those that specify construction integrity, work forces skill standards and provision of employment.

Protection of the environment is affected by the quality of construction of project infrastructure and the work force skills necessary to ensure that quality. These should be required as a Certificate condition so that C&E provisions can be employed. Proponents should not be allowed to dilute such standards in the recruitment of its work force after the receipt of its Certificate or to reduce the employment benefits to communities that were promised in the project documents. When the EAO and indigenous governments

receive a commitment from proponents on workforce development strategies for indigenous workers – the implementation of those strategies should be enforceable.

9.0 SUPPORTING CONDITIONS AT THE PROVINCIAL LEVEL

9.1 PROVINCIAL RESPONSIBILITIES FOR CAPACITY BUILDING AND STABLE FUNDING

All of the objectives of government and indigenous peoples for reconciliation cannot be contained within the confines of the EA process for individual projects. In order for EAs to make an effective contribution to reconciliation, they need to be supported by larger scale initiatives that will form enabling conditions.

R28: Capacity building, including advisory services and stable sources of funding should be provided not only by proponents, but also by the province, to enable independent judgments to be made by indigenous governments, local governments and public interest organizations.

Revitalization of the EA process can imply a premium for doing business in BC. It is important to indicate to potential proponents and their investors what kind of process step and financial commitments that this will entail.

While there is a need for direct capacity building and benefit supports to EA participants that can and should be provided directly by proponents, there is a need to avoid the perception that such supports are designed to “purchase” agreement. A significant proportion of the technical support and funding that is made available to participants should be allocated by an independent agency that has objectively assessed education, training, organizational and technical needs, and remains disinterested in the specific EA outcome. Funds could be accumulated for this purpose from general levies to proponents or as fees charged as process gates are addressed along with the general revenues from government. They could also be derived from the many other land base users that may or may not face the EA process but whose activities contribute to the overall cumulative effects on the land base and the economic, social well-being and health of the relevant communities.

The “honest broker” agency to do this could be a partnership with the EAO and the First Nations Leadership Council where funds are being made available to indigenous people, or a stand-alone indigenous agency, to ensure sensitivity to the varying needs of indigenous people across the province. Where funds are being made available to local governments or public interests, the EAO could perform this task.

9.2 REGIONAL AND STRATEGIC EA

R29: Resources should be made available to conduct regional and strategic level impact assessments to provide essential context for individual project assessments.

R30: Regional EAs should be initiated on a priority basis. These may be tested in areas of limited controversy or areas where natural disasters have had major impacts on biophysical carrying capacity, economic, social, health and cultural conditions. The process could then move on into more complex areas of intense resource development activity. While these assessments can provide necessary context for individual projects when the regional work is done, the continuing work of project proposals and assessments should not be suspended in the meantime.

Regional assessment is a strategic and planning-based approach to land and resource use management. A regional assessment would guide project-based assessment, and help determine if projects were desirable or within the strategic vision developed for regional development, well before a project enters the EA process.

Regional boundaries for the conduct of assessments should reflect and respect traditional territories of indigenous people. They may also reflect the epicenters of high impact areas: such as intense industrial areas, wildfire or pine beetle impact areas, or areas which have previously lacked attention that can easily be defined operationally through advanced digital geospatial representation systems now in place. A regional assessment approach to planning can provide an integrative and multi-sectoral lens on development options, cumulative impacts, and values.

Regional Assessment can identify significant values across the five pillars held by local governments, the general public, specific interest groups and the numerous agencies of local, provincial and federal governments, along with the sector specific planning processes that they have sponsored and the existing commitments and restrictions to development that they represent. Regional assessments could help to identify positive influences as well as negative impacts on all five-pillar values that reviewable projects would be required to address. They can also capture regionally unique development issues based on the nature of geography and resources, and emerging technologies – such as alternative energy.

Government leadership will be necessary to set standards to enable data presentation and cartographic products to be made widely available so that cumulating information can be widely used by proponents in EA processes and with results then becoming widely available to many other users.

Conduct of regional assessments can be linked to the Ministry of Forests, Lands, Natural Resource Operations and Rural Development's mandated objective to "modernize the land use planning and sustainably manage BC's ecosystems, rivers, lakes, watersheds, forests and old growth".

Regional EAs also need to help incorporate work that is addressing Species at Risk, parks and ecological reserves, and major industrial development core areas. As these parallel initiatives take place, strong links need to be made to ensure that the processes inform one another effectively.

Strategic EAs can be employed to deal with issues, such as the growing influence of climate change, novel uses of traditional resources, or macro policies on fossil fuel development that can affect the approach to reviewability, assessment of cumulative effects, or implications for regionally important values across the five pillars.

The combination of regional and strategic scale assessments can help to bridge the rural/urban divide by ensuring that the context and conditions, economy and sustaining employment in rural communities, both indigenous and others, is fully acknowledged in everything from capacity building to independent assessments to the provision of economic benefits.

It is likely to be necessary that government establishes a lead agency to coordinate regional assessments that require the collaboration of numerous government and other bodies engaged in legislation and regulation across the five pillars. Government leadership will be necessary to set standards to enable data presentation and cartographic products to be made widely available so that cumulating information can be used by proponents in EA processes and with results then becoming available to many other users.

9.3 LINKAGE WITH RELATED PROVINCIAL INITIATIVES

R31: The Provincial Government, at the earliest possible date, should initiate information sharing and collaboration among the teams assessing revitalization of Land Use Planning, Rural Development, Species at Risk, Climate Change Strategy, Professional Reliance and Project Impact Assessment.

Regional and strategic impact assessments cannot be initiated by the EAO acting alone. Government initiatives to renew the provincial land use planning system, to set a rural development strategy, to examine the need for a Provincial Species at Risk Act, to address climate change strategy and to review the effectiveness of the professional reliance model are all part of the context in which project assessment resides. This is particularly urgent as all of these initiatives are expected to incorporate responses to the UN Declaration and should be expected to contribute to consistency of approach among agencies.

The current model of professional reliance, now under provincial review, allows for technical studies provided by a proponent to be conducted by qualified professionals under their employ or contract. It is perceived by some parties that this can lead to problems of objectivity or conflicts of interest, and must be balanced by the availability of independent verification of information validity during the assessment of projects' impacts and proposed benefits across the five pillars. This issue of potential bias applies equally to the provision of professional opinions from qualified professionals hired by intervenors other than the proponent. The EAO already includes a verification process for professional information provided from proponent contractors but this needs to be highlighted in public education.

9.4 REGIONAL KNOWLEDGE CENTERS

R32: Regional “Reconciliation” or “Sustainability” Offices should be put in place to “house” the G2G agreements, the multi-agency regional and strategic assessments and related initiatives and to enable local curators of information to be acknowledged and engaged.

Regional Offices should include representatives of the Ministry of Indigenous Relations and Reconciliation. They could also house the regionally accumulating database of information, the corporate memory, to make it accessible for meaningful sharing among agencies and as a unified place for the education of prospective project proponents. The EAO could convene an ongoing round table on major industrial

projects in the region to help build a record of baseline conditions that would help provide the context for new projects.

Such offices would require special teams potentially staffed government resource agencies, indigenous representatives, and regionally placed EAO representatives who have experience with local indigenous people and can become that initial point of contact for proponents, local government and the public. They should be tasked with upholding reconciliation with indigenous people within their ancestral homelands (territories) and respect the “rights of the environment”. Regional offices of this nature could coordinate and connect the building blocks that work to this end including: Cumulative Impacts Assessment, Land Use Planning and Regional/Strategic EAs. Development of regional and strategic EAs need to be of: meaningful, temporal and spatial scope for indigenous people and members of the public at large.

Engagement of indigenous “knowledge keepers” at a regional scale can help to provide the holistic engagement with the land that is key to identifying cumulative impacts of cultural significance.

Successful Case Histories

Evidence of successful relationship development with indigenous people, local governments and the public can provide direction to proponents for effective approaches that can be used, particularly where co-development of projects has been successfully employed. Every proponent need not re-invent well established best practices. The EAO or indigenous partner organizations could help to identify approaches that have a measured likelihood of a positive reception.

Baseline environmental data, field work results and indigenous knowledge may not need to be repeatedly sampled, especially where such data collection itself is environmentally disruptive. Regional EAs and distributed EAO staffing could help make this archived material available to all parties to assist in avoiding unnecessary duplication of costs.

Project based engagement and the working tables needed could be informed by the regional context.

Reviewability thresholds for projects can be adapted to the circumstances, existing impact history and significant values across the five pillars identified by indigenous people, not just volume of operations thresholds that are currently the case.

9.5 EA RESEARCH CAPACITY

R33: Formal arrangements should be made to have funding earmarked and a process established to request continuing research into the effectiveness of EA processes and related project outcomes on indigenous people and participant interests across the five pillars.

The focus of research would be on helping the EA practitioner community to establish and improve suites of best practices. This could also lead to accessible data banking and permanent archives of EA decisions and their information bases along with records of successful mitigation of impact issues that could inform proponents and participants.

There is an opportunity to create a unique and original approach to knowledge building for best practices and innovation in EA to meet this need. The objectives for such a capacity include:

- To support research that meets the information and knowledge needs of EA policy and practice in BC.
- To support research that is applied to EA practice and helps advance best practices in technical work, reconciliation initiatives and public communications.
- To develop research and knowledge building relationships and links between the academic and research communities in BC and Canada, government, indigenous communities and governments, civil society, and business.
- To help train the next generation of EA practitioners.
- To communicate the experiences and innovations in BC to national and global audiences.
- To encourage collaborative EA research.

Suggested Research Management principles include:

- Two streams. 1 year projects and 2 year projects with funds from provincial sources as well as proponents.
- Program would be separate from existing government tendering processes.
- Projects would meet a defined information need.

10.0 RESIDUAL CONCERNS

Co-Chairs Note:

It is important to recognize that the professional public servants of the EAO are bound by legislation, regulations and policies that are established by the provincial government. One example of direction set by government that has affected EA practice in the recent past is the revisions to the Reviewable Projects Regulation that raised the review thresholds substantially. One result was that the number of projects that then qualified for an EA was cut in half and numerous projects that potentially contributed to cumulative effects were not assessed by the EAO.

Many project proposals also “die on the vine”, thus challenging the public perception that nothing ever gets turned down by the EAO. As of March 2018, 298 projects have entered into BC’s EA process. Of those 298 projects, approximately 49 percent of projects have been issued an EA certificate; 22 percent have been terminated, withdrawn, rejected or required to undergo further assessment. A further 12 percent have been issued an exemption or are seeking an exemption. Seventeen percent of the projects are still engaged in the EA process.

The EA process is now undergoing revitalization that is defined by adopting practical ways to reflect the principles of the UN Declaration. At the same time, it is expected to increase public confidence, address sustainability, and provides process certainty to proponents and to ensure that worthwhile projects are successful. These are imperatives provided by the Provincial Government.

What we experienced in working with committee members was a remarkable dedication to task, a willingness to hear out all ideas, great respect for each member's experience and a concerted effort to reflect all contributions in our report. This was matched by the professional and enthusiastic response of the EAO staff for whom, this process was obviously a welcome challenge. The Members of our secretariat representing the First Nations Energy and Mining Council kept us attuned to the First Nations perspective and was appreciated by all.

Residual Concerns of EAAC Committee Members

Short Time for Deliberations

The limited time for deliberations of the EAAC, approximately six weeks, inevitably left some considerations incompletely discussed at the length needed to invest in recommendations. All of the EAAC members found the time allocated for their work was too limited to fully discuss and refine all the perspectives around the table. In many cases, draft materials could only be provided a few hours before the next committee meeting began, leaving little time to consider all the implications of emerging recommendations and their supporting comments. This summary of remaining concerns indicates many of the areas that would have benefited from a more thorough discussion by the Committee and should be taken into consideration as the Provincial Discussion Paper is drafted.

EAO Independence and Stability

Concern remains that the EAO must retain its independence from changing political influences. The EAO is required to conduct a thorough and publicly transparent process that leads to recommendations to government based upon the technical assessments, responsiveness to stakeholder concerns and independent decisions of indigenous governments. The political desirability of a project should be known early in the process before extensive work has been done and remain stable throughout.

Role of the Reconciliation Commission

The Reconciliation Commission is envisioned as a constructive dispute resolution mechanism initially dedicated to dealing with the EA revitalization process and acting as a level of recourse that is an economical and timely opportunity to avoid costly judicial review and court procedures that in any case remain ultimately available but are more limited in standing for EA participants. The EAAC believes that the Commission model may well be adapted to other revitalization processes across government. A pilot test at the EA level may help to prove out this idea. Careful selection of membership to provide experience and balance will be essential. Creation of the Commission must be a collaborative process between government and indigenous people.

Dueling Experts

Providing opportunity and funds for local governments and public groups to conduct independent work within an EA can lead to "dueling experts" that increase expense, take more time and create conditions for impasse. They can also lead to increased confidence in project information, mitigation of adverse effects

and positive contributions to the five pillars of sustainability. The issue for many is making sure that the revitalized EA process truly responds to the need for increased public trust.

The EAAC members are generally of the opinion that it would be best if agreements can be struck within the EA process to ensure that all parties have confidence in the information provided, the analyses conducted and the independent verification process that the EAO provides. It would be desirable to have one set of baseline data collected so that any independent analyses are being conducted based on the same information. This may not always be possible but it should be the goal.

Durability of Gate Decisions

Proponents are concerned about the potential for the orderly process of passage by a project proposal through the decision gates to be interrupted by demands to revisit past gate decisions, thus lengthening timelines and increasing costs. While some additions to the EA process are recommended in this report as a result of the need to reflect reconciliation, environmental rigor and public trust objectives, one of the mainstays of the report is the gate system. Early engagement to establish readiness conditions, what is to be decided at each gate, the criteria to be employed and how disputes can be resolved is intended to provide process integrity that should make revisiting past decisions unnecessary unless project revisions are of such magnitude that reconsiderations are obviously necessary.

The value of the proposed readiness test is an important opportunity to route projects along different paths. However, the option to reject a project at this stage is one that should be used both extremely cautiously and sparingly. Many times, proponents will be able to address what seem to be major obstacles to success if they are provided with clear feedback on the challenges and given the opportunity to address those challenges from both a design perspective and through ongoing engagement as the review proceeds.

Cumulative Effects

One of the key issues for project assessment is the ability to reflect cumulative effects effectively inside the review of a single project. Not only is this technically difficult but it is also one of the key concerns of indigenous people, local governments and the public. The committee has recommended that a process of Regional Environmental Assessments be established to speak to this issue, but the EAO is unlikely to be able to do this unilaterally without reference to numerous other land and resource agencies. To make regional assessments work, the provincial government will have to set a collaborative process in motion, particularly with respect to land use planning initiatives.

Clarity of how significance is determined and how Impact Decisions are made

The level of significance of identified adverse effects is normally based on the changes to measured or estimated baseline conditions in the area affected by a project. This determination is not always clear to non-technical participants and may miss issues of great importance to indigenous people, local government or public groups. This is one of the key areas where plain language material needs to be

provided in response to expressed concerns. The same can be said of the technical impact decisions made at the end of the EA process.

The Role of the Ministry of Indigenous Relations and Reconciliation

It is not clear what contributions can and should be provided by the Ministry of Indigenous Relations and Reconciliation. There does not appear to be legislation or funding sources that would give the Ministry a distinct role in an EA process. The ministry may be of significant importance in the development of the Reconciliation Commission model for conflict resolution and for the development of government to government agreements.

Strength of Legislation

Certainty of the EA process steps, the criteria to be employed in decision making at process gates, opportunities for public engagement, the funding support due to the parties, who should provide provincial capacity funding components and the criteria for ministerial use of the “public interest” factor in an eventual decision would all benefit from being specified in legislation. Overall, the principles of sustainability, precaution and responsibility to future generations need to be articulated in the purpose statements that govern the EA legislation.

Language in the legislation, however, should not be so prescriptive as to prevent assessments from being customized to reflect unique aspects of different projects. Projects vary massively in complexity, location to communities and potential impacts: a legislated one size fits all approach is not appropriate.

Encouragement for Innovation

Emphasis on identifying and mitigating significant adverse effects of a project in the EA process can overwhelm the potential for innovation on the part of proponents. The early engagement phase of an EA, prior to entry at the “readiness gate”, should be seen as an opportunity for responsive design innovations and positive benefit contributions to the five pillars that avoid adversarial approaches.

Support for Good Projects

If the EAAC recommendations are fully incorporated into the EA process and legislation supports the recommendations, BC will achieve a process that allows those projects to move forward that support the creation of good middle-class jobs and help build communities. Our province has an opportunity to incorporate respectful joint administration of the decision-making process with indigenous people while working toward true government to government relationships.

Conversely, projects that fall short of those goals will find the red flags early enough that they will be given an opportunity to alter their project for the better. The committee’s recommendations lay out a process that will allow project proponents and investors to have certainty about how decisions are made by the EAO and the timing of those decisions. The recommendations lay out a process that should allow for public confidence in a process that is transparent and inclusive.

Recognition of Existing Relationships with Indigenous People

In some cases, proponents do an excellent job of developing relationships and identifying issues with indigenous groups and communities prior to the conceptual project description being submitted. That work should be recognized where possible, by reducing the timelines for that period of the assessment, in recognition of that work.

Compliance and Enforcement

The capacity of the EAO to conduct compliance and enforcement actions and the ability to use effective administrative sanctions for non-compliance needs to be strengthened.

Conditions placed into a EA Certificate should only address topics that will not be covered by the regulatory agencies that will be issuing permits for the project and whom will act as the actual life-of-project regulators.

Investment Risk

Throughout the EA revitalization process and the adoption of new requirements, it should be recognized that increases in time, cost and process complexity are elements of investment risk that proponents and their investors must consider in doing business in BC.

Finding ways to incorporate the principles of reconciliation and increasing public confidence in the process was an important part of committee discussions and is reflected in the report. However, as government considers this report in conjunction with the results of other consultations conducted as a part of the revitalization process, it is critical to ensure that the goal of seeing good projects succeed is not lost. Having a wonderful transparent and inclusive process that is so complex it is perceived to be cumbersome and unpredictable will result in many proponents looking elsewhere for a place to invest and the Province's goal of encouraging the development of good projects will fail.

Some members of the Association for Mineral Exploration may have relationships with indigenous communities which may not be represented on this topic through the FNEMC and it is the hope that through the other channels available in the process that those perspectives are able to be shared. In addition, industry participation may not have been representational beyond the mining and clean energy industries. The Secretariat, however, enabled and furthered the conversation of the committee by sharing useful information and perspectives.

Many of the Committee's recommendations - if implemented in the spirit of the discussions - will enhance the Province's EA process; others may inadvertently impose substantial costs on project proponents or create greater regulatory uncertainty than is currently the case.

For example:

- The recommendations depart from current EA practice which - however imperfectly - creates a link between an indigenous community's strength of claim to Aboriginal rights and title, grounded in its

pre-colonial past, and its rightful role in contemporary decision-making. This has the potential to create fundamental process uncertainty, both for proponents and for rights-holding indigenous communities. While tools such as the Reconciliation Commission attempt to address this challenge, it is wholly untested and as such, could create perceived or real conflicts with other legislation, including federal.

- Further clarity is needed on a mechanism for timely and authoritative decision-making if disagreements between indigenous rights-holders cannot be resolved through voluntary dispute resolution;
- Transitional arrangements may be required for the period in which the proposed G2G agreements and/or project collaboration agreements are being negotiated that do not hinder project timelines which are often dependent on commodity cycles and timing;
- Principles of the funding expectations between the Province and the proponent with respect to engagement costs need to be determined.
- Like many BC businesses, mineral explorers operate in a globally competitive investment climate. They rely on the investment decisions of others to create jobs and sustain economic activity in BC and Canada. In that competitive context, measures that increase costs and uncertainty will reduce BC's attractiveness to the global risk capital that fuels economic activity.

We are not at odds on matters of principle and fully support the Government's goal of accelerating reconciliation efforts in BC. We look forward to building upon the work of the EAAC to help craft a revitalized EA process that meets the Government's ambitions, without putting at risk the jobs and other economic opportunities that responsible resource development currently delivers for members of indigenous communities and all British Columbians.

Transition

While outside the scope of the committee mandate, the transition provisions in any new legislation need to be carefully considered. Such provisions will need both to address projects that may be already in the process and also to deal with the need to develop new institutions such as the regional G2G tables, regional EAs and the Reconciliation Commission referred to in the report.

Process clarity and simplicity

Addressing the importance of reconciliation and ensuring public confidence in the EA process are key objectives of EA revitalization in BC. These important themes have been central to our deliberations. For EA to support these objectives, other enabling legislation and policies will have to be developed to inform and help guide EA – this is evident in the Report. In deciding what changes will be made to the EA system in BC, it is important to not place too many burdens or expectations on what EA can reasonably do. At its core, EA practice emphasizes understanding the nature of the environment within which projects occur, identifying impacts, mitigating or eliminating impacts, facilitating effective participation, and supporting

planning and decision-making. An EA system that provides clarity, transparency, and process simplicity is an essential part of building confidence with all those who interact with it, and for ensuring that opportunities and benefits from good projects are not lost.

11.0 APPENDIX 1: COMMITTEE MEMBERSHIP AND SECRETARIAT

Co-Chairs: Bruce Fraser
Lydia Hwitsum

Members: Aaron Bruce
Arjun Singh
Colleen Giroux-Schmidt
Edie Thome
Karen Campbell
Kevin Hanna
Josh Towsley
Mark Freberg
Marla Orenstein
Sunny LeBourdais

Secretariat: Allen Edzerza (FNEMC)
Kate Haines (EAO)
Kevin Jardine (EAO)
Mark Blom (FNEMC)
Paul Blom (FNEMC)
Paul Craven (EAO)

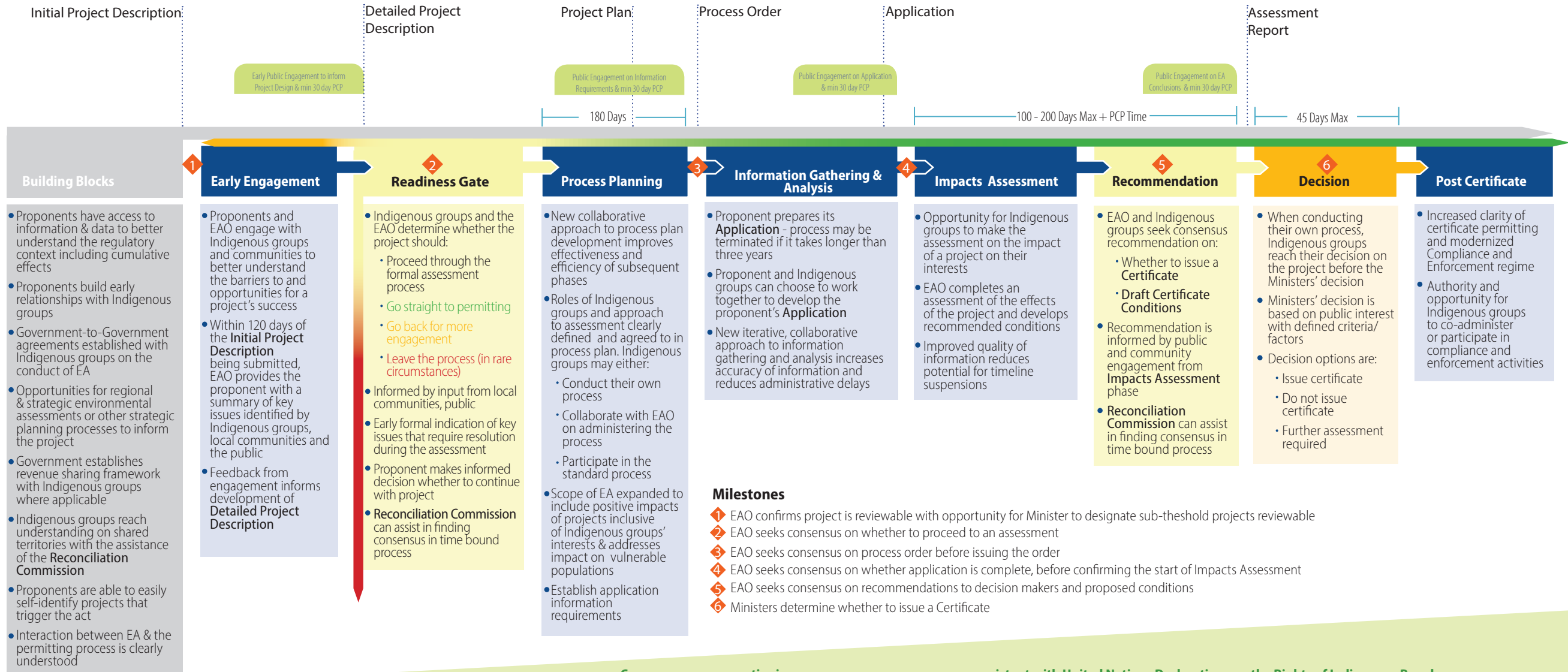
12.0 APPENDIX 2: SUMMARY CHARTS OF EA PROCESS REVITALIZATION

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EA Advisory Committee Chart 1: THE CONCEPTUAL MODEL

Changes that apply throughout the process:

- Public engagements will provide capacity funding and use better ways of sharing information, including plain language documentation and a variety of media
- Capacity funding for Indigenous groups participation in the EA
- Opportunities for the EA process to be collaborative with Indigenous groups
- Implementation of the United Nations Declaration on the Rights of Indigenous Peoples



Consensus among parties increases as process progresses, consistent with United Nations Declarations on the Rights of Indigenous Peoples

EA Advisory Committee Chart 2: THE DECISION GATES

	1 Reviewability Gate	2 Readiness Gate	3 Process Order	4 Impact Assessment Gate	5 Recommendation	6 Decision
Who	ED or delegate	Consensus of EAO and indigenous group(s), formal dispute mechanism (Reconciliation commission; judicial review) <ul style="list-style-type: none"> Informed by input from local communities, public Option for ED to refer to Minister, for stop decision 	Consensus of EAO and indigenous group(s) <ul style="list-style-type: none"> If no consensus, internal escalation within EAO for dispute resolution 	Consensus of EAO and indigenous group(s) <ul style="list-style-type: none"> If no consensus, internal escalation within EAO for dispute resolution 	Consensus of EAO and indigenous groups, with formal dispute mechanism (Reconciliation commission) <ul style="list-style-type: none"> Informed by input from local communities, public 	Minister + responsible Minister Option for Judicial Review by parties that disagree with decision
Why	Certainty for what type of projects will require an EA	To provide early direction to proponent and affected parties	To determine: <ol style="list-style-type: none"> Role, responsibilities, timelines (if not standard) Information requirements 	To confirm readiness of project to undergo impact assessment	To make a recommendation to the Minister on whether the project should receive a certificate	Determination of whether the proposed can proceed to permitting
Criteria	Clear thresholds in regulation based on pathways to impacts	<ol style="list-style-type: none"> Adequacy of early engagement (Indigenous groups, communities, subsets of directly affected public) Key issues identified in early engagement Consistency with Provincial, local, and Indigenous government plans (e.g. Land Use Plans, regional or strategic EAs) Consistency with decisions by Indigenous groups 	N/A	<ol style="list-style-type: none"> Have information requirements been met? Are methodologies adequate? 	<ol style="list-style-type: none"> Assessment report (based on legislated list of factors) Proposed certificate conditions 	Is the project is in the public interest, taking into account the legislated factors for decision
Options	<ol style="list-style-type: none"> EA required No EA required 	<ul style="list-style-type: none"> Proceed (straight to permitting) – Executive Director Proceed with EA – Executive Director Proceed with EA, with caution – Executive Director ED recommendation to Minister to stop <ul style="list-style-type: none"> Minister’s decision (based on legislated criteria and legislated procedural safeguards re: procedural fairness) 	N/A	<ol style="list-style-type: none"> Proceed to impact assessment More information required (should be avoided through iterative, staged process of information gathering and analysis) 	<ol style="list-style-type: none"> Recommendation to issue certificate Recommendation not to issue certificate 	<ul style="list-style-type: none"> Certificate issued Further assessment required Certificate not issued
Inputs	Initial Project Description	Detailed Project Description, Reconciliation commission submissions, public comments, government plans and policies	Agreements with Indigenous groups, Detailed Project Description, public comments	Application public comments	Assessment report, Reconciliation commission submissions, public comments	Executive Director recommendation and assessment report, Indigenous groups decisions <ul style="list-style-type: none"> Informed by input from local communities, public
Outputs	Document confirming project requires review	Letter to proponent from EAO stating key project issues requiring resolution (no more than 120 days after initial project description submission) Executive Director’s reasons for decision <ul style="list-style-type: none"> Minister’s Order with reasons if decision referred 	Project plan, Process Order with reasons for information requirements (tailored to individual projects).	Letter confirming readiness for impact assessment or Letter requesting for further information prior to impact assessment	Consensus recommendations whether to issue EA Certificate or Recommendations of ED with areas of non-consensus identified <ul style="list-style-type: none"> Option for separate submission 	Decision document to outline how: <ul style="list-style-type: none"> All concerns and issues identified early in the process impacted the decision; How Indigenous groups’ decisions were considered (if disagreement, demonstrate how reconciliation objectives were met).