

**The Duty to Consult and Environmental Assessments: A Study of  
Mining Cases from across Canada**

by

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## **Author's Declaration**

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

I understand that my thesis may be made electronically available to the public.

## **Abstract**

In 2004, two pivotal court cases, *Haida First Nation v. British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, were heard by the Supreme Court of Canada. These two cases were fundamental in establishing the duty to consult and accommodate Aboriginals, whereby the Crown, as represented by Canadian government agencies, must consult with and potentially accommodate Aboriginal interests when their rights may be infringed upon. This need for government consultation with Aboriginals raises important questions about the role of environmental assessments (EAs), where government agencies must assess the impacts of proposed projects and consult with members of the public, including Aboriginals.

This thesis examines the relationship between the duty to consult and the EA process, and how well the duty to consult may be met through EAs. The potentially complementary role of impact and benefit agreements (IBAs) is also examined where possible. To accomplish this, the literature surrounding the duty to consult, EAs, and IBAs was analyzed to determine the best practices for each of these elements. From these best practices, a framework for analysis was developed and applied to a selection of 22 mining projects from various jurisdictions across Canada where EAs had been conducted. The cases were then analyzed to determine how well they conformed to the best practices established in the literature review. The results indicate that the territorial EAs have conformed better to the best practices for both the duty to consult and EAs than most other EA regimes in Canada, particularly the federal EA process. As well the results suggest that greater attention to direct socio-economic impacts and legacy effects of non-

renewable resource extraction projects would allow for not only a healthier environment, but also better accommodation of Aboriginal interests and concerns.

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# 1. Introduction

## Purpose and Issues

This thesis investigates environmental assessments (EAs) in Canada, specifically those that involve non-renewable resource extraction projects, to determine how well assessment practice has contributed to meeting the duty to consult Aboriginals. Practice in 22 assessment cases is compared with best practices as established in the relevant literature. To guide the comparison, a framework of questions was developed based on the literature and applied to the selected cases. In addition, a discussion of impact and benefit agreements (IBAs) was included, as some of the cases featured these agreements.

The duty to consult came into effect following enactment of the Constitution Act, 1982, wherein section 35 outlines the rights of Aboriginal peoples in Canada (Lawrence & Macklem, 2000). Once the new Constitution was in place, a series of court cases, such as *Haida First Nation v. British Columbia (Minister of Forests) (Haida)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (Taku River)*, began to clarify the legal framework for consultations and accommodations when the rights of Aboriginals are or may be infringed upon (Lawrence & Macklem, 2000). Uncertainties remain, however; the matter of accommodation in particular remains an area of ambiguity and contention (Sossin, 2010). In that context, an assessment of the current state of consultation and accommodation through EAs may provide a useful role in identifying what is or is not being done in EAs, and what could be done to improve current practices.

Questions about the role EAs in meeting the duty to consult and accommodate overlap with another area of difficulty for EAs: the limited consideration of cumulative

impacts. Many assessments focus only on project-level concerns, and thus adopt a narrow focus both spatially and temporally (Duinker & Greig, 2005). This issue accompanies many other sustainability concerns associated with EAs, such as integrating assessment of the socio-economic and cultural as well as biophysical impacts of projects and ensuring overall lasting positive contributions from projects (Gibson, 2005; Gibson, 2012). It is clear that assessments need to adopt a broader scope and address issues beyond the project level if long-term sustainability is to be achieved. In some regions in Canada, there are multiple projects being conducted that have cumulative impacts on Aboriginal lands, thus proper assessment of cumulative effects and other sustainability concerns would seem to be needed to satisfy the duty to consult in these cases.

In addition to EAs, impact and benefit agreements (IBAs) can be negotiated in some cases between project proponents and Aboriginal communities. These agreements often cover socio-economic issues surrounding projects, especially financial matters, and can be a useful means of addressing Aboriginal interests and concerns. However, the lack of transparency and government involvement presents some challenges for considering how these agreements may help to meet the duty to consult.

These are the primary issues discussed in this thesis. I will begin by reporting on an in-depth review of the literature on the duty to consult, EAs, and IBAs, resulting in a framework of the best practices in these areas. I will present an analysis of 22 cases of EAs that deal with these issues, based on a set of explicit case selection criteria. The search. Surrounding literature will also be analyzed to better understand the various perspectives around each case, as well as their outcomes following the EA process if possible. The primary goal will be to evaluate whether current EA practices have satisfied

the duty to consult, and if the best practices for EAs and the duty to consult as identified in the literature are being met.

## **Background**

### **Duty to Consult**

Since the days of colonization and the establishment of Canada as a nation, the rights of the First Nations have been debated and contested by both governments and the judiciary. In cases such as *Calder v. British Columbia* (1973), judges have debated whether the First Nations have inherent rights independent of the Canadian government, or if they only have rights as legislated by the government or written in treaties. The debate resulted in an accumulation of decisions providing a common law framework around Aboriginal rights, though new legislation could potentially remove any rights that the Aboriginals had through the common law (Asch & Macklem, 1991).

The Constitution Act, 1982 introduced new provisions regarding Canada's Aboriginal peoples. Section 35 of the Constitution Act recognizes and upholds existing treaty rights, and also states that contemporary land claims will also be recognized under the rights to be upheld by the Constitution (Constitution Act, 1982 s. 35(1)). The section also extends the definition of "Aboriginal" to the First Nations, Inuit, and Metis (Constitution Act, 1982 s. 35(2)).

While the Constitution Act, 1982 introduced new opportunities for Aboriginals to assert their rights, section 35 still left a great deal of ambiguity about the scope of the existing rights that would be protected by the Constitution (Asch & Macklem, 1991). This ambiguity would need to be interpreted in practice by the courts, with *R. v. Sparrow* (1990) presenting a ruling that would become crucial in outlining the Crown's obligations

to Aboriginals. In this case, the Supreme Court of Canada concluded that the formulation of future laws that may infringe on Aboriginal rights upheld by the Constitution would require consultation with the affected Aboriginal if the infringement was justified. In imposing an obligation to consult where Aboriginal rights were infringed, the Court extended and clarified the legal framework regarding the consultation of First Nations. The Supreme Court of Canada in *Haida First Nation v. British Columbia (Minister of Forests)*, 2004, held that, since the Haida had a strong, although still unproven, land claim and the Crown (province) had knowledge of activities that would infringe upon this claim, the Crown had a duty to perform meaningful consultation with the First Nations (Haida, 2004 at para. 79). In the case of *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, also in 2004, the Supreme Court held that while meaningful consultation is required by the Crown's duty to consult, an agreement upon the accommodation terms is not necessary (Taku River, 2004 at para. 2).

In light of these court decisions, the Government of Canada published guidelines to help federal officials and other interested parties understand what is entailed in the duty to consult and accommodate (Government of Canada, 2011). The guidelines offer useful considerations for consultation procedures, such as performing early consultation to avoid unnecessary difficulties in the future, as well as the possible need to provide funding to allow remote communities to participate in consultation (Government of Canada, 2011). They also leave the degree of consultation and accommodation to the discretion of those responsible for consulting to allow for variance from case to case (Government of Canada, 2011).

Despite the growing base of common law regarding consultation and accommodation, there are still some areas that are unclear. One of these arises from uncertainties about requirements for accommodation, including what matters should be discussed and addressed in accommodation efforts and how much accommodation will be sufficient to fulfill the duty in each case (Sossin, 2010). Related questions surround the meaning of and expectations for meaningful consultation, even when it does not result in an agreement on the accommodation measures (Sossin, 2010). Since proper consultation and accommodation are crucial parts of ensuring the fair involvement of Aboriginals in resource development projects, answers to these questions are important for Aboriginal groups, governments and proponents of resource projects. Analyzing the current state of EA practices in cases involving Aboriginal interests should help inform the discussion by providing insights into whether and to what extent use of the EA process has been contributing to satisfying the duty to consult and whether it could contribute more.

### **Environmental Assessments, Impact and Benefit Agreements, and Meeting the Duty to Consult**

The concept of environmental assessment (EAs) began to attract widespread interest back in 1969, when the United States introduced the *National Environmental Policy Act* (NEPA) (Gibson, 2005). Following the inception of NEPA, most other countries and many sub-national jurisdictions (provinces and states, etc.) across the globe have adopted similar requirements (Gibson, 2005; Noble, 2010). The role and scope of EAs vary in different contexts and have changed substantially over the years (Gibson, 2005).

Generally, in most jurisdictions, an EA is designed to investigate the potential impacts a project may have on the biophysical and human environments, find ways to mitigate the

negative impacts or suggest potential alternatives that may be more effective than the original proposition (Gibson, 2005). In some cases, EAs also determine ways for projects to make positive contributions to the well-being of the biophysical and human environments (Noble, 2010).

In 1995, the Canadian federal government enacted the *Canadian Environmental Assessment Act* (Noble, 2010). In addition, each province and territory has developed and implemented its own EA law (Noble, 2010). Among their multiple functions, EAs serve as opportunities to assess cumulative impacts and consult with Aboriginals, particularly those regarding non-renewable resource activities.

Credible EA processes are designed to be open and participatory, and public consultation with interested parties is typically a required component of the EA process (Noble, 2010). It is also widely recognized that the EA should be initiated in the early stages of project conception, selection and planning, so that the outcomes of the assessment can be used to make a more informed decision that features the input of the stakeholders (Noble, 2010).

In addition to EAs, another process that may occur with non-renewable resource extraction projects is the negotiation and signing of one or more impact and benefit agreements (IBA). These agreements, often signed between an Aboriginal community and a private company, may be used as a way to ensure that the community receives some benefits, such as revenues, employment and other economic opportunities, from the implementation of a project (Sosa & Keenan, 2001). There are concerns regarding IBAs. In particular, they are often confidential (Sosa & Keenan, 2001), tend not to address the collective concerns of and options for multiple communities, and are negotiated in the

absence of authoritative criteria about how best to ensure fair process or what to include as standard contents (Sosa & Keenan, 2001).

Finally, while both consultation in the EA process and negotiation of associated IBAs may have considerable opportunity for the Crown to meet the duty to consult and accommodate Aboriginals, coordinating the two processes can be difficult (Gibson & O’Faircheallaigh, 2010).

### **Sustainability and Cumulative Impacts**

In various places across Canada, Aboriginals are being faced with proposals for two or more non-renewable resource projects in relatively close proximity to each other. In the Ring of Fire area in northern Ontario, for example, predominantly Aboriginal communities are facing the prospect of many mining and infrastructure projects, involving numerous proponents and inevitably significant cumulative effects, both positive and adverse (Whitelaw et al., 2009). The likely significance of cumulative effects, and the need for consideration of regional scale options, makes the consultation process much more complex for both proponents and Aboriginals than in circumstances involving single projects, proponents and communities (Whitelaw et al., 2009). In such cases, issues of consultation, cumulative impacts, and sustainability are intertwined,

Both the 1995 and 2012 versions of the Canadian Environmental Assessment Act (CEA Act) require proponents to assess the potential cumulative effects of their projects (Gibson, 2012). The government used the definition offered by Hegmann et al. (1999) in the *Cumulative Effects Assessment Practitioner’s Guide*, “cumulative effects are changes to the environment that are caused by an action in combination with other past, present, and future human actions” (as cited in Canter & Ross, 2010).

Some assessments under the CEA Act of 1995 also considered sustainability effects – covering the full range of social-economic and biophysical issues over the long as well as short term and assessing projects’ positive contributions to sustainability instead of focusing only on mitigating adverse impacts (Gibson, 2012). This approach was adopted, for example, in the case of Voisey’s Bay Mine and Mill Project, where the panel recommended approval of the proposed project subject to conditions that would enhance prospects for the mine to deliver positive and sustained contributions to the Aboriginal communities involved (Gibson, 2005).

While the CEA Act requires the assessment of cumulative effects (CEA Agency, 2014b), cumulative effects assessment at the project level has often been performed inadequately in accordance with best practices (Duinker & Greig, 2005). Weaknesses in project-level assessments of cumulative impacts include a lack of focus on contributions to sustainability, limited capacity of single proponents to consider the anticipated projects of competitors, and the narrow scope in foundations for future predictions (Duinker & Greig, 2005).

It is also apparent that since cumulative effects will manifest over large scales of time and place, a broader scope is needed for proper assessment of these impacts and for identification and elaboration of alternatives with fewer negative and more positive sustainability effects. Unfortunately, however, the assessment of these impacts is often quite narrow in scope, and performed on a project-by-project basis (Duinker & Greig, 2005). In cases where multiple projects are conducted in close proximity to each other, and where more future development is expected, it would be more effective and efficient to assess cumulative impacts on a regional or strategic level (Duinker & Greig, 2005).

This would allow for a better understanding of how these projects and their impacts will interact, how future development will have additional impacts and what options are available to enhance positive effects and mitigate negative ones (Duinker & Greig, 2005).

Another weakness of the federal assessment is that while Aboriginal communities are covered under the CEA Act, the assessment of other factors only focuses on the biophysical environment (CEA Act, 2012 s. 5(1, 2)). This excludes the direct socio-economic and cultural impacts of a project (Gibson, 2012). It also does little to address strategic-level concerns, which would be an ideal perspective from which to assess the cumulative effects of multiple projects (Gibson, 2012).

The new CEA Act, 2012 neglects strategic level assessment and eliminates assessment of small projects. It also maintains a definition of “environmental effects” that excludes direct socio-economic and cultural considerations (CEA Act, 2012 s. 5), and has aimed to narrow the scope of assessments to matters under exclusively federal jurisdiction (CEA Act, 2012 s. 5(1)). However, the new Act recognizes need for broader attention to matters affecting Aboriginal interests (CEA Act, 2012 s. 5) and provides an opening for regional environmental effects studies (CEA Act, 2012 s. 73(1)), which may be used to consider the potential cumulative impacts of multiple projects and their implications for Aboriginal communities. While the overall thrust of these changes are not promising for effective attention to cumulative or sustainability effects, some openings remain. Moreover, in many cases involving major resource extraction projects, provincial as well as federal EA requirements apply. Together these may still provide useful vehicles for expanded attention to issues the merit assessment in light of the duty to consult and accommodate Aboriginal interests. In that context too it will be useful to

have a better understanding of the current practices of assessment in mining cases, and how these practices may be improved.

### **Core Research Questions**

Given the issues discussed above, the thesis will address the following questions:

- In principle, can EAs and IBAs be used as methods for the Crown and other responsible parties to fulfill the duty to consult and accommodate Aboriginals?
- In practice, how well is the duty to consult and accommodate currently being met in EAs and related decision-making on non-renewable resource extraction projects?
- How well are cumulative effects and other sustainability concerns being assessed in EAs of current non-renewable resource extraction projects?
- How may the above factors be better addressed through the EA and IBA processes? Will this require significant alterations to the current mechanisms, or perhaps entirely new means of meeting these requirements?

### **Methods**

The thesis begins with an in-depth literature review of the duty to consult and the current issues surrounding consultation and accommodation. There will also be a review of EAs and IBAs, and how these may serve as methods to meet the duty to consult. In addition, information was gathered from an interview, which was given approval from the University of Waterloo Office of Research Ethics. The literature review also discusses Aboriginal interests, non-renewable resource extraction projects and sustainability concerns. The literature review concludes with a framework for assessing how well EAs

and IBAs in non-renewable resource extraction project cases have been used to help meet the duty to consult, including through provision of adequate attention to cumulative effects and sustainability. This framework will help establish what key issues need to be addressed in these areas, and how EAs, IBAs, or other means can address these issues.

With this framework in place, the thesis turns to a search for and analysis of cases of EA that involve mining or other non-renewable resource projects, Aboriginal communities, and their sustainability concerns. Cases were selected using the following search criteria:

- The projects must have been undertaken within Canada.
- Each case must centre on at least one EA process, with a documented EA report or a proponent's Environmental Impact Statement (EIS) report, as well as government-issued guidelines where available.
- Each case must involve potential effects on Aboriginal people and therefore raise the duty to consult and represent a test of how the duty to consult was addressed in the EA or EA-like process.
- Each case must discuss and document the assessment of cumulative impacts and sustainability concerns, as well as consultation with, and possible accommodation of, one or more First Nation, Métis, or Inuit group(s).
- Each case must have had its EA report documentation released no more than eight years ago, following the Supreme Court of Canada rulings in the *Haida* and *Taku River* cases. Recent cases were preferred.

- The cases must involve non-renewable resource extraction activities, particularly mining. This will allow for particular consideration of attention given to long-term legacy impacts of the project on the community and region.
- Each case should involve one or more Impact and Benefit Agreements (IBAs) or similar agreements.
- Preferred cases deal with multiple communities, multiple projects in a region, and multiple proponents, thus presenting a need to examine the cumulative impacts of the projects and/or other activities.
- Cases involving application of federal-provincial or federal-territorial requirements were preferred.
- Cases were selected from the various provinces and territories to allow for attention to differences in the practices of the various authorities (federal, provincial and territorial).

My objective was to find roughly 20 cases to review. Both official EA documents and surrounding literature were used to gain understanding of each project from various perspectives. These other sources included government-issued EIS guidelines, newspaper articles, and in some cases court decisions. The third chapter provides a description of the methodology of the case search and study.

After the cases were assembled, their EA reports and supporting documents were reviewed in light of the framework, with particular attention to the quality of the consultation procedures and the consideration of sustainability criteria, and how these issues might have been better addressed. Attention was also given to unique proceedings and discussions among the cases, as well as any trends over time or across jurisdictions

under different EA legislation. The case study is presented in the fourth chapter of the thesis, with the fifth chapter providing an overall analysis of the cases.

### **Expected Outcomes and Relevance**

The primary outcomes of this research will be:

- Identification of the best practices for the duty to consult and EAs based on the surrounding literature, with attention to the role of IBAs in cases of EAs playing a role in Aboriginal consultation;
- A comparison of current EA practice with EA best practice related to consultation and accommodation of Aboriginals, including consideration of attention to cumulative effects and sustainability concerns that affect Aboriginal interests, and
- Identification of needs for improvement and areas for further research.

Commentary on the current state of consultation and accommodation of Aboriginals in cases of EA, and suggestions as to how to improve the process, should be quite useful to those, Crown or otherwise, who are responsible for consulting Aboriginals. Since that courts have ruled that Constitutional law requires consultation and accommodation of Aboriginals, it would be in the best interest of those consulting to do so to an appropriate standard, ideally conforming to best practices found in the accumulating literature surrounding the duty to consult. This will help all parties avoid costly and time-consuming conflict and possible litigation. Thorough consultation and accommodation may also yield valuable information and resources, such as traditional knowledge, that would be useful when designing, approving and implementing the project (Beckford et al., 2010).

Because Aboriginal interests are affected most by the cumulative and long-term effects of individual undertakings, adequate attention to cumulative effects and sustainability is likely to be an increasing focus of expectations to meet the duty to consult and accommodate. Though CEA Act, 2012 does not cover strategic-level undertakings or provide for strategic-level assessments of cumulative impacts of multiple projects (Gibson, 2012), the assessment of cumulative impacts on a project-by-project basis is still a component of the federal EA (CEA Act, 2012 s. 19(1)). Also, a provision for regional studies is included in the Act (CEA Act, 2012, s. 73(1)). Even without legislative provision, the relevant parties can undertake regional studies and planning with regard to cumulative effects as means of clarifying cumulative effects issues and options as guidance for project level deliberations. Particular attention to current performance in addressing sustainability concerns is therefore likely to be important to those who conduct EAs. It will also be useful to determine how well cumulative impacts and other sustainability concerns are addressed in the various jurisdictions across Canada.

### **Boundaries and Limitations**

The cases studies in this research were limited to cases within Canada, and cases where an EA had been conducted for a mining project. While there are many other cases featuring both EAs and Aboriginal consultation, mining projects present the additional issue of legacy impacts once the project ends, thus these cases were used in this study. There are also cases prior to 2004 that would present similar issues; however, the objective was to analyze Aboriginal cases following the *Haida* and *Taku River* cases.

A significant limitation in this study was the confidentiality of the IBAs associated with the case projects. While some EA reports mentioned IBAs that provided

socio-economic benefits and mitigation measures, it was not possible to assess how comprehensive their coverage was, and how much or little consideration was given to the long-term implications of the project. Finally, the research was limited to reliance on documentary information because travelling to the various locations of these projects was not possible, and only one interview was conducted.

### **Thesis Structure**

The second chapter will provide a discussion of the literature surrounding the duty to consult, EAs, and IBAs, and establish a framework of analysis based on the literature. Chapter three will then outline the methodology used for the case study, then chapter four will present the case study itself. Chapter five analyzes the cases and how well they conformed to the established best practices, followed by the concluding remarks in chapter six.

## **2. Background Literature and Analytical Framework**

### **Introduction**

As Canada's resource extraction industry continues to expand, Aboriginal peoples are becoming increasingly affected by these activities. This involvement brings some major concerns that must be addressed.

When Aboriginals are involved in cases of resource extraction projects, it is important to consider how the constitutional duty to consult and accommodate may apply. With the introduction of the Constitutional Act of 1982, along with various subsequent court rulings, the Crown is required to consult with Aboriginals before any impacts occur on their claimed treaty and Aboriginal rights (Haida, 2004 at para. 34; Sossin, 2010). Aboriginal land claims may be established through the signing of a treaty with the Crown, or made through an historic claim that demonstrates Aboriginal occupation predating the colonization of Canada by Europeans (Asch & Macklem, 1991; Sossin, 2010). In some cases, it may also be necessary for the interests of Aboriginals to be accommodated before the proposed activity is conducted (Asch & Macklem, 1991; Sossin, 2010).

The substantive concerns that are properly the subject of consultation and accommodation include, broadly, the effects of these projects on sustainability of both the biophysical environment and the socio-economic conditions of the Aboriginal communities. Particularly with non-renewable projects, effects during project development and operation are accompanied by various long-term considerations that arise once the project is completed, along with the cumulative impacts of multiple activities.

With both the legal implications of the duty to consult and accommodate and the sustainability concerns of non-renewable resource extraction, the question of how to meet these concerns effectively arises. In this chapter, I will discuss the duty to consult in more detail, and summarize the literature on key elements of and best practice in environmental assessment (EA) and the negotiation of impact and benefit agreements (IBAs). The federal, provincial, territorial, and Aboriginal EA legislation from across Canada will be discussed in light of the best practices from the literature, with a table in Appendix A providing a summary of this analysis. I shall also discuss the potential of EAs and IBAs as mechanisms to address both the legal and sustainability concerns facing Aboriginal communities as well as the government agencies and proponents involved in assessing and implementing non-renewable resource extraction projects.

### **Duty to Consult**

In the years since Confederation, the rights of Aboriginals regarding their role in decision-making rested largely within common law (Asch & Macklem, 1991). This meant that Aboriginal rights would only be recognized through the rulings of court cases, such as the *Calder v. B. C.* case in 1973 (Asch & Macklem, 1991). In this case, Justice Hall held that through their settlement of North America long before European colonization, Aboriginals possessed rights to their historic territories that ought to be respected by the Crown (Asch & Macklem, 1991).

With the introduction of the Constitution Act, 1982, the role of Aboriginal rights and treaty rights would evolve quite significantly. In the Constitution Act, 1982, section 35 constitutionalizes Aboriginal rights in Canada. This section states that:

**35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed

2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada (Constitution Act, 1982, s. 35)

Despite the affirmation of these rights, however, the scope of what rights would be upheld was not specified, and would have to be determined through subsequent court cases (Asch & Macklem, 1991).

An important case in determining more specific Aboriginal rights was *R. v. Sparrow*, in which the Musqueam First Nation argued that they had a constitutional right to fish in waters on their ancestral territories, since they had been doing so for many centuries prior to European colonization and it was a vital part of their culture (*R. v. Sparrow*, 1990 at para. 3, 7). The Supreme Court of Canada ultimately upheld this claim and ruled in favour of the Musqueam First Nation, though it was stated in the ruling that the Crown still possessed sovereignty over all of Canada, and that only existing rights would be protected by the Constitution (*R. v. Sparrow*, 1990 at para. 23).

Another crucial outcome of this case was the ruling that in order to justify an infringement on the rights established in section 35, then the Crown would be obliged to consult with the affected Aboriginal group or groups prior to the infringement (*R. v. Sparrow*, 1990 at para. 82). Other elements of the justification test established in *R. v. Sparrow* include minimizing the infringement on Aboriginal rights and providing fair compensation when expropriation is involved (*R. v. Sparrow*, 1990 at para. 82). This ruling provided the initial foundation for the duty to consult Aboriginals in Canada, though more court litigation would follow to specify further what the duty would entail.

In 2004, Chief Justice McLachlin of the Supreme Court of Canada presided over two pivotal cases in the establishment of the duty to consult: *Haida Nation v. British Columbia (Minister of Forests)* (2004) and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2004). Both of these cases established the duty to consult as it known today.

In the *Haida* case, the Haida Nation of British Columbia contested the transfer of forestry licences by the provincial government, claiming that although the Haida did not sign a treaty in regards to the lands in question, they possessed ancestral rights to this land as they occupied it prior to colonization (Haida, 2004 at para. 3, 6). Chief Justice McLachlin held despite the absence of a treaty, the land claim made by the Haida First Nation, though unproven, triggered the duty to consult in this case (Haida, 2004 at para. 10). She also stated that there was no evidence that the provincial government of British Columbia had adequately consulted and accommodated the interests of the Haida Nation (Haida, 2004 at para. 79). This case opened the door for several more contemporary land claim cases, as well as established that while third parties may engage in consultation with Aboriginals, the duty to consult rests solely on the Crown and it is their responsibility to ensure that the duty is met (Haida, 2004 at para. 53). The *Haida* case also established the “sliding scale” test, whereby cases involving stronger claims and greater impact on Aboriginal rights would require more in-depth consultation and accommodation, whereas weaker claims and less impact on Aboriginal rights would entail less extensive consultation (Haida, 2004 at para. 24).

The *Taku River* case was heard by the Supreme Court of Canada with the *Haida* case, and their rulings were released at the same time (Haida, 2004; Taku River, 2004). In

this case, the Taku River First Nation asserted that the province had approved construction of a mining road through their territory and that they had not been adequately consulted (Taku River, 2004 at para. 3). The road was part of the Tulsequah Chief Mine project proposed by Redfern Resources Limited, which was assessed and approved under the British Columbia *Environmental Assessment Act* (British Columbia Environmental Assessment Office [BCEAO], 2002).

The ruling in this case stated that as long as meaningful consultation had taken place between the Crown and the Aboriginal group or groups, then the two parties are not required to agree upon the chosen accommodation measures (Taku River, 2004 at para. 2). The ruling also stated that involving the Taku River Tlingit First Nation in the EA process had satisfied the duty to consult and sufficiently accommodated the interests of the First Nation (Taku River, 2004 at para. 2).

Through these two cases, the Supreme Court firmly established that the duty to consult applies when the Crown has either constructive or real knowledge of Aboriginal rights, and if an activity is contemplated that would infringe on those rights (Slattery, 2005). Chief Justice McLachlin also described the duty to consult as a “sliding scale,” with the depth of consultation determined by both the evidence and support for the asserted rights and the nature of the contemplated infringement (Slattery, 2005; Newman, 2009; Gibson & O’Faircheallaigh, 2010). Using this scale, cases with stronger Aboriginal claims and a greater adverse impact on the claim would warrant more extensive consultation and possibly accommodation, while weaker claims and less severe impacts would require a lesser degree of consultation (Newman, 2009).

Another important aspect of the duty to consult is that consulting and accommodating Aboriginals has become part of the Crown's obligation to conduct their dealings honourably and with consideration of the other party's needs and interests (Newman, 2009). This was an important part of the *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (Mikisew Cree)* case, where the Mikisew Cree First Nation claimed that the construction of a winter road would infringe on their traditional activities (Mikisew Cree, 2005 at para. 3). The road was planned to be constructed on lands subject to Treaty 8, and though the government possessed the right to "take up" the land, the Supreme Court found that the duty to consult was applicable and that there was still an obligation for the Crown to notify and engage the Mikisew Cree First Nation prior to the construction of the road (Mikisew Cree, 2005 at para. 3, 4). This finding meant that treaty rights would trigger the duty to consult, not just Aboriginal rights cases (Mikisew Cree, 2005 at para. 63). Though the road was adjusted to go around the reserve, the Supreme Court found that government failed to engage in meaningful consultation with the Mikisew Cree First Nation and uphold the honour of the Crown (Mikisew Cree, 2005 at para. 64).

The subsequent cases regarding the duty to consult, such as *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* (2010) and *Beckman v. Little Salmon/Carmacks First Nation* (2010) also present another pertinent debate regarding the duty, which is whether consultation should be regarded in a purposive or procedural manner (Sossin, 2010). Under the procedural approach, it is emphasized that "the duty to consult does not include the duty to compromise" (Sossin, 2010). This stresses the court rulings that state that even if no accommodation measures were established, or the measures were not to

the satisfaction of the Aboriginal participants, then the duty would be discharged if it is found that there was a sufficient effort made to consult (Sossin, 2010).

In contrast, the purposive view emphasizes the importance of accommodating Aboriginal interests when deemed necessary, and emphasizes the importance of using the duty to consult as a means to achieve reconciliation and build strong, positive relationships with Canada's Aboriginals (Sossin, 2010). To demonstrate this viewpoint, Sossin (2010) cites the court case *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests) et al.* (2005), as well as other literature, which favours a stronger focus on accommodating the Aboriginal concerns raised in consultation as a means of ensuring meaningful consultation has transpired.

In response to the court rulings that have shaped the duty to consult, the Government of Canada (2011) has published a set of guidelines to help federal and provincial government officials, third parties, and Aboriginals understand the basic expectations and technicalities of the duty and each of their roles in consultation and accommodation. The document makes a number of useful suggestions for application when conducting consultation, such as to perform consultation as early as possible to avoid unwanted court litigation, to make the consultation as transparent, predictable, accessible, and fair as possible, and to establish meaningful communication and positive relationships with Aboriginals (Government of Canada, 2011). It also states that other existing legislated processes that involve consultation, such as environmental assessments, may be used as a means to help meet the duty to consult (Government of Canada, 2011). A number of provincial governments and other jurisdictions in Canada have established their own consultation guidelines, and the federal guidelines recommend

to federal agencies that these processes be considered when undertaking Aboriginal consultation (Government of Canada, 2011).

In addition to these guidelines, the New Relationship Trust of British Columbia, an independent organization created to fund and build capacity among First Nations in the province (New Relationship Trust, 2014), has published their best practice recommendations for consultation and accommodation based on the input of various First Nations in British Columbia (New Relationship Trust, 2009). This best practice guidelines document makes several suggestions for how First Nations should participate in consultation, such as to appoint the most appropriate representative of their Nation, to gather all the needed land claim evidence, and to participate throughout the entirety of the consultation and be clear about the Nation's needs and desires (New Relationship Trust, 2009). It emphasizes the importance of developing a positive relationship with the Aboriginals and giving them fair consideration through the consultation and accommodation processes (New Relationship Trust, 2009). The document reports that a more thorough, accessible, and fair consultation process would help to avoid costly court litigation, making an inherent rights approach more desirable than a minimal effort to consult and accommodate Aboriginal needs (New Relationship Trust, 2009).

As stated earlier, many provinces and territories have enacted their own consultation policies and guidelines, as they also bear the Crown's duty to consult (Government of Canada, 2011). In addition to considering these guidelines and policies, the federal consultation guidelines recommend that consultation efforts should foster collaboration between federal and provincial or territorial authorities to ensure a more efficient consultation process (Government of Canada, 2011).

There is still disagreement and ambiguity regarding the duty to consult, however. One of these debates concerns the extent to which Aboriginal interests must be accommodated in order to demonstrate meaningful consultation (Newman, 2009; Sossin, 2010). As cases such as *Taku River* (2004) have proved, it is not necessary for there to be an agreement on the accommodation measures that will be used, and accommodation is only required at the higher end of the consultation spectrum established in *Haida*. Since appropriate consultation and accommodation may vary greatly in different circumstances, it is exceedingly difficult to establish a more concrete set of guidelines to standardize expectations for accommodation measures (Sossin, 2010). While those who favour the purposive approach to consultation and accommodation claim that substantive evidence of accommodation is the key to proving meaningful consultation has occurred, other experts and court rulings state that substantive efforts at consultation are by themselves sufficient in meeting the duty to consult (Sossin, 2010). It would therefore seem that we do not yet have a definitive understanding of what constitutes good evidence that a consultation has been “meaningful”.

Ultimately, however, it would be desirable for those engaged in consultation with Aboriginals to be thorough in their consultation and accommodation and work towards an outcome that will satisfy the needs of all the involved parties (Newman, 2009). This would not only help avoid costly litigation, but also foster stronger relationships between the Crown, proponents and Aboriginals, making projects more successful and devising long-term solutions to the economic and legal issues that beset Aboriginal communities (Newman, 2009).

Another difficulty regarding the duty to consult is the limited ability of isolated Aboriginal organizations with resource and personnel constraints to engage fully in consultation (Newman, 2009; Booth & Skelton, 2011), particularly when multiple proponents approach them. These communities, like all Aboriginal communities, are nonetheless expected to engage in consultation (New Relationship Trust, 2009), and may be penalized if they fail to do so. The New Relationship Trust (2009) recommends in their guidelines that these communities seek funding from those consulting with them as needed, though the issues of limited personnel, as well as potential language barriers, may prevent these communities from sufficiently participating in consultation.

The main issue that remains unsolved is just how much Aboriginal interests must be accommodated in order to demonstrate that meaningful consultation has transpired. This issue is confounded by the fact that, following the *Taku* decision, the measures do not need to satisfy the demands of the consulted Aboriginal groups. Most recent court cases have focused on what adequate consultation should be as opposed to what degree of accommodation is acceptable (Newman, 2009).

However, in the *Tsilhqot'in Nation v. British Columbia* case, Chief Justice McLachlin emphasized the importance of reconciling the needs of Aboriginal and non-Aboriginal Canadians in order to satisfy the greater public's interests (*Tsilhqot'in Nation v. British Columbia*, 2014 at para. 16, 23). This would shape the ways in which Aboriginal interests are accommodated, as both Aboriginal interests and the needs of the rest of society must be considered in order to provide the fairest outcome in each case. This would obviously make the accommodation measures in each case context-dependent, and thus it is difficult to establish a universal set of criteria for

accommodating Aboriginal interests while also producing the best result for the whole of Canadian society. Perhaps the most that can be said at this point is that both Aboriginal and broad public interest must be considered and reconciled to the extent possible, and that entails some explicit effort to delineate Aboriginal interests and broader public interests in each relevant context.

The following table outlines the requirements and best practices for the duty to consult:

**Table 1: Requirements & Best Practices for Duty to Consult**

- Consultation recognizes inherent rights of Aboriginal peoples, as opposed to their rights being contingent on legislation
- Consultation adopts a purposive view with a focus on accommodating Aboriginal interests and achieving reconciliation, upholding the honour of the Crown
- Consultation is performed as early as possible and before any infringement on Aboriginal rights\*
- Consultation means are accessible and transparent, with funding provided to communities that require financial assistance in order to participate
- The Crown ensures that the duty to consult is met before any infringement is made on claimed Aboriginal rights\*
- Consultation aims to build a positive long-term relationship with the involved Aboriginal communities that addresses economic and legal issues

\* Requirements of duty to consult that have been directly recognized in court rulings

### **Environmental and Sustainability Assessments**

Environmental assessments (EAs) vary substantially in both title and scope, and may also be referred to as environmental impact assessments or impact assessments (Noble, 2010).

Assessment processes have also adopted different foci, such as on larger strategic-level

concerns, health impacts and/or sustainability concerns (Noble, 2010). Through this section, I shall provide some background and general requirements of the EA process, outline the key best practices as outlined in the literature surrounding EAs, and compare the various EA regimes within Canada, including the federal, provincial, territorial, and Aboriginal EA legislation and requirements.

Environmental assessments, in their basic form, were first established as legislated requirements in the United States in 1969 under the National Environmental Policy Act (NEPA) (Noble, 2010). Since then, most countries around the world have adopted the EA process or a similar framework, and EAs are now one of the most commonly used methods to predict and manage the impacts of major projects (Noble, 2010). The definition for EA offered by the International Association for Impact Assessment (IAIA) is:

The process of identifying, predicting, evaluating, and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made (Senécal et al., 1999).

In addition, EA processes often include some post-approval steps including obligations for monitoring project implementation and decommissioning, and for expected responses to any impacts that may arise during these phases (Senécal et al., 1999; O'Faircheallaigh, 2007; Noble, 2010). These measures, as well as any other biophysical or socio-economic concerns regarding the project, may be further addressed in other privately signed agreements, such as environmental agreements between the proponents and other parties (O'Faircheallaigh, 2007). Most EA processes are also designed to be open and

participatory, whereby various experts and members of the public are consulted and are able to voice their concerns (Senécal et al., 1999).

Optimally, the EA process would begin with establishing a current or anticipated need that must be met, possibly through conducting a project (Gibson, 2005). Once the need is established, a range of options to meet this would then be discussed and their implications and benefits assessed (Gibson, 2005). From there, the most desired option, preferably the one yielding the most benefits and least adverse impacts, would be chosen and assessed in greater detail (Gibson, 2005). Once the proponent's assessment is completed, the relevant government authorities would review the findings and make a decision as to whether the project should proceed or not, and under what conditions (Noble, 2010). Should the project proceed, a monitoring and follow-up program should be in place to assess the accuracy of the EA and the effectiveness of the chosen mitigation measures (Noble, 2010). The EA should also have provisions for the closure of the project, and any restoration work needed (Noble, 2010).

Most EA reports are presented in the following categories and order: project description; screening; scoping; impact prediction and evaluation, and consideration of viable alternatives; impact management; review and decision; and implementation and follow-up (Noble, 2010).

The project description elaborates on the objectives of the project and the current needs the project will meet, as well as any alternative options to the project, or alternative means of conducting the proposed project, that were considered in the planning and assessment process (Noble, 2010). From here, the screening phase determines whether an environmental assessment is required in accordance with the relevant policies and

regulations that are in place, as well as what type of assessment is appropriate and how detailed it will be (Senécal et al., 1999; Noble, 2010).

In the scoping phase of the assessment, the baseline conditions for assessment are identified and the valued ecosystem (and socio-economic or cultural) components (VECs) that require more attention in the assessment are chosen (Senécal et al., 1999; Duinker & Greig, 2005; Carver et al., 2010; Noble, 2010). Scoping also establishes the spatial and temporal boundaries of the assessment, as well as determines which if any alternative broad approaches or specific methods will be considered as possibilities for meeting the needs outlined in the project description (Noble, 2010). Scoping can be closed, where the items to be assessed are predetermined, or open, where the scoping is more flexible and the scoping process considers issues and concerns raised by the public and other interested parties but is also subject to pressures from the proponent to limit considerations to reduce costs and speed approvals (Noble, 2010). Scoping can include development of detailed guidance from the governing jurisdictions concerning what matters are to be addressed in the proponent's EA submission.

The next step of EAs is for the proponent to predict and evaluate the nature and significance of the impacts, positive and negative, that the project options will have on the Valued Ecosystem Components (VECs) outlined in the scoping phase (Senécal et al., 1999; Noble, 2010). Impact assessments can be done using a number of different methods. These include simple checklists, matrices, participant surveys, or more intensive modeling techniques using Geographic Information Systems (GIS) and other tools for modeling numerous human and environmental components if sufficient data are available (Noble, 2010).

Once the anticipated impacts are identified and opportunities for mitigation and enhancement have been considered, the assessment will then identify the preferred alternative (if consideration of alternatives has been required) and specify how the impacts should be managed (Senécal et al., 1999; Noble, 2010). This could include enhancing any positive impacts as well as avoiding or mitigating negative impacts, though traditionally mitigation has been the focus (Gibson, 2005; Noble, 2010). Common methods for impact management include application of the voluntary ISO 14001 Environmental Management System (EMS), Impact and Benefit Agreements, (IBAs), and Environmental Protection Plans (EPPs) that may be required in a project-based EA (Noble, 2010).

In most assessment regimes, consultation with relevant authorities, stakeholders and other interests is encouraged, if not required, from the outset of deliberations. However, formal review typically begins after the proponent's Environmental Impact Statement (EIS) and other relevant documents are submitted and subjected to review from both experts and the public (Noble, 2010). The review may include written comments submitted via email or mail and, in major cases, public hearings (CEA Agency, 2012e). This is then followed by a recommendation from the review authority or panel on whether or not the project should be approved and implemented and what conditions should be met if it is approved (Senécal et al., 1999; Noble, 2010). If the project is approved, it is then implemented under the specified conditions and, ideally, with monitoring of compliance and actual impacts to determine the quality of the impact predictions and management strategy and identify needs for adjustments (Senécal et al., 1999; O'Faircheallaigh, 2007; Carver et al., 2010; Noble, 2010).

## **EA Concerns and Alternative Processes**

As EAs have developed, different types of assessments with different rules on many key components, including what undertakings require assessment, what effects are covered, whether purposes and alternatives are examined, and what test for approval is applied.

One of these is sustainability assessment (SA), which uses the principles of sustainability as the basis for developing evaluation and decision criteria for assessing and evaluating options and proposed undertakings (Gibson, 2005). Adopting sustainability-based approaches to assessment entails attention to reversing current unsustainable trends (Gibson, 2005). Attention is given to long as well as short-term effects (Gibson, 2005). Our planetary systems are highly complex and dynamic, thus our actions and strategies should reflect precautionary and forward thinking (Gibson, 2005). This means that these assessments determine not only how to avoid adverse effects and provide equitably distributed opportunities and benefits in the present, but also how to ensure sufficient resources and a healthy environment for future generations (Gibson, 2005). As a result, SAs seek the identification, design and approval of projects that will make positive contributions to the natural and human environments, as opposed to projects where proponents simply mitigate negative impacts (Gibson, 2005). Some key assessment reviews that have adopted this focus are the Voisey's Bay Nickel Mine Joint Panel Review in Labrador (Gibson, 2005), the Kemess North Project Joint Review Panel (2007), the Whites Point Quarry and Marine Terminal Project Joint Review Panel (2007), and the Mackenzie Gas Project Joint Panel Review in the Northwest Territories (2009).

Another process that has been developing alongside project-level EAs is strategic environmental assessment (SEA). These assessments focus on higher-level decision

making than conventional project-level EAs, they are better situated to consider the cumulative effects of multiple undertakings (see below), and help to guide project-level assessments by clarifying the relevant broader policies, plans, and programs (Carver et al., 2010; Noble, 2010). Since they are meant to help shape strategic decision-making, they are more proactive in their approach and their outcomes are meant to set a course towards a more desirable future outcome (Noble, 2010). Like project-level EAs, they begin by identifying purposes and alternatives and scoping what issues of concern are to be assessed, then subsequently assess various alternative strategies and their potential impacts of each course of action (Noble, 2010). Once a decision is made, monitoring and follow-up programs are put into place, which will help inform future SEAs as to what strategies work and what to avoid (Noble, 2010).

### **Contributions to Sustainability: Cumulative Effects and Legacy Effects**

When adopting a sustainability-based agenda in EAs, numerous aspects of projects that must be considered in order to determine if project implementation will have a positive outcome for the environment and human society. In addition, cumulative impacts and the legacy effects of the project must be considered.

There have been several definitions for cumulative impacts or effects, though a commonly used definition states that:

cumulative effects are changes to the environment that are caused by an action in combination with other past, present, and future human actions. (Hegmann et al., 1999, as cited in Canter & Ross, 2010).

Naturally, these actions may have direct or indirect impacts on the biophysical and socio-economic environments, and may be magnified if multiple activities and

projects are conducted in one region (Noble, 2010). This definition also emphasizes the temporal aspect of cumulative impacts, as future activities may result in greater impacts on the environment, or current activities may have impacts that endure far into the future (United States Council on Environmental Quality, 1997; Noble, 2010).

Since 1995, federal EAs have been required to consider “. . . any cumulative effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out” (CEA Act, 2012 s. 19(1)). Unfortunately, the assessment of cumulative impacts in Canada is largely deemed inadequate largely because it is most often done on a project-by-project basis, under a narrow scope and considered separately from other environmental impacts (Tollefson & Wipond, 1998; Duinker & Greig, 2005). A better practice according to the literature would be to consider cumulative impacts on a larger scale in addition to locally (Duinker & Greig, 2005; Canter & Ross, 2010). This would address both regional and strategic issues (Duinker & Greig, 2005; Canter & Ross, 2010). It is also suggested that cumulative effects be assessed using a valued ecosystem component (VEC)-based approach rather than a project-based approach, thus examining each component beyond the scope of the individual project (Duinker & Greig, 2005).

Another major problem with cumulative effects assessment, which also impacts EAs in general, is that the private sector and project proponents have little interest in any EA process, save as a means of receiving approval to carry out their proposed developments (Duinker & Greig, 2005; Canter & Ross, 2010). This lack of interest results in minimal effort being invested in the assessment process, especially cumulative effects components involving other undertakings; therefore the assessments are often

poorly done (Duinker & Greig, 2005; Canter & Ross, 2010). Currently, the literature states that there is insufficient collaboration among regulatory authorities and proponents to ensure adequate consideration of the cumulative impacts of multiple projects in a region (Canter & Ross, 2010).

A proposed solution to these issues would be to implement a more obligatory strategic assessment regime to address cumulative impacts and broader scale alternatives (Canter & Ross, 2010). These assessments could examine the impacts of multiple projects and activities on broader spatial and temporal scales, thus assessing the cumulative impacts of past and current projects and activities within the assessment's scope and guiding future activities to ensure that cumulative impacts are kept in check (Noble, 2010). Strategic assessments would yield a substantial benefit by helping to streamline and inform future project-level assessments within the domain of the strategic assessment (Gibson, 2005).

Cumulative effects assessment would better conform to the established best practices by adopting a shift in objectives towards a sustainability-based agenda (Duinker & Greig, 2005; Canter & Ross, 2010). By adopting this perspective, these assessments would consider the uncertainties, complexities, and lasting implications of the project, as well as opportunities to contribute positively to current and future conditions and engage the public in the assessment process (Gibson, 2005).

It is also important that cumulative effects assessment be an integrated and comprehensive process. This would entail using public scoping in addition to proponent and agency scoping, considering impacts over large spatial and temporal scales, and considering multiple projects in the assessment (Canter & Ross, 2010).

To adopt a more proactive approach and take future considerations into account, as well as engage the public in the assessment process, Duinker and Greig (2006) recommend that scenario building be used as a tool to help outline how the future may unfold in the face of uncertainty. Impact prediction may be further aided by Internet-based resources (Canter & Ross, 2010) and GIS solutions (Tollefson & Wipond, 1998).

Some important principles of sustainability that should be considered in the EA process according to the literature are the consideration of long-term implications and the recognition of a continual process instead of a static state (Gibson, 2005). Thus, in addition to cumulative impacts, the legacy effects of projects must be considered in order to determine what impact the project will have on the viability of a region's biophysical and human environments on a long-term scale (Gibson, 2005). In leading examples of non-renewable resource project assessment reviews, such as in the Voisey's Bay mine and Mackenzie Gas Pipeline and Voisey's Bay cases, assessing the long-term implications of the project was an important component of adopting an agenda based on sustainability, thus considering the needs of future generations (Gibson, 2005; Gibson, 2011). The panel reviews of both these projects considered legacy implications, and made recommendations such as implementing monitoring plans to assess the impacts and effectiveness of the EA measures, as well as using revenues from the project to enhance local economies and ensure economic stability once the non-renewable resources are depleted and the project ends (Gibson, 2005; Gibson, 2011).

By properly addressing cumulative impacts and legacy effects, EAs can become effective tools to achieve sustainability and ensuring a desirable future for our planet and ourselves.

## **EA Best Practice**

A number of best practices for EAs have been identified and advocated by various authors and agencies. A truly holistic definition of environment should include not only the biophysical environment, but the human environment as well (Senécal et al., 1999; Carver et al., 2010; Noble, 2010). To this end, the EA process should be an interdisciplinary one, involving experts of both natural and human sciences to assess all different aspects of the environment and their interactions with each other (Senécal et al., 1999).

Additionally, EAs should collect and consider knowledge from a variety of sources (Noble, 2010). When working with Aboriginal communities, EAs may seek traditional knowledge, otherwise known as traditional ecological knowledge, based on extensive experience of current and historic conditions of local environments (O'Faircheallaigh, 2007; Beckford et al., 2010). While this knowledge is at times rejected by those with a particular devotion to western science, it has been demonstrated that western scientists and Aboriginals possessing traditional knowledge can collaborate effectively and provide an extensive body of knowledge about local environments (Beckford et al., 2010).

In order to ensure informed decision-making at both higher and lower levels of authority and undertakings, both higher-level strategic assessments and lower-level project assessments should be undertaken and be able to provide feedback and inform each other (Gibson, 2005; Sinclair et al., 2008). It is also important that EAs be required for all major undertakings and interacting projects (Gibson, 2005), which a system of strategic and project-level assessments could facilitate.

In addition, EAs should adopt a sustainability-based agenda, ensuring that positive contributions are made by implementation of the project as well as mitigation of adverse impacts (Gibson, 2005). The assessment must also have a clear purpose to ensure that alternative options can be explored, that the most desirable project is selected and that the selected project is designed and implemented in the best possible way according to the EA agenda of sustainability (Gibson, 2005).

The EA process is intended to be open to the public to allow for discussion, input, and learning among the participants, the proponents, and the authorities conducting the EA (Senécal et al., 1999; Sinclair et al., 2008; Gibson, 2012). The EA process should have several opportunities for the public to engage in meaningful dialogue (Senécal et al., 1999; Carver et al., 2010; West Coast Environmental Law et al., 2012). This would allow all those involved to communicate their ideas and concerns, beginning with initial considerations of purposes and alternatives and continuing throughout the course of the assessment (Senécal et al., 1999; Carver et al., 2010; West Coast Environmental Law et al., 2012).

The practical demands of public participation, as well as continual assessment and learning about changing biophysical and human environments, will require the EA process to be flexible and able to consider and adapt to this new knowledge and input (Senécal et al., 1999; Sinclair et al., 2008). This learning will also continue after the assessment as an effective monitoring and follow-up regime (Sinclair et al., 2008; Carver et al., 2010; Noble, 2010). This will allow for an analysis of the impact management strategies, which will in turn inform future EAs and their respective projects (Sinclair et al., 2008; Carver et al., 2010; Noble, 2010).

In order for the views of the public to carry weight in the review, approval and implementation of a project, EA best practice is to conduct the assessment as early as possible in the planning of a project (Senécal et al., 1999; Gibson, 2005; Sinclair et al., 2008). Especially in Canada where multiple EA processes exist in various overlapping jurisdictions, EAs should ideally be harmonized, joint efforts of relevant authorities with processes designed to fit well together (Gibson, 2005; Carver et al., 2010). At minimum, serious cooperative efforts to ensure effective and efficient collaboration are needed. While various environmental aspects and public opinions should be considered, the process must maintain some level of focus and efficiency in order to conform to the established best practices (Senécal et al, 1999; Carver et al., 2010). If not, the EA will consume too much time and resources, thus delaying potential beneficial opportunities and losing public and political favour (Noble, 2010). This was the case with the Mackenzie Gas Project panel review (Gibson, 2011). Efficient EA processes that are completed earlier in the project planning stages can have more bearing on how projects are implemented (Noble, 2010).

A well-performed EA must also assess the cumulative effects of the project according to the literature (Gibson, 2005). The cumulative effects assessment may be based on attention to the project's VECs, thus considering how each VEC is impacted by all of the past, present, and anticipated projects and activities in the region, but also considering the systems supporting each VEC and the interactions among these systems (Tollefson & Wipond, 1998; Duinker & Greig, 2005; Gibson, 2005). In addition to the cumulative impacts, there may be other implications of the project that are complex or uncertain at the time of the EA, thus the assessment should adopt a precautionary

approach to these unknowns and be prepared to deal with new challenges that arise should the project be implemented (Gibson, 2005).

In order to have reliable influence in the implementation of the project, EAs must be a legal requirement, thus the outcomes of the EA, such as requirements for impact mitigation measures and monitoring plans, can be legally enforced (Gibson, 2005). It is also important that potentially affected Aboriginal communities be consulted through the EA, and that their interests and concerns be accommodated where applicable (Carver et al., 2010). To ensure a successful EA, these and other requirements should be made clear to both responsible authorities and proponents (Gibson, 2005) There should be incentives, legal or otherwise, to ensure that these requirements are met (Gibson, 2005).

The following table summarizes the best practices outlined above.

**Table 2: Best Practices for Environmental Assessments (adapted from Gibson, 2005):**

- EA is interdisciplinary, operating by a broad definition of ‘environment’ that includes both biophysical and socio-economic aspects
- EA is applied at both project and strategic levels, with both levels guiding and providing feedback to each other
- Concerning physical undertakings, EA covers all major projects, as well as multiple interacting projects
- EA is guided by sustainability principles and ensures that positive contributions are made by the undertaking as opposed to solely mitigating adverse impacts
- EA is required to establish a clear purpose for the project or strategic level undertaking and consider alternative broad approaches and specific methods of achieving this purpose from a sustainability-based perspective
- EA is transparent with effective public consultation conducted throughout the assessment
- EA facilitates continual learning throughout the assessment through public consultation and environmental studies, and after the EA through monitoring and follow-up, which contributes to future EAs
- EA is initiated as early as possible in the conception of an undertaking that may have significant effects
- EA is focused and efficient, including efficient collaboration and harmonization

between different EA regimes and levels of decision-making

- EA assesses all cumulative effects (positive, negative, direct and indirect) associated with the undertaking on a VEC basis, and integrates these impacts with other matters discussed in the EA
- EA addresses uncertainty and complexity, and adopts a precautionary approach to these unknowns
- EA is required by law with effectively enforceable requirements and outcomes
- EA considers and respects the rights and interests of any Aboriginals involved or impacted by the proposed project
- Both proponents and responsible authorities are clearly aware of the EA requirements and have legal or other incentives to ensure these requirements are met

### **EA in Canada**

In Canada, the EA process faces numerous challenges, with some being universal and some more unique. For example, our system of multiple levels of governments with overlapping responsibilities allows for diverse and inconsistent environmental assessment regimes across different jurisdictions. The federal government and every province and territory has its own EA law and regulations, each with its own definition of what is entailed by “environment” and its own approach to other key characteristics of EA (Carver et al., 2010; Noble, 2010). In addition, many Aboriginal land claim agreements have established special environmental assessment regimes.

There are numerous differences among the federal, provincial, and territorial EA processes in Canada. These differences include the types of projects that undergo assessment, the requirements and criteria for assessing alternatives and cumulative impacts, opportunities for public participation and participant funding, and the role of Aboriginal communities impacted by or involved with assessed undertakings (Carver et

al., 2010). Having numerous assessment processes at different levels of government has led to widespread criticism, especially from proponents, about process inefficiencies and unnecessary repetition (Carver et al., 2010; Gibson, 2012).

In the following sections, I shall review the Canadian federal, provincial, territorial, and Aboriginal EA regimes in light of key issues raised in the best practices section. These include the scope of application and environmental considerations, strategic-level application, the assessment of alternatives, public participation opportunities, provisions for joint or cooperative EAs, Aboriginal involvement in the EA process, and the inclusion of monitoring and follow-up provisions.

### **EA at the Federal Level in Canada**

The federal level regime has been based largely on the Canadian Environmental Assessment Act (CEA Act), which applied from 1995 to 2012 (Noble, 2010), and its replacement, the CEA Act 2012 (Doelle, 2012; Gibson, 2012). The alterations made in CEA Act 2012 are expected to reduce prospects for a stronger and more desirable EA process in terms of sustainability (Doelle, 2012; Gibson, 2012).

The former CEA Act featured both strengths and weaknesses in terms of EA best practices. The definition of “environment” and the scope of factors to be addressed was a weak point, and the Act did not address or guide strategic-level assessments and concerns (Gibson, 2012). However, it did provide solid coverage and guidance for EAs of both large and small projects, and provided an opportunity for requiring proponents to apply sustainability-based criteria in the EA work (Gibson, 2012). Another strong point of the old CEA Act was the mandatory consideration of cumulative impacts (Gibson, 2012).

While the opportunities for public participation were not perfect, they were nonetheless present (Gibson, 2012). However, triggering of an EA could be late in the process and the ill-coordinated overlap with EAs from other jurisdictions, were ineffective components of the old legislation (Gibson, 2012).

The new federal EA regime focuses largely on biophysical impacts, while direct socio-economic implications do not require assessment (CEA Act, 2012 s. 5(1), (2); Gibson, 2012). The Minister of the Environment does, however, have discretionary power to require the assessment of project alternatives and to cover a larger range of biophysical and socio-economic impacts (CEA Act, 2012 s. 5(3)).

The new CEA Act sharply reduces the number and range of undertakings covered by the Act (Gibson, 2012). The federal government has stated that their assessments will focus on major projects that may have significant environmental impacts (Gibson, 2012). The exemption of all smaller projects, and the failure to address strategic level undertakings reduces potential attention to the cumulative impacts of multiple undertakings, and limits opportunities for public input and learning regarding these projects (Gibson, 2012). Restrictions on which members of the public may participate in the EA further restrict the transparency of the assessment and opportunities for input and learning (Doelle, 2012; Gibson, 2012).

Another change introduced by CEA Act 2012 is process substitution, which applies in situations where provincial and federal EA processes are triggered, only one process, likely the provincial process (Gibson, 2012), shall be applied (CEA Act, 2012 s. 32-37).

Since Aboriginal matters are under federal jurisdiction, the federal EA requires the assessment of a project's potential impacts on Aboriginal people (Doelle, 2012). In section 5 (1) of the Act, which outlines the "environmental effects" that require assessment, the Act states that the following environmental effects require assessment:

- (c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on
  - (i) health and socio-economic conditions,
  - (ii) physical and cultural heritage,
  - (iii) the current use of lands and resources for traditional purposes, or
  - (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance (CEA Act, 2012 s 5(1))

It is important that this section requires assessment covering a much broader range of socio-economic considerations than is required in cases where Aboriginal interests are not involved (CEAA, 2012 s. 5(2); Doelle, 2012).

Other sections that mention Aboriginals are the purpose section, which includes aims to "to promote communication and cooperation with aboriginal peoples with respect to environmental assessments" (CEA Act, 2012 s. 4 (d)), and the scope section, which states that EAs may consider traditional knowledge from Aboriginals (CEA Act, 2012 s. 19 (3)).

Monitoring and follow-up is required under CEA Act 2012 (CEA Act, 2012 s. 19).

## **Provincial and Territorial EAs in Canada**

As mentioned earlier, each province and territory in Canada possesses its own EA legislation and requirements, no two of which are the same (Carver et al., 2010; Gibson & O’Faircheallaigh, 2010). A full review of each provincial and territorial EA regime, considering all of the best practices considerations in Table 2, above, is not possible here. Therefore some key practices and how each regime meets or does not meet the best practice will be discussed.

As stated earlier, an area in which provincial and territorial EAs differ is their definitions of “environment” and the scope of biophysical and human aspects that are considered (Carver et al., 2010). The EA legislation in British Columbia offers no definition of the environment (Environmental Assessment Act, 2002), while Alberta (Environmental Protection and Enhancement Act, 2000 s. 1), Manitoba (The Environment Act, 1988 s. 1(2)), and Prince Edward Island (Environmental Protection Act, 1988 s. 1) focus solely on the biophysical environment. However, other provinces’ legislation requires that both biophysical and socio-economic environments be considered in their EAs. The definition of environment is comprehensive in the legislation of Ontario (Environmental Assessment Act, 1990 s. 1(1)), Saskatchewan (Environmental Assessment Act, 1980 s. 2), Quebec (Environment Quality Act, 2014 s. 1), Newfoundland and Labrador (Environmental Assessment Act, 2000 s. 2), the Northwest Territories (Mackenzie Valley Resource Management Act, 1998 s. 111), Nova Scotia (Environment Act, 1994 s. 3(r)), New Brunswick (Clean Environment Act, 1973 s. 31(1)), and Yukon (Yukon Environmental and Socio-economic Assessment Act, 2003 s. 2).

The EA laws of Yukon (Yukon Environmental and Socio-economic Assessment Act, 2003 s. 42), Alberta (Environmental Protection and Enhancement Act, 2000 s. 49), Newfoundland and Labrador (Environmental Assessment Act, 2000 s. 15), Nunavut (Nunavut Planning and Project Assessment Act, 2013 s. 101), and the Northwest Territories (Mackenzie Valley Resource Management Act, 1998 s. 117) include lists of mandatory requirements for EAs, with some of them being quite robust (Carver et al., 2010). These lists require EAs to consider biophysical, socio-economic, and cultural components of the environment, as well as both positive and negative effects resulting from the project (Carver et al., 2010). British Columbia (Environmental Assessment Act, 2002), Saskatchewan (Environmental Assessment Act, 1980), Manitoba (The Environment Act, 1988), Quebec (Environment Quality Act, 2014), and Prince Edward Island (Environmental Protection Act, 1988), however, do not feature such lists in their EA legislation, with some of them leaving the scoping to the discretion of the respective Minister.

While strategic-level assessments are only mentioned in the EA legislation in British Columbia, the provinces of Nova Scotia, New Brunswick, Quebec and Ontario have used an SEA approach to some of their larger-scale undertakings, such as the Nova Scotia SEA of approaches to decision making on tidal power generation (Carver et al., 2010).

The consideration of alternatives is required only in Newfoundland and Labrador (Environmental Assessment Act, 2000 s. 15), Yukon (Yukon Environmental and Socio-economic Assessment Act, 2003 s. 42), Northwest Territories (Mackenzie Valley

Resource Management Act, 1998 s. 117(3)), and Ontario (Environmental Assessment Act, 1990 s. 6.1(2)).

There is a large range in the provisions for public participation in provincial and territorial EA legislation, in terms of how early participation opportunities are initiated and the number and effectiveness of opportunities for participation (Carver et al., 2010). Preferably, meaningful public participation would be initiated early in the EA process, such as during preliminary screening, would feature two-way communication between parties, and utilize the input and knowledge received from stakeholders such as Aboriginals (Carver et al., 2010). The EA laws of Alberta, British Columbia, and Prince Edward Island present far less than ideal meaningful opportunities for public participation (Carver et al., 2010). Quebec and New Brunswick have more meaningful opportunities, but they are presented too late in the EA process (Carver et al., 2010). The EA regimes in Manitoba, Saskatchewan, Ontario, Newfoundland and Labrador, and Nova Scotia feature even more meaningful opportunities for public participation, and they are initiated relatively early in the process (Carver et al., 2010). The territories possess the most stringent requirements for public participation, with Aboriginals receiving a high priority in each territory's legislation (Carver et al., 2010).

The issue of provisions for joint EAs and cooperation in separate EAs is another aspect of provincial and territorial EAs that varies across jurisdictions. The EA legislation in Manitoba (The Environment Act, 1988 s. 13.1(1)), Ontario (Environmental Assessment Act, 1990 s. 3.1), New Brunswick (Clean Environment Act, 1973 s. 15(1)), Nova Scotia (Environment Act, 1994 s. 47), and Newfoundland and Labrador (Environmental Assessment Act, 2000 s. 31) discuss the possibility of a joint EA process.

Concerning cumulative effects, the only provinces and territories that specifically require the assessment of cumulative impacts are Alberta (Environmental Protection and Enhancement Act, 2000 s. 49), Quebec (Environment Quality Act, 2014 s. 31), the Northwest Territories (Mackenzie Valley Resource Management Act, 1998 s. 117(2)), Yukon (Yukon Environmental and Socio-economic Assessment Act, 2003 s. 42(1)), and Nunavut (Nunavut Planning and Project Assessment Act, 2013 s. 90).

Another major area that is quite relevant to this discussion is whether or not Aboriginals are specifically mentioned in the EA requirements. The British Columbia Environmental Assessment Office, for example, has published its own guidelines for proponents on how to consult with First Nations (British Columbia Environmental Assessment Office [BCEAO], 2013a); however, they are listed as a stakeholder group to be consulted as mandated by the Executive Director (Environmental Assessment Act, 2002; Carver et al., 2010). The provincial governments in Ontario and New Brunswick also provide guidelines for how to engage First Nations and other stakeholders through the EA process (Carver et al., 2010; New Brunswick: Department of Environment and Local Government, 2012; Ontario, 2014). While provinces may have more general consultation policies and guidelines when working with Aboriginals, some of these, such as the Consultation With the Mi'kmaq Interim Consultation Policy in Nova Scotia (Province of Nova Scotia, 2007), contain no provisions for any private sector parties who may be consulting with Aboriginals. Having guidelines and policies specifically for EAs, or at least those with provisions for private sector parties, would be more desirable for each province to use.

These guidelines offer some useful information and requirements for proponents when consulting Aboriginal communities. The guidelines for British Columbia and Ontario outline how proponents must identify Aboriginal groups and how their rights may be impacted by the project (BCEAO, 2013a; Ontario, 2014). Proponents must notify and consult directly with these communities, and document their consultation procedures (BCEAO, 2013a; Ontario, 2014). The guidelines outline how the Crown may delegate some of the consultation requirements to the proponent if the duty to consult applies (BCEAO, 2013a; Ontario, 2014). This may include assessing the impacts of the project on treaty rights (BCEAO, 2013a; Ontario, 2014). The BCEAO guidelines further outline how traditional knowledge should be collected by the proponent and incorporated into the project where applicable (BCEAO, 2013a).

In Newfoundland and Labrador, the *Environmental Protection Act* mentions how the EA process may differ in relation to the *Labrador Inuit Land Claims Agreement Act*, but other Aboriginal groups are not given a unique role in the *Act* (Environmental Protection Act, 2002 s. 4(5)). This lack of recognition is also evident in the EA requirements in Alberta (Environmental Protection and Enhancement Act, 2000), Saskatchewan (Environmental Assessment Act, 1980), Manitoba (The Environment Act, 1988), and Prince Edward Island (Environmental Protection Act, 1988).

All provinces and territories, except British Columbia and New Brunswick, contain provisions for implementing a monitoring and follow-up plan, though they are not always mandatory (Environmental Assessment Act, 1980 s. 5(2); The Environment Act, 1988, s. 11(9), 12(5), 41(1); Clean Environment Act, 1973; Environmental Protection Act, 1988 s. 25(1); Environmental Assessment Act, 1990 s. 9; Environment

Act, 1994 s. 19(1); Mackenzie Valley Resource Management Act, 1998 s. 146; Environmental Protection and Enhancement Act, 2000 s. 49; Environmental Assessment Act, 2000 s. 27; Environmental Assessment Act, 2002; Yukon Environmental and Socio-Economic Assessment Act, 2003 s. 108(3); Environmental Assessment Act, 2013; Nunavut Project Planning and Assessment Act, 2013 s. 135; Environment Quality Act, 2014 s. 53.99). In British Columbia, the Minister may add to the requirements to be met in an EA, and although no list is provided, it can be assumed that a monitoring plan may be required (Environmental Assessment Act, 2002 s. 11).

### **Aboriginal EA Regimes**

In Canada, there are also EA regimes that have been created by land claim agreements with Aboriginal groups. Some of these agreements, such as the Inuvialuit Final Agreement (1984), are recognized in section 35(3) of the Constitution Act, 1982. Similar to the discussion of provincial and territorial EA regimes above, this evaluation will consider the scope of application and environmental considerations, the assessment of alternatives, public participation opportunities, provisions for joint or cooperative EAs, and requirements for a monitoring and follow-up program.

Among the significant Aboriginal EA processes are those established under the Inuvialuit Final Agreement (1984), the Labrador Inuit Land Claims Agreement (2005), and the Labrador Innu Land Claims Agreement-in-Principle (2012).

The Inuvialuit Final Agreement was signed in 1984 and under it the Environmental Impact Review Board (EIRB) and the Environmental Impact Screening Committee (EISC) were formed (Inuvialuit Final Agreement, 1984 s. 11(3) and 11(18)).

According to the EIRB Guidelines, a project screened by the EISC is to be submitted to the EIRB for an assessment if:

- The EISC has made a determination that the development could have significant negative impact and is subject to assessment and review under the IFA; and
- There is no government development or environmental impact review process that will adequately encompass the assessment and review function;
- There is a government development or environmental impact review process that will adequately encompass the assessment and review function; and, the governmental review body declines to carry out such functions; or
- In the opinion of the EISC the government development or environmental impact review process does not or will not adequately encompass the assessment and review function. (EIRB, 2011)

There are also provisions on how to perform assessments in the Yukon North Slope area of the Inuvialuit lands, as these may also trigger an assessment under the Yukon Environmental and Socio-Economic Assessment Act, the area is under its own conservation management (EIRB, 2011). The items for assessment are influenced by territorial acts such as the Wildlife Act or Fisheries Act (EIRB, 2011).

The guidelines provided by the EIRB offer definitions of the environment and environmental effects that include both biophysical and socio-economic factors (EIRB, 2011). Under the EIRB Rules of Procedure and the EIRB Guidelines, the assessment and consideration of traditional knowledge is required, and the guidelines also outline expectations for the assessment of cumulative impacts, consultation and engagement, the

development of a follow-up strategy, and the inclusion of alternatives in the project description (EIRB, 2011; EISC & EIRB, 2011). Proponents are required to provide public notification of their projects, and the EIRB may call for public hearings in some cases (EIRB, 2011).

The Labrador Inuit Land Claims Agreement came into force in 2005 and, like the Inuvialuit Final Agreement, this agreement contains its own provisions for conducting an EA (Labrador Inuit Land Claims Agreement, 2005 s. 11.2.10).

Under the agreement, the definition of “environment” includes both biophysical and socio-economic components, as well as their interrelations (Labrador Inuit Land Claims Agreement, 2013 s. 1.1.1). Environmental effects are also defined, which include impacts on the biophysical environment and on culturally significant, archaeological, and heritage sites and conditions (Labrador Inuit Land Claims Agreement, 2005 s. 1.1.1). There are also provisions for conducting a joint EA process with any overlapping jurisdictions (federal or provincial) with EAs being conducted on projects conducted within the Labrador Inuit lands (Labrador Inuit Land Claims Agreement, 2005 s. 11.2.2).

The agreement requires that EAs must, among other things, consider the cumulative impacts in conjunction with other past, present, or anticipated projects; the project’s need, purpose, alternative means and alternatives to the project; traditional Inuit knowledge; public comments; a follow-up program to verify the predictions of the EA and ensure compliance; and any impacts on renewable resources that will impact their ability to meet present and future needs (Labrador Inuit Land Claims Agreement, 2005 s. 11.2.10).

Also within Labrador is the Labrador Innu Land Claims Agreement-in-Principle. Since it is an Agreement-in-Principle, however, it is still under negotiation and not legally enforced (Government of Canada: Aboriginal Affairs and Northern Development Canada, 2010a).

The Agreement-in-Principle is quite similar to the Labrador Inuit Land Claims Agreement in regards to their EA content. Like the Labrador Inuit Land Claims Agreement, the Innu Agreement-in-Principle features a definition of “environment” that features biophysical, socio-economic, and cultural aspects, as well as “environmental effects,” which include impacts on the environment and various cultural and heritage sites and features (Labrador Innu Land Claims Agreement-in-Principle, 2012 s. 14.1.1). The Innu EA process also requires the assessment of all the same factors listed above in the Inuit EA process, though in the Innu EA process, the impacts on resources and their ability to meet present needs without impacting future generations includes both renewable and non-renewable (Labrador Innu Land Claims Agreement-in-Principle, 2012 s. 14.3.1).

### **Comparison of EA Regimes**

In summary, the territorial and Aboriginal EA regimes are the most comprehensive and adhere most fully to the best EA practices established in this document.

The provincial EA regimes range substantially in how they conform to EA best practices. Some, such as Ontario and Newfoundland and Labrador, appear to meet a number of EA best practices, while others meet some best practices and not others.

The federal EA legislation, while featuring some desirable practices for EAs, has largely been weakened from a sustainability perspective as a result of CEA Act 2012 (Doelle, 2012; Gibson, 2012).

### **Implications for Mining & Other Non-Renewable Resource Extraction**

The EA would have to be initiated early in the planning phase of the project, to allow for consultation by the Aboriginals potentially impacted by the project before any infringement on their established land rights is made. In the case of mining, the development of a new mine or extension of an existing mine will begin with an exploration or prospecting phase, where physical geological surveys and/or aerial surveys to determine if the desired minerals exist in the surveyed area and in what concentrations and quantities (Gibson & O’Faircheallaigh, 2010). Starting the EA at this phase would offer more guidance to the project by ensuring a fairer distribution of benefits and environmental and cultural protection before the mine is further developed. Several exploration projects have been assessed under the Mackenzie Valley Review Board (MVRB) in the Northwest Territories (MVRB, 2014).

However, almost all provinces and territories have traditionally used a free entry system whereby a proponent can prospect on Crown lands, including Aboriginal territory, if they have purchased a prospector’s licence and no other prospectors have staked the land (Gladwin & Associates, 2001; Gibson & O’Faircheallaigh, 2010). This conflicts with the Crown’s duty to consult, as the land would be disturbed prior to any consultation with Aboriginals, by the Crown or otherwise. Challenges have been raised to the free entry system in Ontario and British Columbia, which could lead to a different system

whereby permission would be required prior to prospecting (Gibson & O’Faircheallaigh, 2010).

In Ontario, the provincial government enacted *Mining Amendment Act* in 2009. This legislation updates the original *Mining Act*, and specifically states that its purpose is to acknowledge Aboriginal rights under s. 35 of the *Constitution Act, 1982* and the duty to consult in resource development project (Mining Amendment Act, 2009 s. 2). The Act forbids any exploration activities until the proponent has submitted an exploration plan, which will include any required Aboriginal consultation (Mining Amendment Act, 2009 s. 78.2 (1)).

Another challenge to free entry occurred in the Yukon in the *Ross River Dena Council v. Government of Yukon* (2012) case, where the Yukon Court of Appeal held that the *Quartz Mining Act* free entry system fails to meet the consultation requirements outlined in *Haida Nation v. British Columbia (Minster of Forests)* (2004). The ruling called for measures to be established in order to assess the strength of Aboriginal claims and how they may be affected by the proposed project (*Ross River Dena Council v. Government of Yukon*, 2012 at para. 7).

Another important consideration for mining and other non-renewable resource projects is the legacy of the project, and how future generations may be impacted by it (Gibson, 2011). With non-renewable projects, there is a chance of a boom and bust scenario, which will provide immediate benefits but compromise the ability of people in the future to meet their needs once the project ends (Gibson, 2011; Gibson & O’Faircheallaigh, 2010). Other ongoing issues with mining operations include

contamination of soil and water, as well as infrastructure that will serve no purpose with the closure of the mine (Gibson & O’Faircheallaigh, 2010).

The Mackenzie Gas Project Joint Review Panel serves as an example where these legacy impacts and avoiding boom and bust were considered in the EA process (Report of the Joint Review Panel for the Mackenzie Gas Project, 2009). In this case, the Panel recommended that the pace and scale of development be managed, that project opportunities be used to build lasting livelihood capacities and that revenues be set aside in order to ensure local and regional economic stability once the project ends (Gibson, 2011). The funds would facilitate a transition of the local economy to a more sustainable future, in part through diversification to allow for multiple economic activities to ensure stability (Gibson, 2011).

### **EAs and the Duty to Consult**

According to the consultation guidelines published by the Government of Canada (2011), various regulatory processes can be used to help meet the duty to consult. EAs are specifically mentioned as a means to facilitate consultation and accommodation when proposed projects infringe on Aboriginal rights (Government of Canada, 2011), since public participation is a component of EAs. If EAs were performed according to the established best practices, it is quite possible that they could be effective tools for consulting Aboriginals.

As noted earlier, many EA regimes do not feature a specific role for Aboriginals for consultation purposes. This is the case in Manitoba, where the provincial Law Reform commission found a lack of coordination between consultation performed through the EA process and separate government consultation to specifically to satisfy section 35 of the

Constitution Act of 1982 (Manitoba Law Reform Commission, 2015). The Commission also found that participants desired better coordination of these consultation processes, better guidance and education, and better incorporation of traditional ecological knowledge (Manitoba Law Reform Commission, 2015).

### **Impact and Benefit Agreements**

While participating in EAs concerning particular projects, Aboriginal communities in Canada have sought additional means both to mitigate the project's socio-economic and biophysical risks and to ensure their communities receive economic and other benefits from the project. Some of these needs can be met through the negotiation of impact and benefit agreements (IBAs), which are often between proponents such as mining companies and Aboriginal communities (Sosa & Keenan, 2001).

Ideally, an Aboriginal community will begin to negotiate an IBA after consultation with the proponent and gaining insight about the proposed undertaking, its potential impact on the natural and human environments and the associated implications for the community's rights and interests (Sosa & Keenan, 2001; Fidler, 2010). The signing of a memorandum regarding how the involved parties will engage with each other is another valuable action for Aboriginal communities (Sosa & Keenan, 2001). These documents can be used to establish clearly and authoritatively the means of communication to be used when negotiating and help avoid miscommunications and misunderstandings between the two parties (Sosa & Keenan, 2001).

One common aspect of IBAs is the secrecy of the agreement terms, as IBAs are private agreements that are usually not made public, often due to the fact that they may contain confidential financial information (Fidler & Hitch, 2007). This confidentiality

makes it difficult to establish a list of items that should be included in IBAs in order to ensure fair terms for Aboriginals and sufficient environmental protection (Sosa & Keenan, 2001) or to determine what matters are and are not addressed in IBAs. Common contents of IBAs that are known, however, include employment and business opportunities through tendering directly to Aboriginal communities; education and training through apprenticeships, scholarships and partnerships with local colleges; social and cultural matters through funding community infrastructure, ensuring ongoing communication throughout the project, and accommodating culturally-significant events and activities in workers' schedules; environmental protection by focusing and elaborating on matters discussed in the EA and ensuring that the concerns are met; financial matters such as payouts and establishing development funds; and commercial terms such as conflict resolution strategies and confidentiality (Gogal et al., 2005; Fidler & Hitch, 2007; Fidler, 2010). Aboriginals signing an IBA may also seek additional compensation to cover any unforeseen occurrences or impacts associated with the project (Gogal et al., 2005).

Another concern with IBAs is that proponents may negotiate multiple IBAs with multiple Aboriginal communities in the same region separately (Sosa & Keenan, 2001; Gibson & O'Faircheallaigh, 2010). This strategy has the potential to create unfair arrangements and opportunities that may favour communities with more resources to seek better legal counsel (Sosa & Keenan, 2001), or may cause proponents to enter negotiations only with communities they find easier to work with (Gibson & O'Faircheallaigh, 2010). In order to counteract this, some experts recommend that Aboriginal communities who are in the same area and are negotiating with a single

proponent, work in unison and appoint a single group of band leaders or councillors to represent the communities and seek an arrangement that appropriately meets the needs of each community (Sosa & Keenan, 2001). For this method to be successful, however, it is important that the representatives remain strongly engaged with both the proponent and the communities in order for them to represent accurately the communities (Sosa & Keenan, 2001). This ensures that the needs of the communities are met (Sosa & Keenan, 2001). It is also important that Aboriginal communities and proponents allow for sufficient time to facilitate adequate Aboriginal participation and the gathering of information (Gibson & O’Faircheallaigh, 2010). This would avoid rushed and insufficiently informed negotiations, especially when multiple communities and/or proponents are involved in the negotiations (Gibson & O’Faircheallaigh, 2010). As stated by Gibson and O’Faircheallaigh (2010), the length of IBA negotiations can range from a matter of days to a few years.

In addition to multiple communities, there are cases, such as those of the Snap Lake, Diavik and Ekati diamond mines in the Northwest Territories, where multiple mining operations by different proponents are conducted in close proximity to each other (Gibson & O’Faircheallaigh, 2010). Such cases put a significant strain on the resources of remote Aboriginal communities when they must engage in consultation and negotiations with each proponent (Gibson & O’Faircheallaigh, 2010). It is important that Aboriginal communities seek the necessary resources from governments or industries to ensure informed attention to cumulative effects and to enable effective consultation and negotiation with the relevant parties (Gibson & O’Faircheallaigh, 2010).

It is also important for IBAs to adopt a long-term scope and focus, especially where they concern non-renewable resource extraction activities such as mining that can deliver short-term benefits but leave negative socio-economic and biophysical legacies (Sosa & Keenan, 2001). As with EAs, adoption of a sustainability-based approach with special consideration of future needs would be more ideal (Gibson, 2005), and it may be optimal for IBAs to include provisions for establishing long-term economic, social, and environmental benefits that will sustain the communities beyond the length of the project.

Since IBAs consider ecological, social and cultural protection as well as economic provisions, there is potential for these to be viewed as competing objectives. While strict environmental protection is important, reduced revenue would hinder not only the proponent, but also the Aboriginal communities who seek economic benefits from the project. It may be necessary to consider trade-offs in such cases. It is important that any trade-offs be sufficiently justified in light of sustainability criteria (Gibson, 2005). This would encourage the parties to avoid significant negative impacts or mitigate them as much as possible, and to ensure that significant adverse impacts are not imposed on future generations (Gibson, 2005).

### **IBAs and EAs**

In addition to EAs, IBAs have the potential to be used as tools to accommodate Aboriginal concerns (Fidler & Hitch, 2007). Due to the lack of Crown involvement, their use as a means to meet the constitutional duty to consult is debatable.

Noble (2010) outlines IBAs as a method to manage and monitor the impacts of a project undergoing an EA, since they can cover a variety of environmental and socio-economic concerns related to the project. Ideally, each IBA would be designed to

accommodate the localized needs of various Aboriginal communities in different parts of Canada, and adapted for the different types and scales of projects in each area (Fidler & Hitch, 2007). They may also carry more weight than an EA, if the EA requirements in the jurisdiction in question are weak or narrowly scoped (Sosa & Keenan, 2001; Fidler & Hitch, 2007).

When IBA negotiations are conducted in addition to an EA, different benefits and challenges arise if the IBA is negotiated before, during, or after the EA. If negotiated before the EA, the Aboriginal communities may be able to negotiate for resources to better participate in the EA (Gibson & O’Faircheallaigh, 2010). Also, the minister may see the signing of the agreement as the community giving approval for the project (Gibson & O’Faircheallaigh, 2010). Some drawbacks, however, are that the IBA will not be informed by the findings of the EA, and therefore may not recognize or not address important needs for protecting the biophysical and social environments (Gibson & O’Faircheallaigh, 2010). In addition, since the IBA may be seen as a sign of consent, the proponent and government authorities may conduct the EA studies and review with less effort and diligence (Gibson & O’Faircheallaigh, 2010). Even if conducted prior to an EA, the confidentiality of IBAs would likely limit its capacity to inform the EA process, or other relevant processes and agreements (Fidler & Hitch, 2007).

If the IBA is negotiated after the EA, then the IBA will be better informed by the findings of the EA, and therefore may include more comprehensive provisions to address mitigation and enhancement needs (Gibson & O’Faircheallaigh, 2010). One potential disadvantage is that the EA will not be informed by any concerns that may rise when negotiating the IBA (Gibson & O’Faircheallaigh, 2010).

The final option would be to undertake the EA and negotiate the IBA simultaneously. This approach would allow for the two processes to inform each other, with the concerns raised in the EA being addressed by the terms of the IBA (Gibson & O’Faircheallaigh, 2010). This would also mean, however, that one weak process would also weaken the other, and that the simultaneous undertakings would place high demands on the resources of the Aboriginal communities (Gibson & O’Faircheallaigh, 2010).

### **Potential for EAs and IBAs to meet the Duty to Consult**

If performed with transparency, effective communication, and accessibility, both EAs and IBAs could be used as tools to meet the duty to consult. To meet the best practices of the duty to consult and accommodate, it is important that government agencies respect their right to participate in making decisions that impact them and their ancestral lands (New Relationship Trust, 2009). It is also ideal for those consulting with Aboriginals to use a purposive approach in their engagements with them and place significant focus on accommodating Aboriginal interests, thus helping to build a positive relationship with the communities and helping in the movement towards reconciliation (New Relationship Trust, 2009; Sossin, 2010). Lastly, it is crucial to remember while third parties may conduct their own consultation with Aboriginals, it is the responsibility of the Crown to ensure that the duty to consult and accommodate has been met before any infringement is made on established Aboriginal rights (Government of Canada, 2011).

A well-executed EA conforming to the established best practices would be the optimal way for the process to meet the duty to consult. This would include performing the EA as early as possible in order to ensure that consultation and mitigation measures are established before the project has progressed too far (Gibson, 2005; Carver et al.,

2010; Noble, 2010). The assessment process must also adopt a sustainability-based set of criteria, consider present and future needs and concerns, focus on providing benefits for the biophysical and social environments, and use a precautionary approach to matters of complexity and uncertainty (Gibson, 2005). Another important consideration according to the literature is the assessment of cumulative effects. All direct and indirect impacts related to the project on various scales should be considered (Duinker & Greig, 2005; Canter & Ross, 2010). For effective attention to cumulative effects and response options, which may often be important for adequate efforts to meet the duty to consult. The literature suggests that SEAs are needed address the large-scale of cumulative impacts resulting from multiple projects and help guide (and learn from) project-level EAs (Noble, 2010).

An EA process conforming to the best practices must also require the assessment of alternative strategies (Gibson, 2005; Carver et al., 2010; Noble, 2010). Both alternative means and alternatives to the project must be considered in order to determine the most effective means of achieving the purpose outlined at the beginning of the EA (Noble, 2010). The EA will also have to feature effective means of collaboration – coordinating efforts with other EA processes in overlapping jurisdictions that have been triggered by the proposed project.

In order for the EA to have sufficient bearing on the decision-making and implementation processes, the EA will need enforceable outcomes and mandatory adherence to the monitoring and follow-up plan to assess the effectiveness of the EA outcomes and attend to any impacts that arise (Gibson, 2012).

If the EA is to consider adequately the interests of Aboriginals impacted by or involved in the EA and the proposed project, the EA process must take into account all treaties or other asserted land rights upheld by the Constitution Act of 1982, and offer Aboriginals a unique role (Carver et al., 2010). This will ensure the consideration of traditional knowledge and any unique cultural needs and concerns that relate to the proposed project.

For IBAs, Aboriginal communities should strive for an agreement that is broad in scope. The agreement must consider the multiple needs of the community and environment over a long period of time. With this in mind, the social, cultural, ecological and economic provisions of the IBA, as well as any other concerns addressed in the agreement, could allow for the community to maintain sustained benefits and viability after the end of the project (Sosa & Keenan, 2001). Another consideration would be for multiple communities impacted by one or more projects in the same region to negotiate agreements together (Sosa & Keenan, 2001; Gibson & O'Faircheallaigh, 2010). They may pool their resources to ensure the best agreement terms possible are achieved (Sosa & Keenan, 2001). In addition, it is important that the economic provisions do not overshadow or compromise the protection of the biophysical environment or the cultural practices of the communities (Sosa & Keenan, 2001) and the EA must include careful attention to the long term. Short-term interests should not compromise attention to long-term legacy effects (Gibson, 2005).

Considering the best practices for both the duty to consult and EAs, it could be stated that a sustainability-based approach could be adopted for the duty to consult, as well as EAs and IBAs, in order to meet the best practices. This is explicitly true in how

the guidelines for consultation from both the New Relationship Trust (2009) and the Government of Canada (2011) both suggest developing constructive and long-term relationships with Aboriginal communities through projects such as those featuring an EA or IBA for mutual benefits, which conforms with the long-term considerations of sustainability (Gibson, 2005). These long-term relationships could be created through employing Aboriginals in the project, as well as consulting with them through long-term monitoring programs throughout the life of the project. Other sustainability criteria and EA best practices, such as the consideration of socio-economic and cultural impacts and early initiation of the EA and public consultation (Gibson, 2005; Noble, 2010), would also achieve more effective consultation and, if necessary, accommodation of Aboriginal interests and concerns. By adopting a sustainability-based approach in accommodation as well as EAs and IBAs, with a long-term focus on providing benefits to both the biophysical and socio-economic environments, it seems likely that consultation and accommodation practices could better conform to the established best practices and ensure that Aboriginal concerns regarding resource extraction projects are met.

However, there remain some matters raised that are not entirely resolved. It is still unclear what degree of accommodation is acceptable and will satisfy the duty to consult and accommodate. As stated earlier, the appropriate accommodation measures in each case will be context-dependent. However, in order to conform to best practices and avoid court litigation, a purposive approach to consultation and accommodation, with a focus on accommodating Aboriginal interests would be the better choice in order to achieve reconciliation (Sossin, 2010). This could be done through conducting both IBAs and EAs that conform to the established best practices, while still using a purposive approach to

accommodate their needs in project selection, design and approval and through the course of project implementation.

Another remaining question is what roles the private sector and provincial or territorial governments have in meeting the duty to consult. According to *Haida Nation v. British Columbia (Minister of Forests)* (2004, at para. 57-59), the duty to consult does extend to the provinces and territories. Therefore, several of them have established their own consultation guidelines. Third parties, however, cannot be held responsible for meeting the duty to consult (Haida, 2004 at para. 53). The guidelines note how they may gather information that may be useful to the federal government, and may be able to accommodate Aboriginal interests (Government of Canada, 2011). While this may be the case for third parties, past court cases emphasize that it is ultimately the Crown's responsibility to ensure that, through EAs, IBAs, or other means, the duty to consult and accommodate is met and that Aboriginal interests are adequately considered and included before any infringement on established rights occurs (Sossin, 2010; Government of Canada, 2011).

As stated earlier, since the responsibility for ensuring the duty to consult is met rests solely on the Crown, the matter of IBAs being used as a means to meet the duty to consult is uncertain. Since IBAs are negotiated between proponents and Aboriginal communities, the lack of Crown involvement and oversight is a point that undermines an IBA's ability to ensure the honour of the Crown is upheld and the duty to consult is met. This will require further legal development in order to determine the legitimacy of such agreements (Newman, 2009).

## **Framework for Analysis of Cases**

The best practices for duty to consult set out in Table 1 above and the best practices for EAs set out in Table 2 above provide the basis for a useful framework for evaluating practice in recent cases of EAs for mining projects involving Aboriginals to determine if best practice standards are being met. In order to assess these cases, I will use the following questions as a framework for analysis:

- Were established Aboriginal rights acknowledged, and was there a substantive effort to accommodate Aboriginal interests where necessary?
- Were the EA and associated consultation initiated early in the process so that no Aboriginal rights were infringed on prior to consultation, and so that the matters discussed through consultation could be applied in project selection and design as well as implementation?
- Was the consultation accessible and transparent, and was funding provided to communities that require financial assistance in order to participate in the EA process?
- Did the EA and Aboriginal consultation follow a sustainability-based agenda?
  - i) Did the EA consider both alternatives to the project and alternative means of implementing the project?
  - ii) Was there a focus on providing positive contributions in addition to mitigating adverse impacts?
  - iii) Did the assessment consider both biophysical and human (social, cultural, and economic) components of the environment?

- iv) Did the EA address complexity and uncertainty, and adopt a precautionary approach to the unknown implications of the project?
- v) Did the EA consider legacy effects, long-term impacts and possibilities related to the project?
- vi) Were cumulative effects considered on a broad scale, based on VECs, and in conjunction with the other impacts discussed in the EA?
- Did the EA facilitate continual learning through ongoing consultation and engagement, as well as a follow-up and monitoring regime?
- Was the EA coordinated with other applicable EA regimes?

With these questions in place, it is now possible to assess whether current consultation and EA practices conform to the best practices established in the surrounding literature.

### **3. Case Study – Methodology**

With this framework in place, the next research step was applying the findings of the literature review to an examination of current practices of EA in Canada with particular attention to non-renewable resource extraction projects that involved one or more Aboriginal groups and the discussion of cumulative and legacy impacts.

For this work, a cross-case analysis approach was adopted. This involved application of the analytical framework developed in chapter two to a substantial set of case studies identified and selected using an explicit set of criteria. A cross-case analysis approach is useful in comparing different cases, identifying similarities and differences between and among the cases and presenting new information found through the comparisons (Khan & VanWynsberghe, 2008). Examining multiple cases expands the base of evidence, is better able to capture the diversity of practice, and yields results that are less subject to an author's intervention, making the findings more concrete and reliable (Gerring, 2007).

The selected cases feature EAs conducted under federal, provincial, territorial, and joint jurisdictions, as well as different types of EA. This range of case material is intended to allow for an examination of which jurisdictions and types of EA are better suited to meeting the best practices established by the literature.

As stated in the Introduction, the cases to be reviewed were selected based on the following criteria:

- The projects must have been undertaken within Canada.

- Each case must centre on at least one EA or EA-like process, with a documented EA report or a proponent's Environmental Impact Statement (EIS) report, as well as government-issued guidelines where available.
- Each case must involve potential effects on Aboriginal people and therefore raise the duty to consult and represent a test of how the duty to consult was addressed in the EA or EA-like process.
- Each case must discuss and document the assessment of cumulative impacts and sustainability concerns, as well as consultation with, and possible accommodation of, one or more First Nation, Métis, or Inuit group(s).
- Each case must have had its EA report documentation released no more than eight years ago, following the Supreme Court of Canada rulings in the *Haida* and *Taku River* cases. Recent cases were preferred.
- The cases must involve non-renewable resource extraction activities, particularly mining. This will allow for particular consideration of attention given to long-term legacy impacts of the project on the community and region.
- Each case should involve one or more Impact and Benefit Agreements (IBAs) or similar agreements.
- Preferred cases deal with multiple communities, multiple projects in a region, and multiple proponents, thus presenting a need to examine the cumulative impacts of the projects and/or other activities.
- Cases involving application of federal-provincial or federal-territorial requirements were preferred.

- Cases were selected from the various provinces and territories to allow for attention to differences in the practices of the various authorities (federal, provincial and territorial).

With these criteria, I performed two searches of the Canadian Environmental Assessment Agency's (CEA Agency) registry to find suitable cases to review. In these two searches, six suitable cases were found. Other cases were also discussed and included based on discussions with my thesis advisors, and were selected based on how well they met the criteria in terms of Aboriginal consultation proceedings, how recent the case was, and ensuring the coverage of numerous jurisdictions across Canada.

In addition to these cases, three cases from the Mackenzie Valley Review Board of the Northwest Territories and two cases from Nunavut were selected that matched the search criteria. The complete list of cases for review is:

- Meadowbank Gold Mine, Nunavut
- Galore Creek Gold-Silver-Copper Mine, British Columbia
- Kearl Oil Sands Project, Alberta
- Kemess North Copper-Gold Mine, British Columbia
- Mount Milligan Gold-Copper Mine, British Columbia
- Joslyn North Mine Project, Alberta
- Detour Lake Gold Mine, Ontario
- Prairie Creek Mine, Northwest Territories
- Mining and Milling for the Midwest Project, Saskatchewan
- Morrison Copper-Gold Project, British Columbia
- Eagle Gold Project, Yukon

- Mary River Project, Nunavut
- Donkin Coal Mine, Nova Scotia
- Renard Diamond Mine Project, Quebec
- Jackpine Mine Expansion Project, Alberta
- Gahcho Kue Diamond Mine, Northwest Territories
- Nechalacho Rare Earth Elements Project, Northwest Territories
- Kitsault Mine, British Columbia
- Kami Iron Ore Project, Newfoundland and Labrador
- Prosperity Gold-Copper Mine, British Columbia
- Arnaud Mine Project, Quebec
- Kerr-Sulphurets-Mitchell (KSM) Project, British Columbia

A summary of each case met the search criteria is provided in Appendix B.

Following the preliminary review of each case, the framework for analysis, based on the literature review findings, was applied to each case to determine if the established best practices for EA and the duty to consult were met through the EA process. This was done by searching each government EA report for consultation activities with Aboriginals as performed by government agencies, review panels, and proponents. The government EA reports were retrieved from federal, provincial, and territorial governments, and included different levels of assessment, such as federal comprehensive studies and review panels. These EA reports were all found in online registries, either from the CEA Agency or from the respective province or territory. Some EA reports featured sections dedicated purely to Aboriginal consultation and the concerns they raised, while other reports discuss these matters as they relate to the VECs covered in the

EA report. In more recent cases, such as Arnaud, the proponent's EIS was used, since the federal EA report was not prepared at the time. In some cases, other information was also used to supplement the information from the EA report. This included some court decisions involving Aboriginal participants, news articles, funding information, and submissions from Aboriginals or proponents that involved consultation issues. While the EA reports feature input from the various stakeholders in the EA process, using external sources such as news articles, scholarly commentary where available, and court citations helped to provide more information and perspective in cases with more substantial issues and controversies. In cases involving both federal and provincial authorities that prepared separate reports, both reports were discussed if available, though some provinces only release decision statements and not actual EA reports.

This research conducted for this thesis was document-based, in order to provide consistent coverage of multiple cases across the country. While more primary information sources, such as interviews, may have provided a more thorough understanding of each case from different perspectives, a higher level of detail and the amount of time and resources required to conduct significantly interview-based research was beyond the scope of this study.

The relevant EA best practices and sustainability concerns identified in the framework questions were also assessed in each case. There was an emphasis on items that were unique in each report, with the analysis section compiling these unique items and identifying any trends across time or jurisdictions. Any continuing cases were followed up until December 31, 2014.

In addition to analyzing the EA reports in each case in light of the framework considerations, the guidelines provided for the proponent's EIS were analyzed where available to determine if the elements included in the guidelines were also considered in the final EA report. Typically in older cases few documents other than the EA report were available, while more recent cases present more available documents and submissions. As stated earlier, some of this other available information was used to provide additional insight and commentary on any major issues surrounding Aboriginal consultation. Therefore, more recent cases with more available documentation may be presented more accurately and comprehensively than the older cases with less available information.

In each case, it was mentioned whether or not the EA report or surrounding documents mentioned the negotiation or signing of an IBA. Three IBAs were available and their provisions were discussed. Others were confidential and news releases were used to provide some additional commentary on the nature of the agreements. The date these agreements were signed was also reported when possible to determine how they aligned with the release of the EA report.

Each case discussion also features a summary of the duty to consult or other consultation efforts made by government authorities or the project proponent, as well as an epilogue reporting the fate of each project as of December 31, 2014. A summary table outlining how each case aligned with the framework questions is provided in Appendix C.

Once the framework was applied to each case, the findings were analyzed and synthesized to assess how well the duty to consult as addressed through these cases, and

whether improvements could be made to better address consultation and sustainability concerns in the future. Any trends that occurred over time and across the various jurisdictions were also noted and discussed. An analysis of the cases is presented in chapter five.

## **4. The Cases**

### **Introduction**

With this methodology in place, the selected cases of project EAs and related aspects of consultation with Aboriginal people can now be reviewed using the framework questions established in the literature review. Application of the framework will allow for an examination of how well these cases conform to the EA and duty to consult best practices established in the literature. Cases that have conformed to the best practices for EA are likely to have been more successful in meeting the duty to consult and accommodate in accordance with the respective best practices from the literature. Examining and comparing cases of EA in different jurisdictions across Canada will also help determine if some EA regimes are better suited to meeting the duty to consult than others. The study will also reveal if there are any differences in practice over time since 2004.

Each case discussion will also feature a summary of what efforts were made by all the parties involved to meet the duty to consult, as well as an epilogue stating where each project headed after the EA report was released and if any ongoing issues were present.

The following cases are presented in chronological order from oldest to newest, based on the date of the respective government's EA report.

## **Meadowbank Gold Mine, Nunavut**

### **Background & Context**

The Meadowbank Gold Project proposed the construction and operation of an open-pit gold mine in the Kivalliq Region of Nunavut (NIRB, 2006b). The project proponent at the time of the review was Cumberland Resources Limited (NIRB, 2006b).

In this case, the Kivalliq Inuit Association, which is responsible for all of the Inuit-owned lands and waterways in the region, was one of the parties in the Nunavut Impact Review Board's (NIRB) review process (NIRB, 2006b).

### **Application of Framework**

*Framework Question (FQ) 1: Were established Aboriginal rights acknowledged, and was there a substantive effort to accommodate Aboriginal interests where necessary?*

While the duty to consult is not directly mentioned in the NIRB's hearing report, the Kivalliq Inuit Association was consulted throughout the review process (NIRB, 2004).

*FQ2: Were the EA and consultation initiated early in the process so that no Aboriginal rights were infringed on prior to consultation, and so that the matters discussed through consultation could be applied in project selection and design as well as implementation?*

Formal public participation in this case began in December 2003, when the project stakeholders on the project's Distribution List received the Draft EIS Guidelines from the NIRB (NIRB, 2004).

*FQ3: Was the consultation accessible and transparent, and was funding provided to communities that require financial assistance in order to participate in the EA process?*

The hearing report does not mention whether funding was provided to Aboriginal participants or not (NIRB, 2004). The legislation states that it is possible for a participant

funding program could be established, but this section is not in force (Nunavut Planning and Project Assessment Act, 2013 s. 228).

*FQ4: Did the EA and Aboriginal consultation follow a sustainability-based agenda?*

*i. Did the EA consider both alternatives to the project and alternative means of implementing the project?*

The guidelines established by the NIRB required the proponent's EIS to address both alternatives to the project and alternative means of implementing the project (NIRB, 2004). The specific alternatives to the project mentioned in the EIS Guidelines included canceling the project and implementing the project elsewhere (NIRB, 2004). The proponent was required to justify each alternative means selected in their EIS (NIRB, 2004).

Although the EIS Guidelines required an assessment of alternatives to the project and alternative means of implementing the project (NIRB, 2004), these are not discussed in the final hearing report (NIRB, 2006b).

*ii. Was there a focus on providing positive contributions in addition to mitigating adverse impacts?*

The project EIS was required to conform to sustainability principles outlined in the EIS Guidelines, which include preserving ecological integrity, ensuring that Nunavut's resources remain for use by future generations, providing durable socio-economic benefits for the region, and ensuring the well-being of those outside of the Nunavut Settlement Area (NIRB, 2004).

Both Indian and Northern Affairs Canada and the Hamlet of Baker Lake cited that the project would provide economic benefits through employment, skill development,

and infrastructure if implemented (NIRB, 2006b). The rest of the final hearing report focuses on the mitigation of adverse impacts (NIRB, 2006b).

iii. *Did the assessment consider both biophysical and human (social, cultural, and economic) components of the environment?*

According to the EIS Guidelines established by the NIRB, the proponent's EIS was required to assess the project's impacts on both the biophysical and human environments (NIRB, 2004). The assessment considered both biophysical and human aspects of the environment (NIRB, 2006b).

iv. *Did the EA address complexity and uncertainty, and adopt a precautionary approach to the unknown implications of the project?*

Uncertainty was specifically mentioned in the final hearing report in regards to the long-term climate change predictions, as well as the potential acid-producing potential of the volcanic rock in the Vault storage facility (NIRB, 2006b).

v. *Did the EA consider legacy effects, long-term impacts and possibilities related to the project?*

The Guidelines also required the EIS to assess cumulative and residual impacts, and discuss post-closure monitoring plans and who would be responsible for such plans (NIRB, 2004). The final hearing report discusses some of the long-term concerns associated with the project (NIRB, 2006b).

vi. *Are cumulative effects considered on a broad scale, based on VECs, and in conjunction with the other impacts discussed in the EA?*

The proponent performed an assessment of the cumulative impacts that the project may incur, which included both biophysical and socio-economic environments (NIRB,

2006b). A cumulative impact that was of particular concern to the Government of Nunavut was the project's contributions to greenhouse gas emissions, which was not included in the proponent's Cumulative Effects Assessment (NIRB, 2006b).

*FQ5: Does the EA facilitate continual learning through ongoing consultation and engagement, as well as a follow-up and monitoring regime?*

The proponent was required to develop and implement a Closure and Reclamation Plan, which was to abide by standards that prevent the Inuit or taxpayers from being financially responsible for the project's cleanup, modification, abandonment, or decommissioning (NIRB, 2006b).

The proponent was also required to establish a monitoring regime, which was to include both biophysical and socio-economic impacts (NIRB, 2006b).

*FQ6: Is the EA undertaken cooperatively under the applicable EA regimes?*

No federal review was conducted for this project, although federal agencies, such as Environment Canada and the Department of Fisheries and Oceans, participated in the review process (NIRB, 2006b).

### **Duty to Consult Summary**

Though the duty to consult was not specifically mentioned in this case, the Kivalliq Inuit Association was a party in the review process (NIRB, 2006b). In addition, the proponent signed an Inuit Impact and Benefits Agreement with the Kivalliq Inuit Association (NIRB, 2006b). This agreement contains schedules providing provisions for training and education, the employment of Inuit, access to the mine's facilities, funding and implementation costs, and economic, social, and cultural wellness (Meadowbank Mine Inuit Impact and Benefit Agreement, 2011). The economic, social, and cultural wellness

schedule includes a Post-Closure Inuit Wellness Strategy, which is meant to address the impacts the mine's closure will have on the Inuit, and will be negotiated through 2015 (Meadowbank Mine Inuit Impact and Benefit Agreement, 2011). The agreement indicates that it was signed in 2011, though no definite date is given (Meadowbank Mine Inuit Impact and Benefit Agreement, 2011). This would still be well after the project's hearing report and approval in 2006.

When drafting the Nunavut Planning and Project Assessment Act, the Government of Canada consulted extensively with the Government of Nunavut, the Inuit, and other stakeholders within the territory (Government of Canada: Aboriginal Affairs and Northern Development Canada, 2012). While that does not ensure that the results meet the standard of best practice EA or best practice efforts to meet the duty to consult, the Nunavut context is different from that of provincial jurisdictions where Aboriginal interests had little influence in EA process establishment.

## **Epilogue**

The NIRB recommended approval for the project, subject to terms and conditions, in 2006 (NIRB, 2006a) and approval was granted by the Minister of Indian Affairs and Northern Development. The project, now operated by Agnico Eagle Mines Limited, began production in 2010 (Agnico Eagle Mines Limited, 2014).

## **Galore Creek Gold-Silver-Copper Mine, British Columbia**

### **Background & Context**

The Galore Creek Mine, proposed by NovaGold Canada Incorporated, involves an open-pit gold, copper, and silver mine situated 1000 kilometres northwest of Vancouver, British Columbia (BCEAO et al., 2007). The proposed project would be implemented in the largely pristine Stikine watershed, which is of great significance from both biological and human perspectives (BCEAO et al., 2007). The British Columbia Environmental Assessment Office (BCEAO), Natural Resources Canada, Fisheries and Oceans Canada, Transport Canada, and Environment Canada (BCEAO et al., 2007) performed a joint EA review.

The proposed mine site falls on provincial Crown land, as well as land claimed by the Tahltan First Nation as traditional territory (BCEAO et al., 2007).

### **Application of Framework**

*FQI:* The Tahltan First Nation was consulted by both federal and provincial authorities, with the Central Council, the Band Council, and the Iskut First Nation receiving notification about the project from the BCEAO (BCEAO et al., 2007). The Tahltan First Nation also participated with BC's Technical Working Group<sup>1</sup> on the project through the Tahltan Heritage Resource and Environmental Assessment Team established by the Tahltan Central Council (BCEAO et al., 2007).

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<sup>1</sup> “The working group is comprised of representatives of CEAA, government agencies, First Nations and local governments. When appropriate, officials from neighbouring jurisdictions will also be invited to participate. The working group advises EAO about issues related to the assessment of the proposed project and plays a key role later in the process by helping to assess the adequacy of any proposed mitigation measures.” (BCEAO, n. d. a)

<sup>2</sup> The Cumulative Effects Management Association (CEMA) is a group of various stakeholders, including

*FQ2:* The proponent began consulting with the Tahltan First Nation in 2003 when they met with elected officials from the First Nation, a year before proponent submitted the preliminary project description to the BCEAO (Transport Canada et al., 2007). The Tahltan were also consulted through the EA process at three open houses in June and July of 2006, during the application review phase of the assessment, where the proponent, the BCEAO, and the CEA Agency made presentations about the project and the EA process (Transport Canada et al., 2007). As noted above, The Tahltan Central Council formed the Tahltan Heritage Resource and Environmental Assessment Team that participated in the Technical Working Group through the EA process (Transport Canada et al., 2007).

The joint federal-provincial comprehensive study report states that the Tahltan First Nation felt that the consultation was inadequate, and that there was insufficient consideration of the socio-economic implications for the Tahltan First Nation (Transport Canada et al., 2007). The BCEAO stated that a Socio/Cultural Working Group would be established with the Tahltan First Nation and the Province, which would address these concerns (Transport Canada et al., 2007). The concerns of the Tahltan First Nation were raised during the review of the Application, and the objectives of the Socio/Cultural Working Group seem to be aimed at improving future EAs and other activities involving the provincial government and the Tahltan First Nation (Transport Canada et al., 2007).

*FQ3:* Funding was provided to the Tahltan Central Council from the BCEAO and the proponent to aid with their participation expenses in the pre-application and review phases of the assessment (Transport Canada et al., 2007). In addition, the federal Participant Funding Program provided financial assistance to the Iskut First Nation (Transport Canada et al., 2007).

*FQ4:* The joint comprehensive study report covered the assessment of feasible alternative means of implementing the project, as well as the option the proponent selected as the preferable option (BCEAO et al., 2007; Transport Canada et al., 2007).

The proponent's Application stated that the socio-economic effects through the life and closure of the mine would be largely positive due to the profits and development associated with the mine (Transport Canada et al., 2007). The benefits for the Aboriginal communities included preferential hiring for Aboriginal and other local workers, as well as a long-term program for recruiting, employment, and training of workers (Transport Canada et al., 2007). Much of the rest of the joint assessment review report focused on mitigating adverse impacts as opposed to enhancing positive contributions to the environment (Transport Canada et al., 2007).

The environmental effects considered in the comprehensive study report were: climate; air quality, noise, surface water quantity and quality, groundwater, sediment quality, aquatic resources, fish and fish habitat; wetlands, terrestrial ecosystems, wildlife and wildlife habitat, archaeological and heritage resources, socio-economic effects, visual and aesthetic resources, navigable waters, effects of the environment on the project, environmental effects of accidents and malfunctions, capacity of renewable resources, and cumulative effects (Transport Canada et al., 2007). The socio-economic assessment section included factors such as the potential impacts on the local economic activities, the non-permanent nature of employment through the project, and the impacts and usage of infrastructure that local communities also depend on (Transport Canada et al., 2007).

The precautionary principle is explicitly stated in the report for the cumulative impact assessment for grizzly bears (Transport Canada et al., 2007). The federal

authorities also recommend that the precautionary principle be used for the monitoring of aquatic ecosystems (Transport Canada et al., 2007).

The proponent performed an assessment of cumulative effects, and the findings were presented in the proponent's Application and summarized in the comprehensive study report (Transport Canada et al., 2007). The assessment was based on VECs and land use activities in the region, and considered past mining projects in the region since 1964, five future projects listed through the BCEAO, major exploration projects in the area since 2001, and long-term water quality statistics (Transport Canada et al., 2007). The comprehensive study report concluded that with the proposed mitigation strategies, there would be no severe adverse cumulative impacts associated with the mine (Transport Canada et al., 2007).

The Tahltan Central Council, however, raised concerns with the original cumulative impacts assessment, such as the spatial scale and the temporal scale of monitoring water quality being too narrow, and potential impacts on archaeological sites that may have been omitted by the assessment (Transport Canada et al., 2007). The proponent responded to these concerns by adjusting some of the parameters of their monitoring strategies, and explaining some of the reasoning and results of the assessment (Transport Canada et al., 2007).

The federal comprehensive study report discusses the proponent's assessment of residual project effects in their evaluation of the project's impact on various VECs (Transport Canada et al., 2007). Among these, the federal report mentioned that the socio-economic impacts of the mine once it closes will depend on whether the Aboriginal

communities are able to build a sustainable economy with the revenues associated with the mine while it is in operation (Transport Canada et al., 2007).

*FQ5:* The federal-provincial review report also states that a follow-up plan is required, and that the proponent has committed to developing an environmental management system based on ISO 14000 (Transport Canada et al., 2007). The proposed follow-up plan will be adaptive in nature to account for any unforeseen impacts of the project (Transport Canada et al., 2007). The comprehensive study report also recommends development of a post-closure monitoring plan prepared in consultation with the governments of the United States, Canada, British Columbia, and Alaska, as well as the Tahltan Central Council (Transport Canada et al., 2007).

*FQ6:* As stated earlier, the assessment was a joint process between federal authorities and the BCEAO (Transport Canada et al., 2007).

### **Duty to Consult Summary**

Although the comprehensive study report does not specifically mention the duty to consult, the report does outline how both provincial and federal authorities have consulted with the Aboriginal participants (Transport Canada et al., 2007). According to the comprehensive study report, consultation with both federal and provincial authorities will continue into the permitting phase of the project (Transport Canada et al., 2007).

The report also states that the BCEAO would hold discussions with these communities regarding the socio-economic impacts of the project (Transport Canada et al., 2007).

## **Epilogue**

The project received federal approval on June 4, 2007, as the responsible authorities concluded that the project would have no significant adverse effects if mitigation commitments and requirements were met (CEA Agency, 2007). The project also received approval from the BCEAO, though amendments were made to their certificate of approval (BCEAO, 2014b). However, project construction was suspended for economic reasons (Galore Creek Mining Corporation [GCMC], 2014). The project has been redesigned and assessed for economic feasibility (GCMC, 2014) but is not yet proceeding.

## **Kearl Oil Sands Project, Alberta**

### **Background & Context**

The Kearl Oil Sands Project, proposed by Imperial Oil Resources Ventures Limited, involves the construction, operation, and rehabilitation of a four open-pit mines 70 kilometres north of Fort McMurray, Alberta (Kearl Oil Sands Project Joint Review Panel, 2007). The proponent's project EIS was reviewed by a joint review panel established by the Alberta Energy and Utilities Board and the Government of Canada (Kearl Oil Sands Project Joint Review Panel, 2007).

The proponent made agreements with various Aboriginal groups, including the Athabasca Chipewyan First Nation, Clearwater River Cree Band, Wood Buffalo First Nation, Fort McKay First Nation Industrial Relations Corporation, and Mikisew Cree First Nation (Kearl Oil Sands Project Joint Review Panel, 2007). Some of these agreements were made by the time of the panel hearing, though other groups had not fully reached an agreement (Kearl Oil Sands Project Joint Review Panel, 2007). While all of these groups were engaged with the proponent, not all of them participated fully in the EA process (Kearl Oil Sands Project Joint Review Panel, 2007).

### **Application of Framework**

*FQI:* In this case, the Wood Buffalo Métis Locals Association, along with the Clearwater River Cree Band and the Wood Buffalo First Nation, together submitted notices of question of constitutional law related to the duty to consult (Kearl Oil Sands Project Joint Review Panel, 2007). The provincial authorities of Alberta and the federal authorities claimed that these notices were not submitted according to proper protocol and the panel did not have the authority to consider them under the Administrative Procedures and

Jurisdiction Act (Kearl Oil Sands Project Joint Review Panel, 2007). The panel claimed that it had the authority to consider the submitted notices, which regarded section 35 of the Constitution Act of 1982 (Kearl Oil Sands Project Joint Review Panel, 2007).

Two of the Aboriginal groups involved, the Clearwater River Cree Band and the Wood Buffalo First Nation, asserted that they should be recognized as Bands under the Indian Act, and thus were owed the constitutional duty to be consulted by the Crown (Kearl Oil Sands Project Joint Review Panel, 2007). The panel concluded, however, that the Bands were not recognized under the Indian Act, and thus the constitutional duty to consult did not apply (Kearl Oil Sands Project Joint Review Panel, 2007). The Wood Buffalo Métis Locals Association withdrew their submission prior to the panel's review of the question of constitutional law (Kearl Oil Sands Project Joint Review Panel, 2007). *FQ2*: Concerning consultation, the panel quotes the proponent saying that they had been consulting with the general public since the application was filed, held several meetings and aimed to work cooperatively with the project's stakeholders (Kearl Oil Sands Project Joint Review Panel, 2007). The panel report states that the proponent has established several agreements and memoranda of understanding with the Aboriginal groups involved, though some groups still have unresolved issues with the project (Kearl Oil Sands Project Joint Review Panel, 2007). The report also states that the proponent's agreement with the Mikisew Cree First Nation features the group's involvement in the assessment of the monitoring programs, and that the Mikisew Cree First Nation would be able to recommend changes to the programs (Kearl Oil Sands Project Joint Review Panel, 2007).

*FQ3:* The panel report mentions that the CEA Agency provided funding to participants through the Participant Funding Program (Kearl Oil Sands Project Joint Review Panel, 2007).

*FQ4:* The proponent outlined the project's purpose, the need for the project, and alternatives to the project (Kearl Oil Sands Project Joint Review Panel, 2007). The proponent assessed and selected what was in their view the most preferable alternative means of implementing the project; this was done to the satisfaction of the panel (Kearl Oil Sands Project Joint Review Panel, 2007). The panel concluded that there were no viable alternatives to the mining operation proposed by the proponent, though some groups, including some Aboriginals, wanted the project to be delayed (Kearl Oil Sands Project Joint Review Panel, 2007).

Through their review process, the panel also considered “measures to enhance any beneficial environmental effects” (Kearl Oil Sands Project Joint Review Panel, 2007). Besides the economic benefits of the project, the panel report largely discusses the mitigation of adverse environmental impacts (Kearl Oil Sands Project Joint Review Panel, 2007).

The panel report discusses the project's impacts on both the biophysical and human aspects of the environment (Kearl Oil Sands Project Joint Review Panel, 2007).

The precautionary principle in this case is discussed specifically in regards to the Water Management Framework (Kearl Oil Sands Project Joint Review Panel, 2007). While the panel agreed with the provincial government and Fisheries and Oceans Canada that the framework was sufficient, the Athabasca Chipewyan First Nation and the Mikisew Cree First Nation both argued that the framework did not adhere to the

precautionary principle, as there was still a great deal of uncertainty associated with the potential impacts on the Athabasca River (Kearl Oil Sands Project Joint Review Panel, 2007).

The panel report mentions some potential long-term concerns of the project, such as the impacts on the traditional activities and culture of Aboriginals (Kearl Oil Sands Project Joint Review Panel, 2007).

The panel report also discusses some of the cumulative impacts associated with the project (Kearl Oil Sands Project Joint Review Panel, 2007). The panel report also states that the proponent is a member of the Cumulative Effects Management Association (CEMA)<sup>2</sup>, and is a strong supporter of their initiatives (Kearl Oil Sands Project Joint Review Panel, 2007). However, various stakeholders, including the Mikisew Cree First Nation and the Athabasca Chipewyan First Nation, were critical of the CEMA's effectiveness, and cited several shortcomings of the Association and its work (Kearl Oil Sands Project Joint Review Panel, 2007).

The panel concluded that the implementation of this project would be in the best interests of the public, although there is great uncertainty regarding the cumulative impacts of the rapid development of the oil sands, and the panel recommended that this issue be resolved if the oil sands are going to undergo further development (Kearl Oil Sands Project Joint Review Panel, 2007).

*FQ5:* The panel also recommended that the Responsible Authority design a follow-up plan if the project is approved (Kearl Oil Sands Project Joint Review Panel, 2007). The

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<sup>2</sup> The Cumulative Effects Management Association (CEMA) is a group of various stakeholders, including Aboriginals, who monitor and advise provincial and federal governments regarding the cumulative impacts in North-Eastern Alberta (CEMA, 2012).

key items that are to be covered in the follow-up plan are tailings management, surface and groundwater quality and quantity, fish and fish habitat, in-stream flow needs, air emissions, contamination of local food, and reclamation (Kearl Oil Sands Project Joint Review Panel, 2007). The panel states that the plan should be developed in collaboration with the project's stakeholders who may have expertise in certain relevant fields, and that the results should be communicated to the project stakeholders, as well as the broader public (Kearl Oil Sands Project Joint Review Panel, 2007).

*FQ6:* The project was assessed by a joint review panel in order to meet provincial and federal EA requirements (Kearl Oil Sands Project Joint Review Panel, 2007).

### **Duty to Consult Summary**

In this case, a great deal of Aboriginal consultation was performed by the proponent, who signed agreements with many of the participating Aboriginal communities and organizations (Kearl Oil Sands Project Joint Review Panel, 2007). As mentioned earlier, the panel presided over a submission from two Aboriginal groups regarding whether or not the group was owed the constitutional duty to consult by the Crown (Kearl Oil Sands Project Joint Review Panel, 2007). The panel's report also mentions their hearing where Aboriginals were consulted and heard, as well as consultation between Aboriginal participants and the provincial government regarding greenhouse gas emissions (Kearl Oil Sands Project Joint Review Panel, 2007).

### **Epilogue**

The Kearl Oil Sands Project was given federal approval on June 5, 2008, in part on the basis of the panel's conclusion that the project would cause no significant adverse impacts (CEA Agency, 2012c). Production at the site began on April 27, 2013, by which

time the proponent has spent \$220 million in work with local Aboriginal businesses (Imperial Oil, Ltd., 2013).

However, the panel's report and the approval of this project were met with controversy, and the Pembina Institute for Appropriate Development and others took the case before the Federal Court (Chalifour, 2009). The court in its decision in 2008, found that the panel's finding that the project's contribution to greenhouse gases was not a significant adverse effect needed proper justification that was not included in their report (Chalifour, 2009). The Pembina Institute for Appropriate Development and others brought other challenges before the court, which questioned the panel's conclusions regarding the significance of the project's impacts on endangered species, water, and land reclamation (Chalifour, 2009). These challenges were not supported in the court's ruling (Chalifour, 2009). Chalifour (2009) states that this finding failed to apply the precautionary principle properly, as the mitigation strategies mentioned in the report are highly uncertain, and rely on other organizations, such as the Cumulative Effects Management Association, which have not performed well in past projects.

## **Kemess North Copper-Gold Mine, British Columbia**

### **Background & Context**

The Kemess North Copper-Gold Mine project, proposed by Northgate Minerals Corporation, was a proposed mining development six kilometres north of the proponent's existing Kemess South mine (Kemess North Copper-Gold Mine Joint Review Panel, 2007). The proposed mine site is six kilometres north of the original mine, and 450 kilometres northwest of Prince George, British Columbia (Kemess North Copper-Gold Mine Joint Review Panel, 2007). The project would use, modify and expand some of the existing infrastructure, and would have a life expectancy of only eleven years (Kemess North Copper-Gold Mine Joint Review Panel, 2007). The mine underwent assessment by a joint federal-provincial review panel, with the Tse Keh Nay and Gitksan First Nations being consulted through the EA process (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

### **Application of Framework**

*FQI:* Through the consultation, the Talka Lake, Kwadacha, Tsey Keh Dene Aboriginal groups were referred to collectively as the Tse Keh Nay (Kemess North Copper-Gold Mine Joint Review Panel, 2007). These groups were recognized in the *Agreement Concerning the Establishment of the Joint Review Panel*, as they all asserted rights that were near to or within the project area (Kemess North Review Panel, 2007).

The Guidelines for preparation of the EIS in this case, include a section regarding First Nations consultation. It requires the proponent to report the methods of consultation, the concerns raised, and how the proponent will address the concerns raised by First Nations (Kemess North Copper-Gold Mine Joint Review Panel, 2005).

The report mentions that there were complaints from the Aboriginal participants about the unsatisfactory level of consultation with the provincial government (Kemess North Copper-Gold Mine Joint Review Panel, 2007). While the panel heard from these groups to assess and considered the socio-economic impacts the project would have on the Aboriginal communities, the panel explicitly stated in the report that it had no mandate regarding the evaluation of Aboriginal rights (Kemess North Copper-Gold Mine Joint Review Panel, 2007). Although the Aboriginal groups expressed frustration about the limitation of Crown consultation, the panel stated that it accommodated Aboriginal interests within its capacity, such as recommending the delay of the review in order to allow time for the government and Aboriginal groups to negotiate their participation (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

*FQ2:* The panel heard the concerns from the Aboriginal participants through the hearings in 2006 and 2007, where Aboriginals provided oral and written submissions to the panel (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

*FQ3:* The CEA Agency provided a total of \$190,000 to cover the costs of participation for these groups (Kemess North Copper-Gold Mine Joint Review Panel, 2007). As stated above, the panel held several hearings and accepted both oral and written submissions during their assessment process (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

*FQ4:* In this case, the review panel chose to assess the project using an explicit sustainability framework (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

Using the criteria of the Mining Association of B.C.'s annual Sustainability Award<sup>3</sup>, the Mining Association of Canada's Towards Sustainable Mining<sup>4</sup>, and the Mining, Minerals and Sustainable Development global mining initiative's Seven Questions of Sustainability<sup>5</sup>, the panel analyzed the project using five sustainability perspectives: environmental stewardship, economic benefits and costs, social and cultural benefits and costs, fair distribution of benefits and costs, and present versus future generations (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

The panel report discusses the proponent's assessment of alternatives (Kemess North Copper-Gold Mine Joint Review Panel, 2007). The proponent concluded that a large-scale open pit mine was the only viable method to achieve the project's purpose (Kemess North Copper-Gold Mine Joint Review Panel, 2007). The proponent also assessed numerous alternative means of implementing the project, though the panel highlighted the tailings and waste rock disposal system as the most important component of the alternatives assessment (Kemess North Copper-Gold Mine Joint Review Panel, 2007). This involved disposing of the tailings in Duncan/Amazay Lake as the preferred option, which raised concerns from many participants, including Aboriginals (Kemess North Copper-Gold Mine Joint Review Panel, 2007). Use of the lake for tailings storage would likely result in permanent contamination, which would be a significant cultural loss to Aboriginals, a loss of fish habitat, and would require long-term monitoring after

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<sup>3</sup> Mining Association of British Columbia. (2007). *Mining and Sustainability Award Criteria*. Retrieved from <http://www.mining.bc.ca/documents/2007AwardBrochure.pdf>.

<sup>4</sup> Mining Association of Canada. (2007). *Common Ground: Towards Sustainable Mining*. Retrieved from [www.mining.ca/www/Towards\\_Sustaining\\_Mining/index.php](http://www.mining.ca/www/Towards_Sustaining_Mining/index.php).

<sup>5</sup> Mining, Minerals and Sustainable Development North America, (2002). *Seven Questions to Sustainability: How to Assess the Contribution of Mining and Minerals Activities*. Int. Inst. Sustainable Development. ISBN 1-895536-54-5. Retrieved from [www.iied.org/mmsd/mmsd\\_pdfs/145\\_mmsdnamerica.pdf](http://www.iied.org/mmsd/mmsd_pdfs/145_mmsdnamerica.pdf).

the project's completion (Kemess North Copper-Gold Mine Joint Review Panel, 2007). The panel commissioned three independent studies to verify the findings of the proponent, and in the end the panel agreed that the use of the lake was the only economically feasible option to dispose of tailings and waste rock (Kemess North Copper-Gold Mine Joint Review Panel, 2007). There were other options that would result in a lesser impact on the environment; however, these options were deemed unfeasible (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

While the panel stated that the project would yield substantial economic benefits through its operation, whether these benefits outweigh losing a natural lake and performing long-term maintenance on the site is questionable (Kemess North Copper-Gold Mine Joint Review Panel, 2007). They also state that any economic benefits from the mine would not benefit the Aboriginal groups, and that impacts the project will have on Duncan/Amazay Lake and the area downstream from the project had already raised significant concerns and opposition from the nearby Aboriginal communities (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

The proponent was required by the EIS Guidelines to assess the project's potential impacts on a number of biophysical and socio-economic aspects of the environment (Kemess North Copper-Gold Mine Joint Review Panel, 2005). Both biophysical and human aspects of the environment were discussed in the panel report as well (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

The panel report discusses a number of uncertainties associated with the project and its potential impacts, and the panel clearly favoured a more conservative and

precautionary approach to impact prediction and mitigation (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

The EIS guidelines also required an assessment of the cumulative and residual impacts of the project, as well as the impacts on renewable resource use (Kemess North Copper-Gold Mine Joint Review Panel, 2005).

The panel report discusses the proponent's cumulative effects assessment for the project, which the panel deemed satisfactory (Kemess North Copper-Gold Mine Joint Review Panel, 2007). The assessment was based on five VECs, which were wilderness resources, water resources, locally significant ecosystem resources, wildlife resources, and fisheries resources (Kemess North Copper-Gold Mine Joint Review Panel, 2007). With all of these aspects pertaining to the biophysical environment, there was an evident lack of consideration of cumulative socio-economic and cultural impacts in the assessment.

The assessment considered past land and current land uses in the area, such as the Kemess South Mine Project, two mining operations that ceased in 1992, traditional land use, recreational use, hunting, and past mining explorations (Kemess North Copper-Gold Mine Joint Review Panel, 2007). They conclude that there is no significant chance of adverse cumulative impacts resulting from the project beyond the significant adverse effects of the project itself (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

*FQ5:* The guidelines required the proponent to outline and develop a follow-up program in order to verify and evaluate the predictions and mitigation measures in the EA (Kemess North Copper-Gold Mine Joint Review Panel, 2005).

The panel weighed the pros and cons in terms of the impact the project would have on future generations, and noted that the long-term site management needs and risks of contamination associated with the project would leave a negative legacy for future generations to inherit (Kemess North Copper-Gold Mine Joint Review Panel, 2007). The panel ultimately concluded that proposed project would have significant adverse effects, particularly for Aboriginal communities and future generations, and would not be in the public's best interests (Kemess North Copper-Gold Mine Joint Review Panel, 2007). The panel did note that if the project were approved, an extensive follow-up program should be implemented, which would present an opportunity to collaborate and involve the Aboriginal groups impacted by the project (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

The panel report states that the proposed mitigation measures and follow-up strategies include long-term water treatment, monitoring and maintenance of the tailings dams constructed for the project, and re-establishing wildlife habitat (Kemess North Copper-Gold Mine Joint Review Panel, 2007). The panel also noted the project's long-term implications, as well as follow-up measures, in each appropriate section throughout the report (Kemess North Copper-Gold Mine Joint Review Panel, 2007). There are also recommendations for the proponent and governments to collaborate with relevant stakeholders, such as the Aboriginal communities, where appropriate (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

*FQ6:* The project was reviewed by a joint review panel in order to meet both federal and provincial EA requirements (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

## **Duty to Consult Summary**

In addition to the panel hearings held in 2006 and other public consultation opportunities through the EA process, the Aboriginal participants were also consulted by provincial and federal authorities, as well as the proponent (Kemess North Copper-Gold Mine Joint Review Panel, 2007). The Aboriginal participants also received funding from the CEA Agency to cover the expenses of participating in the EA process (Kemess North Copper-Gold Mine Joint Review Panel, 2007). However, the panel reports that the Aboriginal participants found the consultation process unsatisfactory, and raised concerns about the inadequate funding and consultation efforts by the provincial and federal governments (Kemess North Copper-Gold Mine Joint Review Panel, 2007).

## **Epilogue**

The panel concluded that the project would have severe adverse impacts on the environment and nearby Aboriginal communities, leading to the project's rejection by both federal and provincial authorities (Ministry of Environment & Fisheries and Oceans Canada, 2008; CEA Agency, 2012a).

However, a significantly revised project for the same orebody has been proposed by AuRico Gold Inc. The new project, called the Kemess Underground Project, is currently under assessment by the BCEAO, which assumed responsibility for the EA after process substitution was approved by the federal minister (CEA Agency, 2014c).

## **Mount Milligan Gold-Copper Mine, British Columbia**

### **Background & Context**

Proposed by Terrane Minerals Corporation, the Mount Milligan Gold-Copper Mine consists of an open pit mine 155 kilometres north of Prince George, British Columbia (Fisheries & Oceans Canada [DFO] & Natural Resources Canada [NRCan], 2009). Both the BCEAO and the federal authorities, with Fisheries and Oceans Canada and Natural Resources Canada as responsible authorities, engaged in an initially cooperative EA process, although the BCEAO withdrew from the cooperative process and issued their approval before the federal authorities completed their assessment review (DFO & NRCan, 2009).

The McLeod Lake First Nations, West Moberly First Nations, and Halfway River First Nations were the Aboriginal groups engaged in the consultation process through a Technical Working Group, while the Nak'azdli First Nation declined the BCEAO's invitation to participate in the group (DFO & NRCan, 2009).

### **Application of Framework**

*FQI*: The proposed mine was located in lands that were claimed by the McLeod Lake First Nation, under Treaty 8, as well as the Nak'azdli First Nation (BCEAO, 2009c). The land was also the subject of court litigation between the federal and provincial governments and First Nations that had signed Treaty 8 regarding the western boundary of the claimed territory (DFO & NRCan, 2009). The BCEAO, which was acting as a Crown authority (BCEAO, 2009c), offered each of the four First Nations “deep consultation” in accordance with the spectrum established in the *Haida* ruling, which

would involve holding meetings and seeking to accommodate their concerns (DFO & NRCan, 2009).

The Nak'azdli First Nation expressed concerns about the adequacy of the EA process in meeting the duty to consult and accommodate (BCEAO, 2009c). The BCEAO report states that the Nak'azdli First Nation wanted to establish a joint EA process with the BCEAO, which would lead to a decision on whether the project should proceed or not and if so, under what conditions (BCEAO, 2009c). The BCEAO replied that it would be beyond the authority of the BCEAO to issue a “go/no go” decision for the project, and that this type of shared decision-making process would not be a part of the duty to consult (BCEAO, 2009c). Though the BCEAO continued to share and gather information from the Nak'azdli First Nation, the Nak'azdli felt that the EA process was inadequate in meeting the duty to consult and accommodate and declined the invitation to participate in the Technical Working Group (BCEAO, 2009c; DFO & NRCan, 2009).

One First Nation, the Tsay Keh Dene Band, had traditional territory located fifty kilometres downstream from the project area, and raised concerns about not being consulted in the EA process (DFO & NRCan, 2009). But the BCEAO stated that their concerns of downstream pollution were being addressed in the cooperative EA process already, and that consultation with them was not necessary (DFO & NRCan, 2009). The federal authorities, however, corresponded with the Tsay Keh Dene Band, along with the Takla Lake First Nation and the Métis BC Nation, through the federal EA process, and also received submissions from the Nak'azdli First Nation (DFO & NRCan, 2009).

*FQ2:* Through the provincial consultation procedure, public consultation was performed for thirty days in early 2008 to allow for comments on the draft Terms of Reference

(BCEAO, 2009c). There was also a forty-five day comment period, as well as open houses in four communities, to allow for public input regarding the proponent's EIS later in 2008 (BCEAO, 2009c).

The federal authorities also accepted public comments regarding the proponent's EIS until May 27, 2009 (DFO & NRCan, 2009).

*FQ3:* The proponent provided funding for a traditional and contemporary land use study with the Nak'azdli First Nation through their consultation with the Aboriginal communities (DFO & NRCan, 2009), in addition to funding for the McLeod Lake First Nation to participate in their workshops and other consultations (BCEAO, 2009c). While funding was discussed between Aboriginal communities and the federal government, the comprehensive study report does not specify if funding was actually provided (DFO & NRCan, 2009). The report prepared by the BCEAO states that funding was provided to the McLeod Lake First Nation to participate during the pre-application and review stages, as well as to the West Moberly and Halfway River First Nations during the pre-application phase (BCEAO, 2009c).

*FQ4:* The federal report discusses the proponent's assessment of both alternatives to the project and alternative means of implementing the project (DFO & NRCan, 2009). The three alternatives to the project that were assessed were implementing the project in the near future as proposed, delaying the project until more favourable market conditions arise, or forgoing the project (DFO & NRCan, 2009). The federal report also summarizes the proponent's assessment of alternative means of implementing the project, as well as the options that were chosen (DFO & NRCan, 2009). The BCEAO states that the assessment of alternatives was a required component of the federal EA process and that

they would be discussed in the federal report; the proponent's assessment of alternatives is not discussed in the provincial report (BCEAO, 2009c).

According to the proponent and various participants in the EA process, the project is anticipated to have economic benefits for the region, though the rest of the report largely discusses mitigation as opposed to positive contributions (DFO & NRCan, 2009). The proponent was in the process of negotiating a socio-economic benefits agreement during the time of the report, and was discussing training, employment, and revenue sharing, as well as the funding of a new health centre with the McLeod Lake First Nation (BCEAO, 2009c).

The federal comprehensive study report assesses both biophysical and human aspects of the environment, including traditional land use, archaeological and heritage resources (DFO & NRCan, 2009). Since the assessment used the federal definition of environmental effect, the socio-economic effects that were assessed are largely indirect impacts (i.e. socio-economic effects that result from biophysical effects).

The BCEAO report also assesses both biophysical and human aspects of the environment (BCEAO, 2009c). The BCEAO report also features a specific socio-economic impacts section, which assesses the socio-economic conditions and potential impacts of the project in more detail than the federal report (BCEAO, 2009c).

Neither the provincial nor federal report explicitly mentions the precautionary approach, though both reports include provisions for a follow-up and monitoring plan and an assessment of the effects of an accident or malfunction (BCEAO, 2009c; DFO & NRCan, 2009).

The comprehensive study report reviews the proponent's cumulative impacts assessment for this project, and evaluates each VEC in its own table (DFO & NRCan, 2009). The VECs included human activities that may be impacted by changes in the biophysical environment due to the project (DFO & NRCan, 2009). These tables feature an analysis of the past, present, and future activities that may have an impact on each VEC, as well as any residual effects, their duration and extent, the rationale for assessment, and how the proposed project would contribute to each effect (DFO & NRCan, 2009). The spatial boundaries were defined in local and regional study areas and were adjusted depending on the geographic extent of each activity, and the temporal boundaries extended into the post-closure phase of the mine to the point where the same conditions as before the project were expected to be established (DFO & NRCan, 2009). The report states that besides forestry activities and the Pinchi Lake Mercury Mine that closed in 1975, there are no other significant industrial activities in the project area (DFO & NRCan, 2009). Foreseeable activities that were considered by the proponent were the Mackenzie Green Energy Centre, a proposed road upgrade, and the logging and management of forests impacted by the Pine Beetle (DFO & NRCan, 2009).

*FQ5:* For each aspect discussed in the federal report, there is a section outlining the residual impacts on each component of the environment assessed (DFO & NRCan, 2009). There is also a section outlining a monitoring and follow-up plan, which covers the closure and post-closure phases of the mine (DFO & NRCan, 2009). The proposed program only covers biophysical aspects of the environment, and not any potential socio-economic or cultural repercussions for the Aboriginal communities involved (DFO &

NRCan, 2009). Monitoring provisions are also outlined in the BCEAO report (BCEAO, 2009c).

*FQ6:* The EA process consisted of an initially cooperative EA review between the BCEAO and federal authorities, though in the end each level of government produced its own review report and made its own decision regarding project approval and implementation (DFO & NRCan, 2009). The federal comprehensive report was completed after the BCEAO withdrew from the cooperative assessment process (DFO & NRCan, 2009).

### **Duty to Consult Summary**

According to the BCEAO report, the proponent conducted consultation activities with the Aboriginal communities, which included learning what Aboriginal rights were asserted, how they may be impacted by the project, and how these impacts could be mitigated (BCEAO, 2009c). Both provincial and federal authorities, as well as the proponent, consulted with the Aboriginal participants throughout the formal EA process (BCEAO, 2009c; DFO & NRCan, 2009).

### **Epilogue**

On December 11, 2009, the CEA Agency concluded that the project would have no significant adverse impacts and the Minister issued approval for the Mount Milligan Mine (CEA Agency, 2009). The project also received approval from the BCEAO (BCEAO, 2009b), though the certificate underwent amendments, and submissions and comments were received from the public, Aboriginals, and the proponent (BCEAO, n. d. b). The phased start-up began on August 15, 2013 (Thompson Creek Metals Company Inc., 2014).

## **Joslyn North Mine Project, Alberta**

### **Background & Context**

The Joslyn North Mine Project features an oil sands surface mine, as well as ore preparation and bitumen extraction facilities 70 kilometres north of Fort McMurray, Alberta (Joslyn North Mine Project Joint Review Panel, 2011). The project was proposed by Total E&P Joslyn Limited, and underwent an assessment review by a joint Canada-Alberta review panel (Joslyn North Mine Project Joint Review Panel, 2011). The Mikisew Cree First Nation, Fort MacKay First Nation, and Athabasca Chipewyan First Nation dealt with the proponent directly regarding their project-related concerns, having withdrawn their concerns from the panel's hearing process (Joslyn North Mine Project Joint Review Panel, 2011). The panel report notes that these groups were engaging in negotiations to sign agreements with the proponent (Joslyn North Mine Project Joint Review Panel, 2011).

### **Application of Framework**

*FQI:* In this case, much of the evidence regarding the impacts of the project on traditional land use was untested by participants in the panel hearings, since the Mikisew Cree First Nation, Athabasca Chipewyan First Nation, and Fort McKay First Nations withdrew from the panel's hearing (Joslyn North Mine Project Joint Review Panel, 2011). The proponent stated that based its own consultation and engagement with the Aboriginal communities involved, the project was unlikely to affect traditional activities, or that any impacts would be appropriately mitigated (Joslyn North Mine Project Joint Review Panel, 2011). The proponent also stated that the Aboriginal groups that withdrew

from the panel's hearings did not object to the project (Joslyn North Mine Project Joint Review Panel, 2011).

The panel report also stated that the Mikisew Cree First Nation recommended the use of IBAs as "a pre-condition of regulatory approval" (Joslyn North Mine Project Joint Review Panel, 2011). The panel report states that several Aboriginal groups had signed agreements with the proponents and withdrew objections regarding the project (Joslyn North Mine Project Joint Review Panel, 2011).

The panel concluded that these groups still held concerns regarding the development of the oil sands and the cumulative impacts of the various projects being implemented in the region (Joslyn North Mine Project Joint Review Panel, 2011).

*FQ3:* The CEA Agency provided funding to the Clearwater River Paul Cree Band, the Non-Status Fort McMurray Band Descendants, and the Off-Reserve Fort McMurray Band in order to participate in the EA process (Joslyn North Mine Project Joint Review Panel, 2011). Funding was also provided to the Athabasca Chipewyan First Nation, the Mikisew Cree First Nation, the Meadow Lake Tribal Council, the Prince Albert Grand Council, the Fort McMurray First Nation Industrial Relations Corporation, and the Chipewyan Prairie Dene First Nation by the CEA Agency, as these groups "planned to consult with the federal government and participate in the public hearing" (Joslyn North Mine Project Joint Review Panel, 2011).

The proponent also provided funds to the Athabasca Chipewyan First Nation in order to gather traditional ecological knowledge and conduct a land use study (Joslyn North Mine Project Joint Review Panel, 2011). These studies were ongoing at the time of

the panel's report, and the full implications for the Aboriginal participants were not yet definitive (Joslyn North Mine Project Joint Review Panel, 2011).

*FQ4:* The Terms of Reference for the joint review in this case were prepared by Alberta Environment (2005). The Terms of Reference state that the proponent's EIS must meet both provincial and applicable federal requirements (Alberta Environment, 2005).

The proponent was also required to assess alternative options for the project, including alternative projects that would fulfill the project's stated purpose (Alberta Environment, 2005). This would also include providing a rationale for the options that were chosen (Alberta Environment, 2005).

The panel report discusses both alternatives to the project and alternative means of implementing the project (Joslyn North Mine Project Joint Review Panel, 2011). In this case, the proponent stated that the fuel would be needed by society in the future, as alternative energy sources cannot satisfy the energy needs of society in a short and medium-term timeframe (Joslyn North Mine Project Joint Review Panel, 2011). The panel concluded that the project would satisfy this societal need and provide an economic opportunity for Alberta and Canada (Joslyn North Mine Project Joint Review Panel, 2011).

The proponent also assessed alternative means of implementing the project, and provided reasoning for the options that were selected (Joslyn North Mine Project Joint Review Panel, 2011). The panel agreed with the conclusions of the proponent (Joslyn North Mine Project Joint Review Panel, 2011).

The proponent was also required to discuss the project's anticipated socio-economic benefits, though the rest of the Terms of Reference requires the proponent to

outline the project's anticipated impacts and how these will be mitigated (Alberta Environment, 2005). The panel report states that the project would yield economic benefits, though the rest of the panel report discusses the mitigation of adverse impacts to the environment (Joslyn North Mine Project Joint Review Panel, 2011).

The proponent was required by the Terms of Reference for the Environmental Impact Assessment (EIA) report to address both the environmental and socio-economic impacts of the project, including cumulative and residual impacts (Alberta Environment, 2005). The panel report considered both the biophysical and socio-economic impacts of the project (Joslyn North Mine Project Joint Review Panel, 2011).

In applying the precautionary approach, the panel specifically mentioned the approach in relation to habitat loss, the impacts on species at risk, and the threshold for maintenance of minimum water flow in the Athabasca River (Joslyn North Mine Project Joint Review Panel, 2011).

In terms of the long-term implications of the project, the proponent was required to discuss the long-term output and disposal of waste from the project, the impacts of removing groundwater, and any residual effects resulting from the project (Alberta Environment, 2005).

The EA considered the project's cumulative impacts on air quality, water quality and quantity, wildlife and wildlife habitat of key species, and traditional use of the land and resources (Joslyn North Mine Project Joint Review Panel, 2011). The Oil Sands Environmental Coalition, the Sierra Club Prairie, the Government of Canada, and the Fort MacKay First Nation raised concerns regarding the adequacy of the proponent's assessment of cumulative impacts, with some of these concerns being shared by the panel

(Joslyn North Mine Project Joint Review Panel, 2011). Environment Canada suggested that a Lower Athabasca Regional Plan be developed and implemented in order to help monitor and regulate the cumulative impacts of the various projects in the region (Joslyn North Mine Project Joint Review Panel, 2011). Despite its doubts about accuracy in the proponent's assessment of cumulative impacts, the panel concluded that along with material submitted by other stakeholders, it can draw suitable conclusions regarding the cumulative impacts of the project (Joslyn North Mine Project Joint Review Panel, 2011).

*FQ5:* The panel recommended that a follow-up and monitoring plan be developed by Alberta Environment, Alberta Sustainable Resource Development, and Environment Canada as needed (Joslyn North Mine Project Joint Review Panel, 2011). The plan is to be implemented by either the proponent or the Cumulative Environmental Management Association, and should adopt adaptive management measures as needed (Joslyn North Mine Project Joint Review Panel, 2011).

*FQ6:* The project was assessed by a joint review panel in order to meet provincial and federal EA requirements (Joslyn North Mine Project Joint Review Panel, 2011).

### **Duty to Consult Summary**

In this case, much of the Aboriginal consultation was performed by the proponent, who signed agreements with many of the Aboriginal participants (Joslyn North Mine Project Joint Review Panel, 2011). However, the federal government also provided funding for Aboriginal groups to consult with federal authorities (Joslyn North Mine Project Joint Review Panel, 2011).

## **Epilogue**

The project received approval from the federal authorities on December 8, 2011 (CEA Agency, 2012b). The project was expected to begin production in 2020 (Total E&P Canada Ltd., n. d.). However, the project was indefinitely postponed in May 2014 (Tait, 2014).

## **Detour Lake Gold Mine, Ontario**

### **Background & Context**

The Detour Lake Gold Mine was proposed by Detour Gold Corporation (CEA Agency, 2011b). The project as reviewed included an open-pit mine 185 kilometres northwest of Cochrane, Ontario by road, along with an ore processing facility, tailings and waste rock storage facilities, and other associated infrastructure (CEA Agency, 2011b). The project underwent a comprehensive study coordinated by the CEA Agency, with regulatory decisions required from Fisheries and Oceans Canada and Natural Resources Canada, and advice from Environment Canada, Transport Canada, Health Canada, and Aboriginal Affairs and Northern Development Canada (CEA Agency, 2011b).

During the consultation for the preparation of the comprehensive study report, the six Aboriginal groups that participated were the Moose Cree First Nation, Taykwa Tagamou Nation, Wahgoshig First Nation, Métis Nation of Ontario, Timmins Métis, and Northern Lights Métis Community Councils (CEA Agency, 2011b). Detour Gold Corporation also negotiated impact and benefit agreements (IBAs) with three of these communities, as well as a memorandum of understanding with Métis Nation of Ontario (CEA Agency, 2011b).

### **Application of Framework**

*FQI:* The six Aboriginal groups (the Moose Cree First Nation, Taykwa Tagamou Nation, Wahgoshig First Nation, Métis Nation of Ontario, Timmins Métis, and Northern Lights Métis Community Councils) that participated in the consultations all had land claims or treaty rights might be impacted by the project (CEA Agency, 2011b). To address these concerns, Detour Gold signed IBAs with multiple groups and a

memorandum of understanding with the Métis Nation of Ontario (CEA Agency, 2011b). The proponent also stated that it would hire cultural monitors from the Aboriginal groups in order to monitor and protect any culturally significant sites encountered through the course of the project (CEA Agency, 2011b).

*FQ2:* Public consultation in this case was held at three stages: firstly at the start of the process to comment on the conduct of the study, secondly to comment on the environmental effects during the study, and lastly to comment on the findings and recommendations of the draft report (CEA Agency, 2011b). In meeting the duty to consult, the report states that the CEA Agency operated as the consultation coordinator (CEA Agency, 2011b).

The comprehensive study report features an appendix with a table listing the concerns raised by the Aboriginal communities through the EA process (CEA Agency, 2011b). Among the reported concerns was that the comprehensive study report would be completed and released without time to consider and incorporate the concerns of the Moose Cree First Nation (CEA Agency, 2011b). The table states that a presentation was made in Moose Factory and that these concerns were incorporated into the EA (CEA Agency, 2011b). Also reported in this table, however, was a concern about the proponent beginning construction on the site prior to the completion of the EA, which the Agency stated was the construction of project components which did not require federal permits (CEA Agency, 2011b).

*FQ3:* The consultation by the CEA Agency was held at the three formal stages mentioned above, which allowed for Aboriginal comments to be received and considered at these three stages of the EA process (CEA Agency, 2011b). In addition, the CEA Agency

addressed Aboriginal concerns by contacting and clarifying concerns with the participating communities and organizations through various means of communication (CEA Agency, 2011b). The proponent also conducted their own consultation with the Aboriginal communities, which included providing funding and resources for traditional land use and knowledge studies (CEA Agency, 2011b). The report also states that funding was provided by the CEA Agency through the Participant Funding Program to Moose Cree First Nation, Taykwa Tagamou Nation, Wahgoshig First Nation, and the Métis Nation of Ontario (CEA Agency, 2011b).

*FQ4:* The comprehensive study report discusses the three alternatives to the project as considered by the proponent: proceed with the project in the short-term as proposed, delay the project until more favourable economic circumstances arise, or forgo the project (CEA Agency, 2011b). The assessment concluded that the best method of achieving the project's purpose would be to proceed with the project as planned (CEA Agency, 2011b).

The proponent also considered various alternative means of implementing the project (CEA Agency, 2011b). The evaluation and selection of the preferable alternative means was considered satisfactory by both the CEA Agency and Environment Canada (CEA Agency, 2011b).

The mine promised economic benefits for the area through training and hiring Aboriginal workers and utilizing local suppliers and services (CEA Agency, 2011b). Besides this, there would be no positive impacts for the environment, and the negative impacts on the biophysical environment would likely impact the traditional activities of the Aboriginal communities, such as trapping and fishing (CEA Agency, 2011b). The

report states that these negative impacts should be minimal and can be reversed once the mine closes (CEA Agency, 2011b).

The environmental effects covered in the comprehensive study report include effects on air quality, noise, and greenhouse gas emissions; local watercourses, lakes, and wetlands; groundwater; terrestrial environment; species-at-risk; land and resource use; traditional land uses; public health and safety; cumulative effects; effects of accidents and malfunctions; capacity of renewable resources to meet present and future needs; and effects of the environment on the project (CEA Agency, 2011b). While some socio-economic factors are considered, the assessment follows the federal requirements in that direct socio-economic impacts do not require assessment (CEA Agency, 2011b).

The proponent stated that their site management plan will be structured based on the precautionary principle (CEA Agency, 2011b).

The comprehensive study report also discusses the government reviewers' conclusions regarding the significance of any residual environmental impacts for each environmental effect (CEA Agency, 2011b). These residual effects were also considered in the development of the follow-up and monitoring plan, and each effect is discussed in greater detail in tables in the appendices of the comprehensive study report (CEA Agency, 2011b).

A cumulative effects assessment was included in the proponent's EIS submission and was reviewed in the comprehensive study, which was focused on the valued ecosystem components (VECs) and valued socio-economic components (VSECs) related to the project (CEA Agency, 2011b). It considered any past, current, and reasonably foreseeable activities in the area, such as a previous mining operation or a potential

expansion to the mine (CEA Agency, 2011b). The past activities in the area mentioned in the assessment include hunting, trapping, forestry, fishing, and the past mining operation that the proposed will be built upon (CEA Agency, 2011b). The proponent's assessment concludes that there are not likely to be any significant cumulative impacts associated with the project, even when considering the 2012-2022 Abitibi River Forest Management Plan (CEA Agency, 2011b). However, other federal authorities expressed concerns regarding the consideration of potential expansion to the project, though the CEA Agency concluded that there should be no significant impacts if the mine were expanded (CEA Agency, 2011b). In comparison to various other assessments, the cumulative effects assessment in this case was rather brief, and did not provide the same amount of detail in outlining and justifying the boundaries of the assessment, or the VECs that were assessed.

*FQ5:* The comprehensive study report discusses the establishment of a follow-up plan, which would be developed in consultation and engagement with the involved Aboriginal communities, along with various government agencies and the proponent (CEA Agency, 2011b). The follow-up monitoring would be intended to indicate any adverse impacts that arise and the effectiveness of the chosen mitigation measures (CEA Agency, 2011b). In particular, the monitoring program would identify any impacts on VECs such as water resources, the terrestrial environment, local resources, and traditional activities (CEA Agency, 2011b).

Aside from the follow-up plan, the report devotes little attention to the legacy impacts of the mine in terms of the economic implications for the Aboriginal communities (CEA Agency, 2011b). While the project may enhance the local economy

through the course of the mine's operation, there is no mention of boom-and-bust effects at mine closure (CEA Agency, 2011b), though it is possible that such matters were discussed between the proponent and the Aboriginal communities in negotiation of the IBAs. The decommissioning measures outlined in the report include rehabilitating the open pit mine, dismantling the buildings and other infrastructure associated with the mine, and monitoring acid rock drainage and the tailings dams (CEA Agency, 2011b).

*FQ6:* No provincial assessment was performed for the overall project.

### **Duty to Consult Summary**

In addressing the duty to consult, the comprehensive study report states the following:

The federal government has a duty to consult and, where appropriate, to accommodate, when it has knowledge that its proposed conduct might adversely impact an established or potential Aboriginal or Treaty right. Aboriginal consultation is also undertaken more broadly as an important part of good governance and sound policy development and decision making. In addition to the federal government's broader obligations, the Act requires that all federal EAs consider the effect of any project-related change in the environment, and also the effect of that change on current use of land and resources for traditional purposes by Aboriginal peoples. The Act also requires consideration of the effect of any project-related change in the environment on physical and cultural heritage, as well as "any structure, site, or thing that is of historical, archaeological, paleontological or architectural significance," such as sites historically occupied by Aboriginal peoples.

For the purposes of this comprehensive study, the Agency served as Crown consultation coordinator and conducted the Aboriginal consultation in a manner that was integrated with the EA process. (CEA Agency, 2011b).

This statement has been used in other federal comprehensive study reports, such as the Donkin Coal Project (CEA Agency, 2013h). This was the first case in this study in which this statement appeared, and it has appeared in each federal comprehensive study report in this study since. As stated earlier, the proponent consulted with the Aboriginal participants as well, and this information was used in the comprehensive study report (CEA Agency, 2011b). The proponent also signed IBAs with a few of the Aboriginal groups involved in the EA process (CEA Agency, 2011b). The IBA that was signed with the Métis Nation of Ontario is stated to provide employment and training opportunities, as well as education and a scholarship program with Northern College and College Boreal (Métis National Council, 2012). The article states that the agreement was finalized in January 2012 (Métis National Council, 2012), which is after the release of the comprehensive study report and federal approval in 2011.

## **Epilogue**

The Detour Lake Gold Mine Project received approval from the federal authorities in December 2011, as it was determined that there would be no significant adverse effects resulting from the project (CEA Agency, 2011a). The project began development on 2011, and production began in 2013 (Detour Gold Corporation, 2012).

## **Prairie Creek Mine, Northwest Territories**

### **Background & Context**

The Prairie Creek Mine Project proposes the construction of an underground lead zinc mine near the Nahanni National Park Reserve in the Northwest Territories (Mackenzie Valley Review Board [MVRB], 2011). The project was proposed by Canadian Zinc Corporation (MVRB, 2011). The MVRB was required to conduct an EA to assess the impacts of the project (MVRB, 2011).

In this case, the Aboriginal groups that were involved in the EA process were the Nahanni Butte Dene Band, the Liidlii Kue First Nation, and the Dehcho First Nation (MVRB, 2011).

### **Application of Framework**

*FQI:* In this case, the MVRB report does not discuss the duty to consult, and does not mention any Aboriginal land claims (MVRB, 2011). However, under the Mackenzie Valley Resource Management Act, the half of the MVRB is appointed by the Aboriginal groups covered by the Act (Government of Canada: Aboriginal Affairs and Northern Development Canada, 2010b). The proponent conducted a socio-economic impact assessment, which appears as an appendix in their Developer's Assessment Report (MVRB, 2011). In addition, a traditional knowledge assessment was conducted and submitted by the Nahanni Butte Dene Band (MVRB, 2011).

The proponent states in their socio-economic impact assessment that a similarity between this project and the diamond mining activities in the region is that there are deposits within an area involving on-going Land Claim negotiations (Canadian Zinc Corporation, 2010). Besides this statement, there is little discussion of Aboriginal titles or

land claims (Canadian Zinc Corporation, 2010). The proponent's assessment also mentions the negotiation of IBAs with the Aboriginal participants (Canadian Zinc Corporation, 2010).

The proponent's assessment report was not fully accepted by the other participants in the EA process, however. A submission from the Nahanni Butte Dene Band presents some criticisms and concerns the band had with the proponent's socio-economic impact assessment, as well as other sections of the Developer's Assessment Report (Nahanni Butte Dene Band, 2010). One of these concerns was that the Band's approval of the project depended on the appropriate mitigation of adverse impacts and the signing of an IBA, which was not stated in the proponent's report (Nahanni Butte Dene Band, 2010). Also among their criticisms were that the proponent outlined the Aboriginals' current living conditions as quite poor, and that the mine will be of enormous benefit to the community (Nahanni Butte Dene Band, 2010). The Band felt that both these assertions were inaccurate representations of the actual conditions (Nahanni Butte Dene Band, 2010).

*FQ2:* The public consultation opportunities mentioned in the EA report were through information requests and technical sessions held in Yellowknife, as well as a public hearing (MVRB, 2011). All three Aboriginal groups that were parties in the EA process participated in both the hearing and the technical sessions and/or made written submissions according to the MVRB report (MVRB, 2011).

*FQ3:* There is no mention of funding in the EA report (MVRB, 2011).

*FQ4:* The terms of reference state that the proponent must discuss alternative means of implementing the project, as well as research and provide justification for each selected

option, in their Developer's Assessment Report (MVRB, 2009). The MVRB report features the proponent's assessment of alternative components of the project that were available, as well as which option was chosen and the advantages of each selection (MVRB, 2011).

To help ensure positive outcomes from the project, the MVRB's terms of reference in this case state that the chosen mitigation and monitoring strategies must aim to maximize the benefits from the project as well as mitigating the project's adverse impacts on the environment (MVRB, 2009). These are to be chosen by consulting and engaging with local communities, as well as responsible government agencies (MVRB, 2009).

The MVRB report states that the proponent is negotiating IBAs with the Aboriginal participants in order to ensure the communities receive economic benefits from the project (MVRB, 2011). Aside from the economic benefits of the project, the rest of the EA report discusses the mitigation of adverse impacts (MVRB, 2011).

Under NWT EA law, the terms of reference required the proponent to assess the project's potential impacts on both the biophysical and human aspects of the environment (MVRB, 2009). Although the MVRB report examines both biophysical and human aspects of the environment, the project's impacts on the human environment do not receive as much attention as the impacts on the biophysical environment (MVRB, 2011).

The precautionary principle was specifically applied to preserving the integrity of the aquatic ecosystems within the Nahanni National Park Reserve, as well as the water quality for the nearby communities (MVRB, 2011). This particularly demands extreme caution when storing harmful tailings and waste rock from the project (MVRB, 2011).

The proponent is also required to prepare a Closure and Reclamation Plan for the project, which is to be developed with input from local communities and other project stakeholders (MVRB, 2009). In this case, there is particular concern for the long-term impacts on groundwater, as well as acid mine drainage or leaching from the mine or other project infrastructure (MVRB, 2009).

In this case, recommendations for the long-term assessment and monitoring of the project's impacts in the EA report focused heavily on the preservation of water quality in the area (MVRB, 2011). This included an adaptive management strategy for the preservation of water quality, as well as provisions for the storing of tailings and waste rock (MVRB, 2011). The EA report states that the proponent is developing an Aquatic Effects Management Plan in collaboration with Parks Canada and a technical advisory group, whose members are not identified in the EA report (MVRB, 2011).

The MVRB report does not discuss the cumulative impacts of the project (MVRB, 2011). However, the proponent was required to assess cumulative impacts according to the EIS Guidelines (MVRB, 2009).

*FQ5:* The MVRB report discusses monitoring provisions for water quality, spills along the transportation routes, wildlife impacted by the transportation routes through the Wildlife Mitigation and Monitoring Plan, and tailings and waste rock (MVRB, 2011).

The proponent has committed to collaborating with Aboriginals and regulatory authorities where appropriate in their monitoring plans (MVRB, 2011).

*FQ6:* No federal review was conducted for this project, although numerous federal authorities, such as Aboriginal Affairs and Northern Development Canada, Parks Canada,

Environment Canada, Transport Canada, and Natural Resources Canada, were parties in the MVRB's EA process (MVRB, 2011).

### **Duty to Consult Summary**

Though the duty to consult was not specifically mentioned in this case, Aboriginal participants were consulted through the EA process by means of technical sessions, written submissions, and a public hearing (MVRB, 2011). A traditional knowledge assessment was also submitted by the Nahanni Butte Dene Band to inform the EA process (MVRB, 2011). The proponent also negotiated IBAs with Aboriginal communities to ensure the reception of economic benefits from the project (MVRB, 2011). Statements from the chiefs of the bands who signed these agreements indicated that the IBAs would provide environmental protection, employment opportunities, training and education (Canadian Zinc Corporation, 2015). The two IBAs listed on the proponent's website are dated in January and June of 2011 (Canadian Zinc Corporation, 2015), which are both before the release of the EA report in December 2011, and the federal decision in 2012.

### **Epilogue**

The responsible federal authorities submitted a letter to the MVRB in response to the Board's EA report, stating that they agreed with their conclusions that the project would have no significant adverse impacts and that no further assessment was required (Duncan, 2012). The proponent states that development of the project has begun and that most of the necessary infrastructure has been constructed (Canadian Zinc Corporation, 2014).

## **The Midwest Uranium Mining and Milling Project, Saskatchewan**

### **Background & Context**

The Midwest Project, proposed by AREVA Resources Canada Incorporated, is an expansion to the company's existing McClean Lake Operation in northern Saskatchewan (Canadian Nuclear Safety Commission [CNSC] et al., 2012). The project would include the construction of an open-pit uranium mine, along with the necessary infrastructure to transport the uranium to an existing mill and manage the waste from the operation (CNSC et al., 2012). A comprehensive study to review the proponent's assessment of the impacts of the project was performed by the Canadian Nuclear Safety Commission, Fisheries and Oceans Canada, Transport Canada, and Natural Resources Canada, in consultation with Health Canada, Environment Canada, Aboriginal Affairs and Northern Development Canada, and the Saskatchewan Ministry of the Environment (CNSC et al., 2012).

Numerous Aboriginal groups and communities were invited to engage in the process, including the Hatchet Lake Denesuline First Nation, Black Lake Denesuline First Nation, Fond du Lac Denesuline First Nation, Northern Settlement of Camsell Portage, Northern Settlement of Wollaston Lake, Northern Settlement of Uranium City, Northern Hamlet of Stony Rapids, Prince Albert Grand Council, Métis Nation of Saskatchewan, Peter Ballantyne Cree Nation, Barrenlands First Nation, Northlands First Nation, Montreal Lake Cree Nation, Métis Local 20-Timber Bay, and Métis Local 16-Weyakwin (CNSC et al., 2012).

## **Application of Framework**

*FQ1:* The project featured a direct infringement on an Aboriginal right to fish in the Mink Arm of South McMahon Lake, which would be dewatered through the implementation of the Midwest Project (CNSC et al., 2012). The proponent proposed to compensate for this infringement by implementing a fish habitat compensation plan, relocating the fish to South McMahon Lake to maintain the net fish population in accordance with DFO policy (CNSC et al., 2012).

The report states that Aboriginal communities had complaints about the consultation for the project (CNSC et al., 2012). The Aboriginals said that the poorly-attended open houses should not be considered as adequate consultation, that they could not access all of the online information postings, and that the information presented was too technical to be understood by the members of the communities (CNSC et al., 2012). They also state that the Consultation Policy supported by the Athabasca Regional Government should have been used for the consultation procedures to avoid these issues (CNSC et al., 2012).

The federal authorities' response to these statements was that letters and telephone calls were also used to notify and inform the Aboriginal communities, that funding was provided to help cover the costs of participation such as hiring technical experts, that Aboriginal communities are expected to participate in consultation activities, and that the Government of Canada will operate by other consultation protocols to the extent possible (CNSC et al., 2012).

The report states that the Crown will continue consulting with Aboriginals as needed, and that the project will not likely infringe on Aboriginal rights (CNSC et al.,

2012). The report also mentions an Impact Management Agreement signed between mining companies, including AREVA (Cameco, 2015), and the Hatchet Lake, Black Lake and Fond du Lac First Nations, as well as the northern hamlets of Wollaston Lake and Stony Rapids and the northern settlements of Uranium City and Camsell Portage (CNSC et al., 2012). This agreement promises local training and hiring for First Nations and other northern communities (CNSC et al., 2012).

*FQ2:* The Midwest Project review applied both federal and provincial consultation protocols during the EA process, though not the Consultation Policy of the Athabasca Regional Government according to the Aboriginal communities (CNSC et al., 2012). The federal procedures allowed for three formal opportunities for public consultation at the start of the process, during the study and for a final review of the report. Thirty-day consultation periods were provided for comments on the EIS, the province's Technical Review Comments and the draft comprehensive study report (CNSC et al., 2012). The comprehensive study report states that the proponent began consulting with the Aboriginal communities in 2005 (CNSC et al., 2012).

*FQ3:* The CEA Agency provided funding for one Aboriginal group under the Participant Funding Program, while three others received funding through the Aboriginal Funding Envelope (CNSC et al., 2012).

*FQ4:* The proponent was required to assess the alternatives to the project and alternative means of implementing the project, which are featured in the report (CNSC et al., 2012). Prior to the release of the comprehensive study report, the proponent decided to delay the project for economic reasons (CNSC et al., 2012). The proponent also considered various

alternative means of implementing the project, which are featured in the report (CNSC et al., 2012).

Though the report states in the project description that Midwest Project is anticipated to yield positive economic effects for northern Saskatchewan, the report also states that the positive impacts of a project, such as regional employment, do not require assessment under the CEA Act (CNSC et al., 2012).<sup>6</sup>

The report discusses the project's impacts on the human and socio-economic as well as biophysical environments, and assesses exposure to radiation, air emissions, increase in transportation, heritage resources, use of renewable resources, and navigation of the impacted waterways such as Mink Arm (CNSC et al., 2012). The assessment of impacts on the human environment largely discusses indirect impacts (CNSC et al., 2012). The socio-economic and cultural implications for Aboriginals are mentioned in the consultation section, as the communities and organizations raised concerns on matters such as employment and training, ongoing consultation through the span of the project, the use of traditional knowledge, and the consideration of the human and biophysical environments.

The EA report mentions and addresses uncertainties associated with the disposal of mill tailings and the Fish Habitat Compensation Plan (CNSC et al., 2012).

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<sup>6</sup> Other EAs reviews conducted under CEA Act, such as the one done by the Joint Review Panel for the Lower Churchill Hydroelectric Generation Project (2011), have decided that positive impacts must be assessed for the purposes of determining whether significant adverse environmental and/or socio-economic impacts can be justified. Many other federal comprehensive study reports include a "Benefits for Canadians" section, presumably for reasons similar to those noted by the Lower Churchill panel.

The report discusses the residual impacts for each VEC analyzed in the proponent's EIS, though there is no discussion of long-term, post-closure economic implications for the Aboriginal communities involved in the project (CNSC et al., 2012).

The EA report discusses the cumulative effects of the project (CNSC et al., 2012). It took eight other proposed projects in the region into consideration, though no past or current activities are mentioned (CNSC et al., 2012). The assessment examined the impacts on terrestrial habitats, surface water and sediment quality, groundwater levels, the long-term implications for the hydrogeological environment, and the cumulative effects generally in the Athabasca Basin (CNSC et al., 2012).

*FQ5:* The report also recommends a follow-up and monitoring plan, and discusses various programs that the proponent has in place at the McClean Lake Operation (CNSC et al., 2012). The monitoring work done for this previous project will help inform the implementation and monitoring for the Midwest Project (CNSC et al., 2012). There is also a table outlining various components of the environment, how they will be monitored, and which party will be responsible (CNSC et al., 2012). The aspects in the table focus exclusively on the biophysical environment, however, and do not mention socio-economic or cultural implications (CNSC et al., 2012).

*FQ6:* The assessment review was jointly undertaken by federal authorities and the provincial authorities of Saskatchewan (CNSC et al., 2012).

### **Duty to Consult Summary**

In this case, Aboriginal consultation was undertaken by both provincial and federal authorities, with funding being provided through the Aboriginal Funding Envelope of the federal Participant Funding Program (CNSC et al., 2012). The proponent also conducted

their own consultation, as well as signed Impact Management Agreement with some of the participating communities and organizations (CNSC et al., 2012). Aboriginal consultation is expected to persist beyond the EA process (CNSC et al., 2012).

### **Epilogue**

The federal responsible authorities concluded that the project was unlikely to result in any significant adverse impacts, thus the Midwest project was given approval on September 12, 2012 (CEA Agency, 2012d). However, the project has been delayed since 2013 and continues to be postponed in 2014 (Denison Mines, n. d.).

## **Morrison Copper-Gold Project, British Columbia**

### **Background & Context**

The Morrison Copper-Gold Mine was proposed by Pacific Booker Minerals Incorporated. The project involves the construction of an open-pit gold-copper-molybdenum mine 35 kilometres north of Granisle, British Columbia (BCEAO, 2012). As of December 31, 2014 the project was still undergoing a comprehensive study by federal authorities (CEA Agency, 2014a), though the BCEAO had completed an assessment report in 2012 (BCEAO, 2012).

The proposed project would affect the land use of the Babine Lake First Nation, thus they were consulted by the BCEAO through the EA process (BCEAO, 2012). Another Aboriginal group, the Yekoochoe First Nation, did not participate directly in the EA process, but requested to remain informed of the studies and concerns (BCEAO, 2012). The Gitanyow and Gitxsan First Nations were consulted starting in 2010, when they contacted the BCEAO regarding their fishing rights on the Skeena River (BCEAO, 2012). The report also mentions discussions between the proponent and Aboriginal groups involving the negotiation of an IBA between Babine Lake First Nation and the proponent (BCEAO, 2012).

### **Application of Framework**

*FQI:* The BCEAO report states that the proposed project would be constructed within the traditional lands of the Lake Babine First Nation, and that the Gitanyow and Gitxsan First Nations were concerned about the project's impacts on their downstream fishing rights (BCEAO, 2012). All of these groups were consulted through the EA process, in addition to the Yekoochoe First Nation receiving project information and updates (BCEAO,

2012). The BCEAO report mentions that the Lake Babine First Nation participated in the technical working group, while the Yekoochoe First Nation did not (BCEAO, 2012).

The Lake Babine First Nation have been fishing primarily salmon throughout their history, and thus had a proven right to the area and required deep consultation with the BCEAO in regards to the *Haida* spectrum; this consultation began in 2003 (BCEAO, 2012). The BCEAO report outlines the consultation activities over the period leading up to 2012, outlining the provision of funding at various stages, the concerns raised by the Lake Babine First Nation, and litigation filed by the proponent against the Lake Babine First Nation in 2009 (BCEAO, 2012). The Lake Babine First Nation was consulted and asked to comment on the draft Terms of Reference, as well as during the application review phase (BCEAO, 2012).

The report also outlines the proponent's engagement with the Lake Babine First Nation, which began in 1992 (BCEAO, 2012). The report states that the Lake Babine First Nation was engaged in baseline studies, and provided information on various aspects of the project, including traditional ecological knowledge and land use (BCEAO, 2012). The two parties also signed memoranda of understanding, one of which included provisions for IBAs covering the construction and operation phases of the project and providing for some sharing of revenues from the project (BCEAO, 2012).

The report then lists the main concerns of the Lake Babine First Nation regarding each aspect of the assessment, and how each concern will be mitigated (BCEAO, 2012). The BCEAO concludes that they feel the honour of the Crown has been upheld and that the adverse impacts will be avoided and mitigated to the degree necessary to satisfy the duty to consult (BCEAO, 2012).

The report also outlines the consultation procedures and issues discussed, with the Gitanyow and Gitxsan First Nations, as well as the Yekoochoe First Nation (BCEAO, 2012) and reports mitigation and accommodation measures considered. The Yekoochoe First Nation was also interested in seeking economic benefits through the project, which the proponent seemed interested in discussing (BCEAO, 2012).

*FQ2:* As mentioned above, the proponent began consulting with the Lake Babine First Nation in 1992 (BCEAO, 2012). The BCEAO wrote to the Lake Babine and Yekoochoe First Nations in 2003 when the EA process began (BCEAO, 2012). This allowed the Lake Babine First Nation to participate in the early stages of the EA process, such as the drafting of the Terms of Reference (BCEAO, 2012).

*FQ3:* As stated earlier, the Lake Babine First Nation received funding from the BCEAO at various phases in the EA process, as well as from the federal authorities (BCEAO, 2012).

*FQ4:* The assessment of alternatives is not mentioned in the BCEAO report (BCEAO, 2012). However, the federal guidelines state that the proponent was required to assess feasible alternatives to and alternative means of implementing the project for the comprehensive study report (CEA Agency et al., 2010b).

Though the federal guidelines state that the EA will be conducted in order to promote sustainable development (CEA Agency et al., 2010b), it is not explicitly stated that the project must provide an overall positive contribution to sustainability as opposed to solely mitigation of adverse environmental impacts (CEA Agency et al., 2010b).

The BCEAO report outlines how the Lake Babine and Yekoochoe First Nations would benefit economically from the project, though the rest of the consultation report

discusses the mitigation of adverse impacts on the environment, as well as concerns for human health regarding the use of toxic chemicals such as cyanide (BCEAO, 2012).

The federal comprehensive study report will apply the federal definitions of environment and environmental effect, which covers project effects on the biophysical environment and the indirect socio-economic effects of the effects on the biophysical environment (CEA Agency et al., 2010b). This would imply that direct impacts on the human environment will not be examined.

The assessment of effects in the BCEAO report contains a section for the biophysical, social, economic, heritage, and health impacts of the project (BCEAO, 2012).

The BCEAO report states that there was uncertainty among the stakeholders regarding the project's impact on water quality and aquatic ecosystems, the location of the mule deer's winter habitat, the impacts of the mine beyond the mine's footprint, and the security of the site (BCEAO, 2012).

The assessment considered the cumulative impacts on the aspects identified by the parties involved in the assessment process, in addition to considering the background information on the VECs, the impacts of this project, other developments, and future undertakings on these VECs, and the potential for residual impacts and their severity (BCEAO, 2012). Discussion of cumulative and residual effects was integrated into the reviews of each environmental component considered in the EA as opposed to being relegated to a separate section of the report (BCEAO, 2012).

The federal assessment will be required to consider both cumulative effects and the residual impacts of the project (CEA Agency et al., 2010b).

*FQ5:* The BCEAO report includes a section which discusses the proponent's Environmental Management Plans, which outline how the proponent will avoid or mitigate negative impacts on the biophysical, economic, social, health, and heritage aspects of the environment through the construction, operation, and closure of the mine (BCEAO, 2012).

*FQ6:* The BCEAO report states that the federal authorities will produce a separate comprehensive study report (BCEAO, 2012).

### **Duty to Consult Summary**

According to the BCEAO, the Lake Babine First Nation was owed “deep consultation” according to the *Haida* spectrum (BCEAO, 2012). The provincial authorities consulted with the Aboriginal participants through the EA process, such as during the drafting of the Terms of Reference (BCEAO, 2012). The provincial authorities also provided the Lake Babine First Nation with financial assistance at various stages of the EA process (BCEAO, 2012).

The proponent also consulted with the Lake Babine First Nation, as the BCEAO report mentions negotiation of an IBA between the Lake Babine First Nation and the proponent (BCEAO, 2012).

### **Epilogue**

The BCEAO initially rejected the project, resulting in proponent taking the case to court (Dhillon, 2014). The court sided with the proponent, stating that the decision-making did not meet the requirements for procedural fairness (Dhillon, 2014).

The provincial EA process has been suspended as a result of an investigation into the tailings dam breach at the Mt. Polley mine (Dhillon, 2014). According to the Major

Projects Management Office (MPMO), the federal process was paused while finalizing the comprehensive study report in 2012 (MPMO, 2012b).

## **Eagle Gold Project, Yukon**

### **Background & Context**

Proposed by Victoria Gold Corporation, the Eagle Gold Project involves the construction, operation, closure and rehabilitation of an open-pit mine 45 kilometres northeast of Mayo, Yukon (YESAB, 2013). The project was reviewed by the Yukon Environmental and Socio-Economic Assessment Board (YESAB) to assess the project's impact on the biophysical and socio-economic environments (YESAB, 2013).

The proposed project is within the traditional territory of the Nacho Nyak Dun First Nation and would likely impact them; thus they were consulted through the EA process (YESAB, 2013). The First Nation also entered negotiations to sign a Cooperative Comprehensive Benefits Agreement (CBA) with Victoria Gold Corporation (YESAB, 2013).

### **Application of Framework**

*FQI:* Through the assessment process, the proponent was required to consult with the Na-Cho Nyak Dun First Nation, as their territory would be impacted by the implementation of the project (YESAB, 2013). The YESAB report states that the proponent conducted a Traditional Knowledge and Use Study Report with the Na-Cho Nyak Dun First Nation, containing the information gathered from interview and meetings from 2009 to 2010 (YESAB, 2013). While the Na-Cho Nyak Dun First Nation requested that the report not be shared with the Executive Committee conducting the EA, the concerns and knowledge that were gathered and applied in the EA are discussed in each section of the EA (YESAB, 2013).

There was also a Cooperative Benefits Agreement (CBA) signed between the proponent and the Na-Cho Nyak Dun First Nation, which will provide training, employment, scholarship, and health and wellness programs, ensure the hiring of a liaison and environmental monitor from the community, create a plan for ongoing communication, and establish revenue sharing and financial support for the community (YESAB, 2013).

According to the YESAB report, the project would potentially impact the Na-Cho Nyak Dun First Nations' traditional activities through effluent impacting the aquatic environment, impacts on wildlife that are relied on for hunting and trapping, and restricted access to certain areas around the project site (YESAB, 2013). There would still be some access to the Potato Hill site, which is significant to the Na-Cho Nyak Dun First Nation, and monitoring and mitigation measures were required to reduce risks of adverse impacts on wildlife and aquatic ecosystems (YESAB, 2013). There will also be monitoring of socio-economic impacts, such as youth leaving high school to seek employment with the project (YESAB, 2013).

*FQ2:* The proponent was required by the Yukon Environmental and Socio-Economic Assessment Act (YESAA) to consult with potentially impacted First Nations, as well as other communities, prior to submitting their project proposal to the Executive Committee (YESAB, 2013).

*FQ3:* There is no mention of any financial assistance being provided to the Na-Cho Nyak Dun First Nation during the EA process, although the proponent has committed to providing funding to assist with training and other expenses once the project commences (YESAB, 2013).

*FQ4:* The proponent was required to assess various alternative means of implementing the project, which were discussed in the YESAB report (YESAB, 2013).

The YESAB report states that the project is anticipated to have positive socio-economic impacts through employment and economic opportunities and development, though it also outlines how negative impacts, such as employee discrimination and youth abandoning their education, could also apply (YESAB, 2013). Much of the rest of the report discusses the mitigation of adverse environmental impacts (YESAB, 2013).

The screening report discusses both biophysical and human aspects of the environment (YESAB, 2013).

The YESAB report discusses the residual impacts of the project that may require additional measures to monitor and mitigate, and how these impacts may interact with other projects in the region (YESAB, 2013).

The cumulative impacts of the project along with other proposed projects and projects known to the Executive Committee of the YESAB in the Yukon and beyond are assessed with each aspect covered in the assessment (YESAB, 2013). Both environmental and socio-economic cumulative impacts were considered (YESAB, 2013).

*FQ5:* The YESAB report recommends that the proponent be required to implement a follow-up plan to monitor the impacts of the project and verify the predictions made in the EA process (YESAB, 2013). Monitoring is required for the aquatic environments and geochemical predictions, as well as fish and fish habitat (YESAB, 2013).

### **Duty to Consult Summary**

The YESAB report focuses largely on the proponent's consultation with the Na-Cho Nyak Dun First Nation (YESAB, 2013). This included the preparation of a Traditional

Knowledge and Use Study Report and the negotiating of a Cooperation and Benefits Agreement (YESAB, 2013). The agreement contains provision for the use of traditional knowledge, employment and training opportunities, an environmental monitor, business and contracting opportunities, health and wellness and culture, the current claims made by the Na-Cho Nyak Dun First Nation, and financial considerations (Comprehensive Cooperation and Benefits Agreement, 2011). The agreement was made on October 17, 2011 (Comprehensive Cooperation and Benefits Agreement, 2011), which was well before the release of both the screening report and the decision.

### **Epilogue**

The project was approved by the YESAB (YESAB, 2013). The proponent received a Quartz Mining License from the Yukon Government in 2013, though a Type A Water Permit is still required (Victoria Gold Corporation, 2014; Government of Yukon: Energy, Mines and Resources, 2014). The proponent currently anticipates production in 2016 (Victoria Gold Corporation, 2014).

## **Mary River Project, Nunavut**

### **Background & Context**

The Mary River Iron Ore Project in northern Baffin Island, Nunavut was proposed by Baffinland Iron Mines Corporation. It is centred on the construction of iron ore mine, but also involves extensive rail infrastructure to transport the ore concentrate to tidewater plus shipping the ore to southern markets (NIRB, 2012b). The project was reviewed by the Nunavut Impact Review Board (NIRB) to assess the impacts the project would have on the biophysical and human environments, though the Government of Nunavut and several federal agencies were also involved in the assessment process (NIRB, 2012b).

The Inuit people were represented in the hearing process by the Qikiqtani Inuit Association, Nunavut Tunngavik Incorporated, and Makivik Corporation (NIRB, 2012b).

### **Application of Framework**

*FQ1:* In the final hearing report, the concerns raised by the members of the public, including the Aboriginal participants, are discussed along with each aspect of the assessment (NIRB, 2012b).

*FQ2:* The final hearing report outlines the opportunities provided for each party to participate in the EA process, beginning at the screening phase and continuing through the drafting of the EIS, and concluding with the final hearing (NIRB, 2012b). There were numerous opportunities and efforts for public consultation throughout the assessment process, with some opportunities for the public, proponents, and interveners, while other events were specific to certain groups, the proponent, or those on the Project Specific Distribution List (NIRB, 2012b).

*FQ3:* While the final hearing report mentions that the proponent “contributes to a fund managed by the Qikiqtani Inuit Association which is meant to support managerial and financial expertise to Inuit entrepreneurs” (NIRB, 2012b), it does not mention any funding provided to assist with participating in the EA process.

*FQ4:* The proponent was required to perform an assessment of alternative means of implementing the project in their EIS (NIRB, 2009). This includes the null or “no-go” option, in which case the project is not implemented (NIRB, 2009). Other options that must be assessed include routes for rail transportation, other port sites and shipping routes, alternative mining methods, alternative power generation methods, alternative closure and reclamation options, and other alternative options for other components of the project (NIRB, 2009).

In the final hearing report, the proponent’s assessment of alternatives focused on shipping methods and routes (NIRB, 2012b). The NIRB considered the findings of the proponent as well as the concerns raised by other project stakeholders, and made their own recommendations as to which options would be preferable (NIRB, 2012b).

The EIS Guidelines required the proponent to assess and discuss both positive and negative impacts the project may have on the socio-economic environment (NIRB, 2009) and to consider the principles of sustainable development and the precautionary principle when preparing their EIS (NIRB, 2009). The sustainability principles stated in the EIS Guidelines include preserving ecosystem integrity, ensuring intergenerational equality, and ensuring sustained socio-economic benefits for Nunavut (NIRB, 2009). The proponent must also describe how the project would contribute to the sustainable development of the communities involved (NIRB, 2009).

The NIRB report states that the project is anticipated to have positive socio-economic impacts through economic development, training, education and employment, which the report states may be applicable to other jobs (NIRB, 2012b). The assessment also considered potential negative impacts associated with these aspects of the project, such as substance abuse and short-term employment, though these were not considered significant (NIRB, 2012b).

The EIS Guidelines provided by the NIRB outline components of both the biophysical and socio-economic environments that the proponent must assess in their EIS (NIRB, 2009). The final hearing report discusses both environmental and socio-economic impacts of the project as well (NIRB, 2012b).

The guidelines required the proponent to consider the precautionary principle in their assessment (NIRB, 2009). The final hearing report explicitly states that it addresses uncertainty in regards to cumulative and residual impacts through requirements for monitoring plans that facilitate adaptive management (NIRB, 2012b). These monitoring plans cover both environmental and socio-economic impacts of the project, and emphasize the need for positive action where there is great risk of serious adverse impacts as well as uncertainty (NIRB, 2012b).

The EIS must also assess long-term biophysical and socio-economic impacts of the project (NIRB, 2009). The EIS must also include a Closure and Reclamation Plan, as well as a follow-up and adaptive management plan (NIRB, 2009).

In terms of long-term and residual impacts, the report mentions that there was concern over the long-term economic implications of the mine (NIRB, 2012b). The NIRB recommended that the Government of Nunavut and the proponent should sign a

Development Partnership Agreement (NIRB), which is an agreement aiming to yield maximum benefits from such projects and to invest in long-term economic stability (Nunavut: Department of Economic Development and Transportation, 2012).

The report also assesses the cumulative impacts of the project, as well as the transboundary impacts (NIRB, 2012b). These are described as impacts that may occur inside or outside of the Nunavut Settlement area, and that cross provincial, territorial, or international boundaries (NIRB, 2012b). One such impact that is mentioned is the proposed shipping route from the project, which runs through the Hudson Strait and could impact neighbouring jurisdictions (NIRB, 2012b). Various socio-economic impacts with broad impacts were also assessed, as well as habitat loss of migratory species, greenhouse gas emissions, and air pollution (NIRB, 2012b).

*FQ5:* The final hearing report states that the NIRB has the authority to create a monitoring plan for the project, which is included with the Certificate of Approval (NIRB, 2012b). The plan will cover both the biophysical and human environments, verify the predictions in the EA process, ensure compliance to the conditions of approval, and adapt mitigation measures as needed (NIRB, 2012b).

*FQ6:* There was no federal review of the project, although federal authorities, such as Aboriginal Affairs and Northern Development Canada, Environment Canada, Fisheries and Oceans Canada, Health Canada, Natural Resources Canada, Parks Canada, and Transport Canada, were involved in the hearing process (NIRB, 2012b).

## **Duty to Consult Summary**

Throughout the review process, the NIRB held numerous public consultation opportunities, with some being held for specific stakeholder groups such as Aboriginals (NIRB, 2012b). The IIBA that was signed with the Qikiqtani Inuit Association includes provisions for financial participation, contracting opportunities, employment, education and training, maritime shipping, workplace conditions, community support, Inuit travel and access, Inuit engagement in project stewardship, project monitoring and mitigation, wildlife compensation, archaeology, deposits of stones used for carving, dispute resolution, renegotiation, and project reporting from the Qikiqtani Inuit Association and the proponent (The Mary River Project Inuit Impact and Benefit Agreement, 2013). The agreement was made on September 6, 2013 (The Mary River Project Inuit Impact and Benefit Agreement, 2013), after both the hearing report and the decision.

## **Epilogue**

The NIRB issued a certificate of approval for the project in 2012 (NIRB, 2012a). The project has since been altered, and the revised plan has received approval from both the NIRB and the Minister of Aboriginal Affairs and Northern Development (CBC News, 2014). Extraction began in October 2014 (Baffinland Iron Mine Corporation, 2014).

## **Donkin Coal Mine, Nova Scotia**

### **Background & Context**

The Donkin Export Coking Coal Project was proposed by Xstrata Coal Donkin Management Limited. It involves the construction and operation of an underground coal mine on Cape Breton Island in Nova Scotia (CEA Agency, 2013h). The project was subjected to a comprehensive study EA. The proponent's EIS was reviewed by CEA Agency, in consultation with Fisheries and Oceans Canada, Transport Canada, Natural Resources Canada, Health Canada, Environment Canada, the provincial government of Nova Scotia, and the Kwilmu'kw Maw-klusuaqn Negotiation Office (CEA Agency, 2013h).

The Mi'kmaq First Nation, which asserts a land claim to the whole province of Nova Scotia, was consulted through the EA process. The Mi'kmaq First Nation also signed a Memorandum of Understanding with the proponent in hopes that the two parties will eventually negotiate an agreement to ensure mutual benefits from the project (CEA Agency, 2013h).

### **Application of Framework**

*FQI:* The Mi'kmaq of Nova Scotia were consulted through the EA process, as their rights would be impacted by the project (CEA Agency, 2013h). The various government agencies involved, both federal and provincial, collaborated during the consultation process and integrated their efforts into the EA process as much as possible (CEA Agency, 2013h).

The EIS guidelines state that the final EIS must outline the proponent's consultation with the Mi'kmaq of Nova Scotia (CEA Agency, 2012h). This includes

consideration of any rights that are asserted or established, the potential adverse impacts the project may have on the Mi'kmaq of Nova Scotia, and any concerns raised by the Mi'kmaq through the proponent's consultation (CEA Agency, 2013h). The guidelines refer to some advisory resources to assist the proponent in their consultation activities, including the federal guidelines for consultation and two guides specifically written for consultation with the Mi'kmaq, with one published by the Nova Scotia provincial government (CEA Agency, 2012h). The EIS must also consider the traditional land uses by the Mi'kmaq and archaeological and heritage resources as VECs (CEA Agency, 2012h).

The CEA Agency Comprehensive Study Report concluded that Aboriginal interests and concerns would be accommodated through the project's implementation by using fish habitat compensation, protecting archaeological resources, and wetland compensation (CEA Agency, 2013h). In addition, the proponent and the Mi'kmaq First Nation signed a Memorandum of Understanding, intended to ensure economic opportunities and benefits through the project for the communities involved in the project (CEA Agency, 2012h).

*FQ2:* The Mi'kmaq were consulted at the typical three formal consultation opportunities available to all participants: to comment at the onset of the EA process, during the comprehensive study to comment on the final EIS, and to comment on the comprehensive study report (CEA Agency, 2013h).

*FQ3:* The Mi'kmaq received funding from the federal Participant Funding Program (CEA Agency, 2013h). The Mi'kmaq were engaged by the CEA Agency through phone

calls, letters, meetings, and emails, in addition to the consultation opportunities mentioned above (CEA Agency, 2013h).

*FQ4:* The comprehensive study report discussed the alternatives to the project and the alternative means of implementing the project as assessed by the proponent (CEA Agency, 2013h). The report states that no available alternatives to the project would fulfill the purpose of the project (CEA Agency, 2013h). The report also presents the proponent's assessment of alternative means of implementing the project (CEA Agency, 2013h). An independent study, used to assess which method of transportation would be most suitable for shipping the coal, found that a marine option would be preferable to rail transportation (CEA Agency, 2013h).

The EIS was also required to address any residual effects of the project on each VEC, as well as the project's benefits to Canadians (CEA Agency, 2012h). This includes any environmental enhancements, contributions to sustainability, scientific knowledge and socio-economic opportunities and benefits (CEA Agency, 2012h).

In terms of benefits for Canadians, the comprehensive study report states that the proposed mitigation measures should remove or reduce any adverse impacts to the environment, and that the project is anticipated to have socio-economic benefits for the area, with benefits for the Mi'kmaq being confirmed through a benefits agreement (CEA Agency, 2013h).

While the comprehensive study report discussed both biophysical and human aspects of the environment, the socio-economic impacts that were assessed were largely indirect in keeping with the basic federal EA requirements (CEA Agency, 2013h).

In addressing uncertainty, the comprehensive study report states that the follow-up plan has been designed to analyze and address any uncertain matters discussed through the EA process (CEA Agency, 2013h).

As required in the guidelines, the comprehensive study report assessed the residual impacts of the project on each VEC (CEA Agency, 2013h).

The guidelines state that the EIS must include a cumulative effects assessment, considering the impacts that the proposed project would have in conjunction with other past, present, and foreseeable future projects and activities in the region on the outlined VECs (CEA Agency, 2012h).

An assessment of cumulative effects by the proponent considered the impacts of past and ongoing mining exploration, fishing activities, two nearby power stations, Port of Sydney dredging and infilling, the Maritime Link Project, and the St. Ann's Bank Area of Interest (CEA Agency, 2013h). The report lists the potential impact of each project on each VEC, though it is stated that there should be no significant adverse cumulative impacts if the mitigation measures proposed in the EA were implemented (CEA Agency, 2013h).

*FQ5:* A follow-up and monitoring strategy is outlined in the report, which will involve monitoring the habitat and wetland compensation undertakings, fisheries, archaeological and heritage resources, birds and wildlife, rare plants, and the marine and freshwater environments (CEA Agency, 2013h).

*FQ6:* The federal and provincial authorities signed an agreement to coordinate the EA process, and the proponent's EIS was designed to meet both federal and provincial requirements (CEA Agency, 2013h).

### **Duty to Consult Summary**

The government consultation efforts in this case were coordinated by the CEA Agency federally and by the Nova Scotia Department of Natural Resources provincially (CEA Agency, 2013h). The CEA Agency also provided funding to the Mi'kmaq in order to participate in the EA process (CEA Agency, 2013h). The CEA Agency has stated that Aboriginal consultation efforts in order to meet the duty to consult were incorporated into the EA process as much as possible (CEA Agency, 2013h).

The proponent also conducted engagement activities with the Aboriginal participants, and this information was used to inform the CEA Agency of the impacts the project would have on Aboriginals and how these impacts may be mitigated (CEA Agency, 2013h).

### **Epilogue**

Since the project was deemed unlikely to result in significant adverse impacts, the proponent received both federal and provincial approval to proceed with the project (CEA Agency, 2013f; Belliveau, 2013). The mine has now been purchased by a subsidiary of Cline Group LLC from Glencore Xstrata and Morien Resources Corporation (Ayers, 2014).

## **Renard Diamond Mine Project, Quebec**

### **Background & Context**

The Renard Diamond Mine project was proposed by Stornoway Diamond Corporation. It involves the development of a diamond mine on the “Foxtrot property” in the James Bay Municipality of northern Quebec (CEA Agency, 2013g). A comprehensive study review was conducted by the CEA Agency to assess the proponent’s EIS for the project. The CEA Agency consulted with Natural Resources Canada, Fisheries and Oceans Canada, Environment Canada and the Cree Regional Authority (CEA Agency, 2013g). Through the EA process, the Cree Nation of Mistissini was consulted by the CEA Agency, and the Band Council of Mistissini signed an IBA, known as the Mechshoo Agreement, with the proponent (CEA Agency, 2013g). The project was also reviewed by provincial officials in Quebec (Stornoway Diamond Corporation, 2014).

### **Application of Framework**

*FQI:* The federal report recognizes the concerns raised by the various stakeholders, including the community of Mistissini, regarding the environmental impacts of the project and the proposed mitigation measures in the discussion of each VEC considered in the report (CEA Agency, 2013g). The socio-economic concerns of the Mistissini community seem to have been largely addressed through the IBA titled the Mechshoo Agreement, which was signed with the proponent during the comprehensive review period (CEA Agency, 2013g). The agreement includes the creation of an environmental committee that would allow for the Cree to monitor the social and environmental impacts of the projects (CEA Agency, 2013g). Other provisions by the proponent to reduce the project’s impact on traditional activities include banning employees from hunting,

fishing, or trapping in the area, reducing the noise level during hunting seasons, avoiding interference with boat and snowmobile transportation, and posting signage where the project's road intersects with snowmobile and ATV trails (CEA Agency, 2013g).

*FQ2:* The federal opportunities for public participation for this project were held in three stages, which allowed for comments at the beginning of the EA process, after submission of the proponent's EIS, and the release of the comprehensive study report (CEA Agency, 2013g). The report states that most of the comments were received from Aboriginals during the second phase of consultation, when federal authorities met with community representatives from the Cree community of Mistissini in June 2012 (CEA Agency, 2013g). The report also states that the CEA Agency kept regular contact with Mistissini throughout the assessment process (CEA Agency, 2013g).

The proponent was also in consultation with the Aboriginal communities, as they held pre-consultation meetings with both Chibougamau and Mistissini, in order to prepare for their environmental and social impact study report (CEA Agency, 2013g). The proponent also held open houses and negotiated an IBA with the Mistissini community (CEA Agency, 2013g).

*FQ3:* While the report states that the CEA Agency provided funding through the Participant Funding Program, it does not explicitly state whether funding was provided to Aboriginal communities or not (CEA Agency, 2013g). The CEA Agency website, however, states that the Funding Review Committee recommended that funding be provided to the community of Mistissini (CEA Agency, 2011).

*FQ4:* The guidelines do not mention the consideration of alternatives to the project, or alternative means of implementing the project (DFO & NRCan, 2010).

The proponent considered the option of not proceeding as an alternative to the proposed project, and concluded that proceeding with the project as planned would be the most desirable option (CEA Agency, 2013g). The proponent also assessed the alternative means of implementing the project, and selected the options that would have the lowest impact on the environment and would meet the economic criteria of the project (CEA Agency, 2013g). The CEA Agency was satisfied with the proponent's assessment of alternatives (CEA Agency, 2013g).

There is also no mention of net positive contributions from the project, or the consideration of sustainable development (DFO & NRCan, 2010). Besides the anticipated socio-economic benefits of the project, the report focuses on mitigation of adverse impacts as opposed to positive contributions to the environment (CEA Agency, 2013g).

The EA guidelines state that the EA will use the federal definitions of environment and environmental effect (DFO & NRCan, 2010). The assessment scope also requires the consideration of land use by Aboriginals (DFO & NRCan, 2010). The comprehensive study report discusses both biophysical and human aspects of the environment, although in keeping with the basic federal EA requirements, direct socio-economic impacts were not assessed (CEA Agency, 2013g).

The precautionary approach is not specifically mentioned in the comprehensive study report (CEA Agency, 2013g).

The temporal boundaries section notes that all immediate, short-term, and long-term impacts resulting from the project require assessment, and residual impacts are mentioned as a component of the cumulative impacts assessment (DFO & NRCan, 2010).

The comprehensive study report discusses any anticipated residual impacts on the environment in each aspect of the environment assessed, and how these effects will be mitigated (CEA Agency, 2013g).

The report discusses the potential cumulative effects of the project, which were assessed within immediate, local, and regional spatial boundaries and a temporal boundary ranging from 1920 to 2050 (CEA Agency, 2013g). The proponent identified a list of past, present, and foreseeable future projects and activities in the region to be considered in the assessment (CEA Agency, 2013g). The report outlines the cumulative impacts on the terrestrial, aquatic, and wetland environments, and does not discuss cumulative socio-economic effects that could arise from the project plus other activities in the region (CEA Agency, 2013g). The report states that with the implementation of the proponent's mitigation measures, there should be no substantial negative cumulative impacts (CEA Agency, 2013g).

*FQ5:* The report also outlines a follow-up plan to be implemented by the proponent, which will monitor air and surface water quality, fish and fish habitat, and birds and bird habitats (CEA Agency, 2013g). Again, no socio-economic factors are considered in this part of the report, though the report states that impacts on Aboriginals are covered in the Mechshoo Agreement (CEA Agency, 2013g). The period of the follow-up program for the surface water and air quality extends into the closure and rehabilitation phases of the mine's operation, while the monitoring of fish and fish habitat is contingent on the permits from Fisheries and Oceans Canada (CEA Agency, 2013g). Birds and bird habitats will be monitored during the pre-construction and construction phases (CEA Agency, 2013g).

*FQ6:* The provincial government of Quebec conducted its own environmental and social assessment, and there is no mention of any activities carried out jointly between the provincial and federal authorities in the report (CEA Agency, 2013g). However, the MPMO website states that the federal and provincial authorities conducted coordinated Aboriginal consultation, and that under Chapter 22 of the James Bay and Northern Quebec Agreement, the federal and provincial review processes will be coordinated as much as possible (MPMO, 2012a).

### **Duty to Consult Summary**

In this case, the federal authorities held public consultation with the project stakeholders, including Aboriginals, at the three stages of the assessment required by the CEA Agency (CEA Agency, 2013g). The proponent also consulted with the Aboriginal participants in this case to gather the information necessary for the EIS, and negotiated an IBA with the community of Mistissini referred to as the Mechshoo Agreement (CEA Agency, 2013g). This IBA is stated provide employment and training throughout the life of the project, and ensure long-term benefits for Mistissini (Canadian Mining Journal, 2012). The Mechshoo Agreement was signed prior to March 27, 2012 (Canadian Mining Journal, 2012), well before both the release of the comprehensive study report and the decision.

### **Epilogue**

The Renard Mine received approval from both provincial and federal authorities (CEA Agency, 2013e). The project's construction began in July 2014 (Stornoway Diamond Corporation, 2014).

## **Jackpine Mine Expansion Project, Alberta**

### **Background & Context**

Shell Canada Energy submitted an application for the Jackpine Mine Expansion Project in 2007 (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). An environmental assessment by a joint review panel began in 2010 (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). The project would entail the construction of an additional mining operation and associated infrastructure approximately seventy kilometres north of Fort McMurray, Alberta (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

Numerous Aboriginal groups were involved in the EA process (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). They included the Athabasca Chipewyan First Nation, the Métis Nation of Alberta, the Non-status Fort McMurray and Fort McKay First Nation, the Clearwater River Paul Cree Band, the Fort McKay First Nation and the Fort McKay Métis Community Association, the Fort McMurray First Nation #468, and the Mikisew Cree First Nation (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

### **Application of Framework**

*FQI:* In this case, several of the Aboriginal groups raised concerns regarding the impacts that the Jackpine Extension would have on their traditional knowledge and land use, as well as the cumulative impacts of the numerous projects in the region (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). Most of these groups also voiced concerns over the adequacy of the Crown's consultation, and raised a question of constitutional law (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

The panel's report states that both provincial and federal authorities plan on continuing Aboriginal consultation after the release of the panel report, yet before the project is approved (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). The panel recommended that the provincial and federal authorities ensure that the duty to consult and accommodate is met prior to the issuance of approvals, as the evidence gathered through the EA process suggests that the project will likely have significant impacts on nearby Aboriginals if it is implemented (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

The Métis Nation of Alberta raised the concern that Alberta's consultation policy only applies to First Nations, and that Métis are not included (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). The Métis Nation of Alberta further stated that the Métis are largely disregarded by both provincial and federal authorities, and that their rights are not considered in cases such as this (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). The Métis Nation of Alberta stated that a provincial consultation policy regarding the Métis should be developed. This proposal is supported in the panel's recommendations (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

In regards to questions pertaining to confirming legal rights stemming from section 35 of the Constitution Act of 1982, the panel stated that the matter would be better addressed by the courts than in an EA setting (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

*FQ2:* After the panel was established, a public comment period was provided in 2011 regarding the proponent's application and EIS, following which the panel requested more

information from the proponent (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). Another public comment period was held in 2012, followed by the panel hearing later in the year (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

*FQ3:* The CEA Agency provided funding to the Non-status Fort McMurray/Fort McKay First Nation, Clearwater River Paul Cree Band No. 175, Athabasca Chipewyan First Nation, Mikisew Cree First Nation, Métis Nation of Alberta Association Region 1, Fort McKay First Nation, and Fort McMurray #468 First Nation (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

The proponent provided funding to the Athabasca Chipewyan First Nation, the Mikisew Cree First Nation, Métis Local 125, and the Fort McKay First Nation to assist with participating in the EA and to conduct a land use study (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). The Métis Nation of Alberta stated that it had not received funding from the proponent, though they had received funding from the CEA Agency (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

*FQ4:* The Terms of Reference provided by Alberta Environment (2007) required that the proponent's EIA must include an assessment of project alternatives, as well as reasoning behind the selection of each preferred option (Alberta Environment, 2007).

The proponent assessed both alternatives to the project and alternative means of implementing the project (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). The proponent stated that cancelling the project would not achieve the stated purpose and thus should not be considered an option, which the panel agreed to (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). The proponent also

provided an analysis of alternative means of implementing the project and a rationale for their choices, which satisfied the panel (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

The proponent was required by the EIA Guidelines to outline both the biophysical and socio-economic implications of the project. These impacts also include the cumulative and residual impacts of the project, also considering other developments in the region (Alberta Environment, 2007). The EA assessed the project's potential impacts on both the biophysical and human environments (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

The proponent was required to state how the project would provide economic benefits for the region and province of Alberta, though the rest of the requirements for the assessment discuss the mitigation of adverse biophysical impacts (Alberta Environment, 2007). The terms of reference also covered public health and safety, traditional ecological knowledge and land use, and historical and archaeological resources (Alberta Environment, 2007).

The proponent stated that project would yield economic benefits for the region, Alberta, and Canada as a whole (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). Besides this, the panel's report focuses on mitigating adverse impacts to the environment (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

The panel report states that a precautionary approach should be adopted in the EA process (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). To this end, the panel used the precautionary approach in the assessment, which was applied to their

assessment of habitat and biodiversity loss, and what levels of loss would be acceptable in the report (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

The Terms of Reference also require the proponent to assess the residual impacts of the project, as well as the long-term impacts related to waste output and groundwater removal (Alberta Environment, 2007). The panel's report discusses long-term implications of the project, such as the impacts on wetlands, old-growth forests, traditional plant loss, habitat loss for migratory birds and moose, biodiversity loss, peatland disturbance, and impacts on Aboriginal culture and land use (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). As an accommodation measure, Fort McKay recommended that assistance should be provided to ensure long-term economic stability, as well as measures to facilitate a transition of the local economy "to a post oil sands economy" (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

Aboriginal groups were featured in many of the panel's recommendations, including collaborative efforts for wildlife monitoring and reclamation, ensuring adequate Crown consultation prior to project approval and the issuing of permits, and recommending that the Government of Alberta should develop a consultation policy for the Métis (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). Despite this, there are no measures for long-term socio-economic stability as recommended by Fort McKay (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

The proponent assessed the project's potential cumulative impacts on air quality, greenhouse gas emissions, effects on wetlands, effects on old-growth forests, effects on traditional plant potential areas, wildlife and wildlife habitat, biodiversity, and social and economic effects (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

As stated earlier, there were a number of criticisms from various project stakeholders and the panel, although the panel concluded that it had sufficient information to judge the cumulative impacts of the project (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

*FQ5:* The panel report recommends that the provincial and federal authorities should have the proponent implement a follow-up plan, which should adopt adaptive management principles in order to identify and correct any unforeseen adverse impacts of the project (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

*FQ6:* The joint review panel's mandate was to meet both provincial and federal EA requirements (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

### **Duty to Consult Summary**

As stated earlier, many of the Aboriginal groups in this case raised a question of constitutional law regarding section 35 of the Constitution Act of 1982 (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). However, the panel stated that such questions should be addressed by the courts, as a regulatory EA process was not appropriate for judging whether the duty to consult had been met or not (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). The panel report states that the provincial and federal authorities will continue to consult with Aboriginals after the release of the report and before any approvals are issued (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

The Aboriginal groups in this case voiced concerns over the project's impact on their culture and land use, especially in conjunction with the other projects in the region (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). The panel also

concluded that the project was likely to have significant adverse impacts for the nearby Aboriginals (Joint Review Panel for the Jackpine Mine Expansion Project, 2013).

### **Epilogue**

The panel ultimately concluded that although the project would have significant adverse impacts on the environment and Aboriginals, it was still in the public interest to carry out the project and the adverse impacts would be justified (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). The federal authorities approved the project on December 6, 2013 (Aglukkaq, 2013).

However, the Athabasca Chipewyan First Nation and the Métis Nation of Alberta felt that the consultation process was inadequate and took the matter before the Alberta Court of Appeal, asking that the panel be made to state whether Aboriginals had been adequately consulted or not (The Canadian Press, 2012). The court ruled against the Aboriginals, saying that the panel was not mandated to assess the Crown's duty to consult (The Canadian Press, 2012). Some experts have also criticized the absence of explicit justification for accepting such significant adverse environmental impacts, as the federal decision statement does not include any description of or rationale for how the impacts were justified (Olszynski, 2013).

## **Gahcho Kue Diamond Mine, Northwest Territories**

### **Background & Context**

The Gahcho Kue Diamond Mine was proposed by DeBeers Canada Inc. (Mackenzie Valley Environmental Impact Review Board [MVEIRB], 2006). The project would entail the construction of three open pit mines and the infrastructure needed for mine's operation, which would be located at Kennedy Lake, Northwest Territories (MVEIRB, 2006). The project was subjected to a review by the MVRB (MVEIRB, 2006).

The MVRB performed an initial assessment and prepared an EA report, which concluded that the project would likely have significant impacts and public concern if implemented (MVEIRB, 2006). Therefore the MVRB ordered that a full Environmental Impact Review be conducted and a review panel was established (MVEIRB: Gahcho Kue Panel, 2013; MVEIRB, 2006). The proponent sought a judicial review of this order from the Northwest Territories Supreme Court, which upheld the MVRB's order for a full Environmental Impact Review (EIR) (MVEIRB: Gahcho Kue Panel, 2007).

In this case, the Yellowknives Dene First Nation, the Deninu Kue First Nation, the North Slave Métis Alliance, the Northwest Territories Métis Nation, the Dene Nation, the Tlicho Government, the Akaitcho Interim Measures Agreement Implementation Office, and the Lutsel K'e First Nation were among the Aboriginal groups involved in the territorial EA process (MVEIRB, 2006).

### **Application of Framework**

*FQI:* The land chosen for the proposed mine falls onto the traditional territory of several Aboriginal groups (MVEIRB: Gahcho Kue Panel, 2013). The area is covered in an agreement signed with the Tlicho Government, as well as Treaty 11 and the asserted

territory of the Akaitcho First Nations and the Northwest Territories Métis Nation (MVEIRB: Gahcho Kue Panel, 2013). The latter two groups are negotiating land claims with the federal government (MVEIRB: Gahcho Kue Panel, 2013).

*FQ2:* In this EA process, public consultation was performed throughout the EA process, and the report includes a registry documenting the participation of each party throughout the EA, including the Aboriginal groups (MVEIRB, 2006). The panel held a review of the proponent's EIS, to which the parties of the EA process were invited (MVEIRB: Gahcho Kue Panel, 2013).

*FQ3:* The MVRB provided financial assistance to three representatives of each community to participate in the community issues scoping hearing during the initial EA process (MVEIRB, 2006). The proponent provided funds to Aboriginal groups during the EIR in order to conduct traditional knowledge and land use studies (MVEIRB: Gahcho Kue Panel, 2013).

*FQ4:* The terms of reference issued by the MVRB required the proponent to assess and consider both alternatives to the proposed project and alternative means of implementing the project (MVEIRB: Gahcho Kue Panel, 2007).

The EIR report features a table outlining each selected option and the benefits of each choice (MVEIRB: Gahcho Kue Panel, 2013). Alternatives to the project, such as cancelling the project, delaying the project, and accounting potential opportunity costs while considering the impacts on other activities, were also considered in the alternatives analysis (MVEIRB: Gahcho Kue Panel, 2013). Various Aboriginal participants were in favour of delaying the project, as they felt that the project would be more beneficial and

have less impact on biophysical and human environments if it were implemented at a later date (MVEIRB: Gahcho Kue Panel, 2013).

The proponent was required to state the projected and actual benefits expected from the project, because the communities involved in the EA process were concerned about how substantial the benefits will actually prove to be (MVEIRB: Gahcho Kue Panel, 2007).

The proponent stated that the project would yield socio-economic benefits for the region, though some Aboriginal participants stated that other projects in the area have not been beneficial enough to justify their adverse impacts on the environment (MVEIRB: Gahcho Kue Panel, 2013).

In the terms of reference issued by the MVRB, the project's impacts on both biophysical and human aspects of the environment required assessment by the proponent (MVEIRB: Gahcho Kue Panel, 2007). The panel's EA report assesses the project's potential impacts on both biophysical and human environments as well (MVEIRB: Gahcho Kue Panel, 2013).

The panel report discusses various uncertainties associated with the project, and outlines the requirements and measures needed to account for them (MVEIRB: Gahcho Kue Panel, 2013).

The MVRB's terms of reference for the environmental assessment outline several long-term concerns regarding the project (MVEIRB: Gahcho Kue Panel, 2007). These include the long-term socio-economic and cultural concerns related to relying on non-renewable resource projects with limited economic sustenance beyond the life of the project, as well as biophysical concerns such as waste storage, water quality impacts, and

the impacts on the nearby caribou herds (MVEIRB: Gahcho Kue Panel, 2007). A reclamation plan was also required (MVEIRB: Gahcho Kue Panel, 2007).

The panel's EA report discusses several long-term implications of the project (MVEIRB: Gahcho Kue Panel, 2013). One such consideration is the need for a positive economic transition to other livelihood sources once the project ends, after its expected eleven-year lifespan (MVEIRB: Gahcho Kue Panel, 2013). The North Slave Métis Alliance recommended that employees be involved in the closure and reclamation of the mining site and receive additional revenue, and that an assessment of the socio-economic impacts of the mine closure be conducted three years before the closure of the mine (MVEIRB: Gahcho Kue Panel, 2013). The territorial government also suggested working with the proponent to facilitate the economic transition once the mine closes, as well as the signing of a socio-economic agreement (MVEIRB: Gahcho Kue Panel, 2013).

Cumulative impacts were assessed by the proponent in this case, particularly the impacts on caribou and other wildlife and species at risk (MVEIRB: Gahcho Kue Panel, 2013). The cumulative impacts of multiple projects on caribou are of particular concern to the Aboriginal participants, who feel that more action on a broader scale is needed in order to ensure the sustainability of the caribou herds (MVEIRB: Gahcho Kue Panel, 2013). A measure proposed by the panel is to have the Government of Northwest Territories and Aboriginal Affairs and Northern Development Canada collaborate and develop a broader cumulative effects management framework that is informed by and informs project-specific monitoring and mitigation measures regarding caribou (MVEIRB: Gahcho Kue Panel, 2013).

*FQ5:* The EA includes follow-up and monitoring measures, which cover both biophysical and human aspects of the environment (MVEIRB: Gahcho Kue Panel, 2013). The follow-up measures include the previously mentioned socio-economic agreement to be signed between the territorial government and the proponent (MVEIRB: Gahcho Kue Panel, 2013). The report also mentions that the proponent and Aboriginal groups are negotiating IBAs, though it is stated that commitments to complete these agreements are not on public record (MVEIRB: Gahcho Kue Panel, 2013).

*FQ6:* No federal review was conducted for this project, although several federal authorities, such as Aboriginal Affairs and Northern Development Canada, Environment Canada, Fisheries and Oceans Canada, Natural Resources Canada, Parks Canada, and Transport Canada, were involved in the EA process (MVEIRB: Gahcho Kue Panel, 2013).

### **Duty to Consult Summary**

While the duty to consult was not directly mentioned in the MVRB report, the Aboriginal groups were consulted through the EA process (MVEIRB: Gahcho Kue Panel, 2013).

The report does mention that some Aboriginal groups assert their traditional territory within the boundaries of the proposed project, and that land claims are being negotiated between certain Aboriginal groups and the federal government (MVEIRB: Gahcho Kue Panel, 2013). The MVRB report also states that the proponent was negotiating IBAs with some Aboriginal groups, which may further accommodate their interests beyond the EA process and ensure benefits from the project (MVEIRB: Gahcho Kue Panel, 2013). The only date given was for the Lutsel K'e Dene First Nation IBA, which was signed on July 17, 2014 (DeBeers Canada, 2013). This is after both the EA report and decision.

## **Epilogue**

The panel assessing the project concluded that with the mitigation and monitoring measures outlined in their report, the project would have no significant adverse impacts on the environment and recommended the project's approval (MVEIRB: Gahcho Kue Panel, 2013). The responsible federal authorities approved the project in July 2013 (Valcourt, 2013b).

## **Nechalacho Rare Earth Elements Project, Northwest Territories**

### **Background & Context**

The Nechalacho Rare Earth project was proposed by Avalon Rare Metals Incorporated (MVRB, 2013). The proposed project involves the development of two sites: an underground mining facility on the north shore of Great Slave Lake, and a Hydrometallurgical site on the south shore of Great Slave Lake (MVRB, 2013). The project was subject to NWT EA requirements, and the proponent's assessment was reviewed by the Mackenzie Valley Review Board (2013), as opposed to an environmental impact review by a panel.

Various Aboriginal groups were registered parties in the EA process, including the Fort Resolution Métis Council, the Yellowknives Dene First Nation, the North Slave Métis Alliance, the Tlicho Government, the Lutsel K'e Dene First Nation, the Deninu Kue First Nation, the K'atlo'deeche First Nation, and the Akaitcho Interim Measures Agreement (IMA) Office (MVRB, 2013).

### **Application of Framework**

*FQI*: While the duty to consult is not specifically mentioned in the EA report, the Yellowknives Dene First Nation references the project's impact on their "constitutionally enshrined rights" (MVRB, 2013). The report also lists respecting Aboriginal rights and treaties among the lessons that the proponent has learned and incorporated into their project (MVRB, 2013). Other lessons on this list that pertained directly to Aboriginals included initiating early dialogue with Aboriginals, forging positive relations with Aboriginal communities, and utilizing traditional knowledge in the EA process (MVRB, 2013).

In order to accommodate Aboriginal interests, the proponent has made commitments to train and employ Aboriginal workers, as well as to adopt an alternating weekly schedule, where workers would have every other week available to participate in traditional activities and/or care for their families (MVRB, 2013).

The proponent also considered Aboriginal traditional knowledge and concerns regarding impacts on the environment and land use (MVRB, 2013). These were incorporated into the project through mitigation measures and the selection of alternative means to decrease the project's impact on the environment (MVRB, 2013).

The proponent stated that they are negotiating IBAs with the Yellowknives Dene First Nation and the Deninu Kue First Nation, which will aid in the mitigation of adverse impacts, as well as clarify the benefits to each party (MVRB, 2013).

The proponent is also required to negotiate a Socio-Economic Agreement with the Government of the Northwest Territories (MVRB, 2013). These agreements cover the socio-economic considerations of a project, including employment and training, human and cultural well-being, traditional economies, net effects on the government, and sustainable development (Government of the Northwest Territories, n. d.). Since the MVRB anticipates that there will be significant adverse socio-economic impacts resulting from the project, the EA report concludes that this agreement will be needed to ensure that the proponent provides the promised benefits to the region and mitigates any adverse impacts (MVRB, 2013).

*FQ2:* The EA process offered several opportunities for the interested parties to participate (MVRB, 2013). These were during the scoping, development of the Terms of Reference,

information requests, technical session, technical report, hearing, and closing comments phases of the EA process (MVRB, 2013).

*FQ3:* The proponent provided support for Aboriginal groups in conducting traditional knowledge studies, and has committed to providing capacity funding once the project is underway to assist with training (MVRB, 2013).

*FQ4:* According to the Terms of Reference provided by the MVRB (2010), the proponent was required to include an assessment of alternative methods of implementing the project, including a discussion of the potential impacts of each option. The proponent was required to assess alternative means of implementing the project and justify their decisions in terms of how the chosen method will be the most beneficial in terms of the likelihood of environmental impacts (MVRB, 2013). The MVRB was satisfied with the proponent's selection of alternative means (MVRB, 2013).

Another provision to be included in the EA is the proponent's prediction about what training, education, or other measures will be needed to help maximize the benefits from the project for the local and regional economy (MVRB, 2010). The proponent must also provide estimates weighing the project's socio-economic benefits versus its costs (MVRB, 2010).

The project is anticipated to yield economic benefits through employment, training, education, and the use of local businesses (MVRB, 2013). The rest of the report largely discusses adverse impacts to both the biophysical and human environments (MVRB, 2013).

The Terms of Reference prepared by the MVRB require the proponent to assess every impact the project may have on each VEC, which include both biophysical and

human aspects of the environment (MVRB, 2010). Both biophysical and human aspects were considered in the EA report as well (MVRB, 2010).

The EA report states that the precautionary principle should be applied by monitoring water quality, as there is uncertainty as to the potential impacts of the project on water quality (MVRB, 2013).

The Terms of Reference also require the proponent to outline their proposed follow-up plan, which is to cover both closure and post-closure phases of the project (MVRB, 2010). The follow-up plan must cover the potential impacts on fish, water, wildlife, and people (MVRB, 2010). The plan must also focus on the long-term impacts on the region's caribou herds, with special attention to factors that might affect already declining caribou population levels (MVRB, 2010). The plan will also include site reclamation measures, and how reclamation may affect wildlife (MVRB, 2010).

The EA report considers long-term implications relating to tailings storage, as well as long-term impacts to water quality resulting from mining projects (MVRB, 2013).

The proponent was required to assess the cumulative impacts of the project, which included consideration of other past, present, and anticipated future projects (MVRB, 2013). This included a focus on wildlife and caribou populations (MVRB, 2013).

*FQ5:* Given the concern for the caribou populations and other wildlife, the MVRB recommended that the proponent and the territorial government develop a Wildlife Effects Monitoring Program, which would be implemented by the proponent (MVRB, 2013). The program would be based on both traditional and scientific knowledge, and

would involve local Aboriginals in the monitoring of the wildlife in the region through the course of the project (MVRB, 2013).

Other aspects of the environment would be featured in the proponent's broader monitoring of impacts as well, such as air and water quality (MVRB, 2013). The socio-economic impacts of the project would be monitored through the Socio-Economic Agreement signed between the proponent and the territorial government (MVRB, 2013).

*FQ6:* No federal review was conducted for this project, although some federal authorities, such as Transport Canada, Fisheries and Oceans Canada, Environment Canada, and Aboriginal Affairs and Northern Development Canada, were parties in the EA process (MVRB, 2013).

### **Duty to Consult Summary**

While the duty to consult was not specifically mentioned in the EA report, the knowledge and concerns of the Aboriginal participants were heard and considered by both the proponent and the MVRB. The EA report discusses the proponent's obligations to ensure that Aboriginal communities benefit from the project, and that the impacts on their culture and activities will be mitigated (MVRB, 2013). The MVRB report expects that these obligations will be addressed through the negotiating of IBAs with the Yellowknives Dene First Nation and the Deninu Kue First Nation, and possibly through the Socio-Economic Agreement as well (MVRB, 2013). The IBA signed with the Deninu Kue First Nation is stated to ensure employment, training, and business contracts for the community (Vela, 2012). The IBA for the junior exploration was signed on July 29, 2012 (Vela, 2012), prior to the EA report and decision.

## **Epilogue**

Acting upon the recommendations of the MVRB, the Minister Aboriginal Affairs and Northern Development Canada approved the project, and stated that any concerns regarding Aboriginal Rights and Titles had been sufficiently addressed by the MVRB (Valcourt, 2013a).

## **Kitsault Mine, British Columbia**

### **Background & Context**

The Kitsault Mine Project involves the construction, operation, and decommissioning of an open-pit molybdenum mine 140 kilometres north of Prince Rupert, British Columbia (CEA Agency, 2013d). The mine was proposed by Avanti Kitsault Mine Limited. It underwent a federal comprehensive study EA, with a review coordinated by the CEA Agency, in consultation with Fisheries and Oceans Canada, Natural Resources Canada, Environment Canada, Health Canada, and Aboriginal Affairs and Northern Canada (CEA Agency, 2013d) and a provincial review by the BCEAO (BCEAO, 2013c). The federal and provincial EA reviews were conducted separately but the federal and provincial authorities cooperated through the Technical Working Group, the review of the project's impacts as assessed by the proponent, and public consultation (CEA Agency, 2013d).

The Nisga'a First Nation, Metlakatla First Nation, Gitanyow Hereditary Chiefs' Office on behalf of Gitanyow Huwilp Luuxhon, Gitxsan Nation, Kitselas First Nation, Kitsumkalum First Nation, and Métis Nation of British Columbia were all contacted and invited to participate in the federal EA process, as these Aboriginal groups had land and interests which could be impacted by the proposed project (CEA Agency, 2013d). In this case, the assessment was required to take into account the Nisga'a Final Agreement, a treaty protected by section 35 of the Constitution Act of 1982, which required the comprehensive study to consider the project's impact on the Nisga'a First Nation in greater depth (CEA Agency, 2013d). The BCEAO report also features this focus on the Nisga'a First Nation, and included the Nisga'a Nation Report as a section in their EA report (BCEAO, 2013c).

## **Application of Framework**

*FQ1:* The federal comprehensive study report outlines the asserted rights of each of the potentially affected Aboriginal groups and how they may be affected by the project (CEA Agency, 2013d). The appendix section also outlines the measures to be taken to accommodate the concerns of the Aboriginals raised during consultation (CEA Agency, 2013d). These include various monitoring plans for wildlife and vegetation, a response plan in the event of a hazardous material spill, and a strategy to mitigate the impact of vehicle traffic on wildlife (CEA Agency, 2013d).

The BCEAO report features a section devoted to the consultation of the Nisga'a First Nation (BCEAO, 2013c). This section features all of the concerns raised by the Nisga'a First Nation through consultation, as well as the proposed measures to mitigate the impacts of the project on their activities and environment (BCEAO, 2013c). There is another section of the BCEAO report that discusses the concerns raised by the other Aboriginals consulted in the EA process, and how the proponent proposed to mitigate the project's impacts on them (BCEAO, 2013c).

*FQ2:* The comprehensive study report does not state when consultation with the Aboriginal communities began, though the BCEAO report states that their consultation process began by accepting public comments on the draft application information requirements (AIR) in March of 2011 (BCEAO, 2013c).

*FQ3:* The report outlines the proponent's means of consulting with the Aboriginal communities, which included site visits, open houses, working group meetings, and further funding to assist with participation and field surveys (CEA Agency, 2013d).

The report states that the Nisga'a First Nation, Metlakatla First Nation, Gitanyow Hereditary Chiefs' Office on behalf of Gitanyow Huwilp Luuxhon, Gitxsan Nation, Kitselas First Nation, Kitsumkalum First Nation, and Métis Nation of British Columbia all received funding from the CEA Agency's Participant Funding Program (CEA Agency, 2013d).

*FQ4:* The federal comprehensive study report features a discussion of both alternatives to the project and alternative means of implementing the project, which were assessed by the proponent (CEA Agency, 2013d). The three alternatives to the project, like the other cases, discuss the options of implementing the project as planned, delaying the project, or forgoing the project (CEA Agency, 2013d). The proponent concluded that proceeding with the project as planned would be the most effective means of achieving the project's purpose (CEA Agency, 2013d). The proponent also assessed alternative means of implementing the project, and the CEA Agency was satisfied with the assessment methodology and the selection of the most preferable options (CEA Agency, 2013d).

The BCEAO report mentions some alternative means of implementing the project throughout the report, though no specific discussion of an assessment of alternatives is present (BCEAO, 2013c).

In the conclusion section, the comprehensive study report states that the project will yield moderate benefits for the economy of the Nisga'a First Nation, though their social and cultural well-being could face both positive and negative impacts resulting from the project (CEA Agency, 2013d). Much of the rest of the discussion regarding Aboriginal communities concerns how adverse impacts on wildlife and traditional activities will be mitigated (CEA Agency, 2013d).

Both the federal comprehensive study report and the BCEAO report discuss biophysical and human aspects of the environment, including the issues raised in consultation with First Nations (BCEAO, 2013c; CEA Agency, 2013d). Both reports feature a separate section devoted to consultation and issues regarding the Nisga'a First Nation, which is more detailed than discussions of issues affecting other First Nations involved in the EA process (BCEAO, 2013c; CEA Agency, 2013d).

The comprehensive study does mention and identify means of accommodating some of the uncertainties associated with the project's potential impacts (CEA Agency, 2013d). The BCEAO report also discusses some of the uncertainties associated with the project (BCEAO, 2013c).

The federal report discusses the residual effects on each aspect of the assessment (CEA Agency, 2013d). In terms of land use, the residual effects listed are the loss of traditional territory for the Metlakatla First Nation, as well as land for other activities, where it is included within the project footprint, impacts on moose population due to greater use of Highway 37 and potential illegal hunting, and potential exposure to contaminants if released into Lime Creek and enter the rest of the watershed (CEA Agency, 2013d). Given the proponent's mitigation measures, which include plans to monitor wildlife, regulate transportation, and a spill response plan, most of which will be developed in consultation with the Aboriginal groups, the report concludes that these effects should not be significant (CEA Agency, 2013d). The potential residual impacts of the project are also discussed in the BCEAO report (BCEAO, 2013c).

The proponent's cumulative effects assessment performed in this EA focused on surface water quality, fish and fish habitat, wildlife and wildlife habitat, marine aquatic

resources, and land and resource use as VECs (CEA Agency, 2013d). The assessment also considered effects of past and current mining exploration, current and future land uses by Aboriginals, transportation, guide outfitting, trapping, fishing, water licences, and the foreseeable future KSM Mine and Northwest Transmission Line projects (CEA Agency, 2013d). A comment from the BCEAO and the Transportation Working Group was that the assessment should factor in the use of Highway 37 for additional projects in the region, and the report concluded that the cumulative impacts of the project should be insignificant with the implementation of the proponent's mitigation strategies (CEA Agency, 2013d). An evaluation of the cumulative effects of the project is also featured in the BCEAO report (BCEAO, 2013c).

*FQ5:* The report also discusses the project's follow-up plan, which is judged to be adaptive in the event of unforeseen impacts, but largely focuses on the biophysical environment (CEA Agency, 2013d). The BCEAO report also mentions a follow-up plan (BCEAO, 2013c).

*FQ6:* The assessment was conducted cooperatively between the federal and provincial authorities through the Canada-British Columbia Agreement for Environmental Assessment Cooperation (CEA Agency, 2013d), though the BCEAO prepared a separate assessment report (BCEAO, 2013c). Federal and provincial authorities, along with the Nisga'a Lisims Government, cooperated in their review of the proponent's EIS (CEA Agency, 2013d).

### **Duty to Consult Summary**

In this case, a separate consultation procedure was required with the Nisga'a First Nation under the Nisga'a Final Agreement (BCEAO, 2013c; CEA Agency, 2013d). This

consultation was conducted by both provincial and federal levels of government, and a report of this consultation is included with the BCEAO report (BCEAO, 2013c; CEA Agency, 2013d).

Both provincial and federal authorities also conducted consultation with other Aboriginal participants (BCEAO, 2013c; CEA Agency, 2013d). The CEA Agency provided funding for the Aboriginal participants through the Participant Funding Program (CEA Agency, 2013d).

The proponent also engaged with the Aboriginal participants, which included organizing site visits and open houses, as well as providing funding to assist in participation and the conducting of field studies (CEA Agency, 2013d). The information gathered from these activities was used and considered in the comprehensive study report (CEA Agency, 2013d).

### **Epilogue**

The BCEAO has issued a certificate of approval (BCEAO, 2013b). The project also received approval from the federal authorities (CEA Agency, 2014d).

## **Kami Iron Ore Project, Newfoundland and Labrador**

### **Background & Context**

Proposed by Alderon Iron Ore Corporation, the Kami Iron Ore Project involves the construction of an open-pit mine and associated infrastructure in western Labrador, as well as storage and load-out facility on Sept-Iles, Quebec (CEA Agency, 2013b). The project was subjected to a comprehensive study with review by CEA Agency, which consulted with Natural Resources Canada, Fisheries and Oceans Canada, Environment Canada, Transport Canada, and Health Canada (CEA Agency, 2013b). The project also required assessment by provincial authorities (CEA Agency, 2013b). The two governments cooperated to some extent in their reviews but produced their own reports.

The Agency identified and consulted with the Innu Nation, NunatuKavut Community Council, Innu-takuaikan Uashat mak Mani-utenam, Nation Innue Matimekush-Lac John, and Naskapi Nation of Kawawachikamach through the comprehensive study process (CEA Agency, 2013b). The report also states the Innu Nation is seeking the negotiation of an IBA to seek financial compensation for the adverse impacts associated with the project (CEA Agency, 2013b).

### **Application of Framework**

*FQI:* As stated above, five Aboriginal groups were identified as having rights that would be infringed upon by the implementation of the project (CEA Agency, 2013b). Federal and provincial authorities conducted the consultation jointly, holding comment periods for both the draft and final EIS (CEA Agency, 2013b).

In this case, the Aboriginal communities were concerned about the cumulative impacts of the various industrial activities in the area, which resulted in some traditional

lands being unusable for the past fifty years (CEA Agency, 2013b). The proponent plans on minimizing or eliminating adverse impacts through measures to protect water and air quality, banning employees from hunting, and rehabilitating the project site (CEA Agency, 2013b). The proponent and the Crown plan to continue consulting Aboriginal communities regarding impact monitoring and regulatory decisions (CEA Agency, 2013b).

The federal comprehensive study report also outlines the concerns that were raised by the Aboriginal communities through consultation, as well as both the proponent's and CEA Agency's responses to these issues (CEA Agency, 2013b). Among these concerns was that there was no direct discussion with Aboriginal groups regarding section 35 of the Constitution Act of 1982, and thus no assessment of the strength of claims and rights (CEA Agency, 2013b). The CEA Agency stated that based on its analysis of available information, the impact on Aboriginal rights should be minimal (CEA Agency, 2013b).

*FQ2:* The federal EA process provided three consultation opportunities for Aboriginal participants and other participants to comment on these documents: at the commencement of the EA process, during the comprehensive study, and at the release of the comprehensive study report (CEA Agency, 2013b).

*FQ3:* The CEA Agency communicated with the Aboriginal communities by means of telephone, letters, emails, meetings, and three consultation opportunities to comment on the draft EIS, the final EIS, and the comprehensive study report (CEA Agency, 2013b).

The federal authorities provided funding to four of the identified Aboriginal groups; the Nation Innue Matimekush-Lac John did not apply for funding (CEA Agency,

2013b). In addition, the NunatuKavut Community Council accepted funding from the proponent to perform a traditional land use study (CEA Agency, 2013b).

*FQ4:* The EIS Guidelines, which were prepared jointly by the CEA Agency and the Newfoundland and Labrador Department of Environment and Conservation (NLDOEC), required the proponent to assess and consider alternatives to the project, as well as feasible alternative means of implementing the project and the preferred alternatives (CEA Agency & NLDOEC, 2012).

The only other alternative that was considered by the proponent's assessment of alternatives to the project was the option not to proceed with the project, though the proponent concluded that the most viable option was to proceed with the project as planned (CEA Agency, 2013b). The proponent also assessed alternative means of implementing the project and selected the most preferable options, which was done to the satisfaction of the CEA Agency (CEA Agency, 2013b).

In the Guidelines' section on sustainable development, it is stated that the EA process is an opportunity to ensure a net benefit to the environment, including both biophysical and human aspects (CEA Agency & NLDOEC, 2012). The section also outlines how a sustainable development approach also allows for greater public participation and input, as well as the consideration of future generations and how their needs may be impacted by the project (CEA Agency & NLDOEC, 2012). The Guidelines also require the proponent to state the socio-economic benefits of the project (CEA Agency & NLDOEC, 2012).

While the project is expected to yield socio-economic benefits, the majority of the EA report focuses on the mitigation of negative impacts (CEA Agency, 2013b).

The EIS Guidelines feature a definition of environment that expands on the federal definition to include various human aspects of the environment, as well as biophysical aspects (CEA Agency & NLDOEC, 2012). The federal report does assess both biophysical and socio-economic aspects of the environment (CEA Agency, 2013b), though the coverage of socio-economic factors discussed in the report is no more comprehensive than other comprehensive study reports in this analysis.

The precautionary approach is specifically mentioned in regards to the management of tailings and waste from the project, as well as any unexpected archaeological sites in the project area (CEA Agency, 2013b).

The Guidelines oblige the proponent to assess the potential residual impacts of the project on both biophysical and human environments, whether deemed significant or not (CEA Agency & NLDOEC, 2012). The residual effects of the project were discussed in the comprehensive study report (CEA Agency, 2013b).

The cumulative effects of the project were discussed in the comprehensive study report, which considered the impacts of past, ongoing, and future projects and activities, as well as the Kami Iron Ore Project, on each VEC, based on how each VEC would change from the baseline conditions (CEA Agency, 2013b). The potential effects on these VECs, as well as the mitigation strategies of wetland reclamation and rehabilitation, monitoring impacts on migratory caribou, and cooperation with planning authorities and other proponents in the area, were considered on a regional scale (CEA Agency, 2013b). The comprehensive study report concludes that with the proponent's mitigation strategies in place, there should be no serious adverse cumulative impacts (CEA Agency, 2013b).

*FQ5:* The report states that a follow-up plan is required by the CEA Agency, which would include monitoring the atmospheric environment, landforms, soil, ice, snow, water resources, wetlands, fish, fish habitat, fisheries, wildlife, historic and cultural resources, and traditional land use (CEA Agency, 2013b). The federal agencies involved in the EA would be responsible for ensuring the design and implementation of the follow-up measures in accordance with the CEA Act (CEA Agency, 2013b). The monitoring of the impacts on traditional land use would involve ongoing consultation with the Aboriginal communities as needed (CEA Agency, 2013b).

*FQ6:* The federal and provincial authorities involved in the EA worked jointly through the consultation aspects of the EA processes, including consultation regarding the Draft EIS Guidelines and the Summary of the EIS (CEA Agency, 2013b).

### **Duty to Consult Summary**

In this case, both federal and provincial authorities consulted with Aboriginal participants, with at least some degree of collaboration between the two levels of government (CEA Agency, 2013b). The federal authorities also provided funding to four of the Aboriginal groups that were identified through the EA process (CEA Agency, 2013b).

There was concern from the Aboriginal participants that there was no mention of section 35 of the Constitution Act of 1982, though the comprehensive study states that the impact on Aboriginal rights is expected to be minimal (CEA Agency, 2013b).

The proponent also consulted and engaged with the Aboriginal participants in this case, as one First Nation accepted funding from the proponent to conduct a land use study to inform the EA process of the project's impacts on their activities (CEA Agency,

2013b). The proponent also signed an IBA with the Innu Nation, which is stated to provide employment opportunities, training, business opportunities, financial benefits, environmental and cultural heritage protection, and the creation of an environmental monitoring committee (Innu Nation, 2014). The agreement was signed on or prior to January 23, 2014 (Innu Nation, 2014), which was most likely after the EA report and the provincial decision, but before the federal decision.

### **Epilogue**

The project received approval from both federal and provincial authorities (CEA Agency, 2014g; NLDOEC, 2014).

## **Prosperity Gold-Copper Mine, British Columbia**

### **Background & Context**

The Prosperity and New Prosperity Gold-Copper Mine projects were proposed by Taseko Mines Limited. Both centred on the development of a large open-pit gold and copper mine near Williams Lake, British Columbia (BCEAO, 2009a; New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). The initial proposal was subjected to both a provincial assessment by the BCEAO and a federal review panel (BCEAO, 2009a; Federal Review Panel for the Prosperity Gold-Copper Mine Project, 2010). While the severe environmental impacts were seen as justifiable by the provincial assessment review (BCEAO, 2009a), the federal review panel concluded that the significant ecological effects and impacts on First Nations could not be mitigated if the project were implemented (Federal Review Panel for the Prosperity Gold-Copper Mine Project, 2010). The federal government rejected the proposal. The proponent later submitted a proposal for the New Prosperity Mine, making alterations to the project that changed the location of the tailings area, reduced the area disturbed by the project, and took additional measures to reduce the project's adverse impacts on the environment and First Nations (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). This proposal was subjected to a second federal panel review, which will be examined through the framework questions to determine how well the EA conformed to the best practices.

In this case, both the Tsilhqot'in and Secwepemc First Nations asserted Aboriginal rights that would be impacted by the proposed project, which was verified by the panel (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). Both

of these groups participated in the EA process (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013).

### **Application of Framework**

*FQ1:* The review panel's report states that the panel's mandate concerning Aboriginal rights was to assess how the project would impact Aboriginal interests and rights, established or potential (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). It was not the panel's mandate, however, to assess the strength or validity of any Aboriginal claims, though the findings from their consultation with Aboriginals could inform the Crown in their efforts to meet the duty to consult and accommodate (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013).

In this case, the project's potential impacts on the Tsilhqot'in and Secwepemc First Nations required assessment by the panel (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). These included impacts on socio-economic and health conditions, physical and cultural heritage, traditional use of lands and resources, and sites, structures, or things of historical, archaeological, architectural, or paleontological importance (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013).

The proposed project would be undertaken within the traditional territory of the Tsilhqot'in First Nation, particularly the Xeni Gwet'in's Caretaker Area (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). The Panel concluded that loss of significant traditional areas, such as Little Fish Lake, would result in a great loss to the Tsilhqot'in First Nation (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013).

A transmission line that would be constructed for the project would pass through the traditional territory of the Secwepemc First Nation and interfere with their traditional activities (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). The Secwepemc First Nation stated that they were willing to meet with the proponent and discuss an alternative route, though they stated that the proponent had not engaged with them (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013).

In light of these issues, the panel concluded that the proposed project would have significant adverse impacts on the rights of these First Nations, and that the impacts on the cultural heritage of the Tsilhqot'in First Nation could not be mitigated (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). The panel also concluded that there would be some adverse socio-economic impacts on Aboriginal communities, though these impacts were not deemed significant (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). The panel's recommended that if the project proceeds, the proponent should consult and engage the First Nations to minimize the impacts on significant traditional and heritage resources, as well as to re-route the transmission line running through the Secwepemc First Nation's traditional territory (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013).

*FQ2:* To provide opportunities for public participation, the panel provided a public comment period in early 2012 to allow for comments regarding the EIS Guidelines and the Terms of Reference (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). The panel later provided a forty-five day public comment period in the fall of 2012 to allow for public input regarding the EIS (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). There were also public hearings in 2013 to allow

for public presentations regarding the project (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013).

*FQ3:* As stated above, the panel both accepted submissions and held hearings to engage Aboriginal participants and other members of the public (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). The CEA Agency also provided funds to Aboriginal participants through the Participant Funding Program (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013).

*FQ4:* The EIS was required to assess both feasible alternatives to and alternative means of implementing the project.

The panel summarized the proponent's assessment of alternatives to the project and alternative means of implementing the project (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). The proponent assessed alternative project locations, the option of not proceeding with the project, and alternative means of power production (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). The proponent concluded that project should proceed at the chosen location, as this would be the most economically viable means of achieving the project's purpose (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013).

The panel's report also summarizes the proponent's assessment of the alternative means of implementing the project (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). While some aspects of the project had not changed from the previous proposal and thus had no new alternative means in the new proposal, the aspects that had changed (i.e. tailings storage facility, waste rock, and ore locations) featured new alternative means which considered the input from the project stakeholders such as

Aboriginals (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). However, this assessment was met with criticism from the Tsilhqot'in First Nation, who questioned why the proponent selected a tailings impoundment option that, according to the initial proposal EIS, would be less appropriate in terms of environmental impacts (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013).

The Guidelines' section on sustainable development focused on meeting present and future needs without compromising future generations, as well as how the interacting components of ecosystems may be impacted by the project (CEA Agency, 2012f). The proponent was also required to state whether each environmental change is positive or negative (CEA Agency, 2012f). It is not explicit that overall positive contributions to sustainability are required.

Throughout the review process, the proponent stated that the project would yield economic benefits through employment, training, and revenues from the mine, as well as road improvements and increased traffic to improve the local economy (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). The proponent also stated that at certain phases of the project, the water management plan would increase the flow volume through Fish Lake and create a positive impact (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). The rest of the panel's report discusses the mitigation of adverse impacts (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013).

The EIS was required to assess the project's environmental effects, as defined under the new CEA Act, and to consider the project's potential impacts on both biophysical and human environments, as well as impacts on Aboriginals (CEA Agency,

2012f). The human aspects covered in the EIS include navigable waters, human health, physical and cultural heritage resources, and Aboriginal interests (CEA Agency, 2012f).

The panel's mandate required that the assessment be conducted using a precautionary approach, using monitoring plans and adaptive management in the event of unforeseen impacts resulting from the project (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013).

The Guidelines also require the assessment of residual environmental impacts, which are defined as effects "that remain after the implementation of mitigation measures" (CEA Agency, 2012f). These include the project's residual impacts on Aboriginal rights and land use (CEA Agency, 2012f).

The panel assessed the residual impacts of the project, as well as the cumulative impacts of the project in conjunction with other projects and activities (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). These were assessed individually for each relevant component or indicator, and presented with each factor throughout the report (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013).

*FQ5:* As stated above, the panel report included provisions for a monitoring and follow-up plan (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013) in the event of federal approval of the project.

*FQ6:* While the BCEAO conducted an assessment of the original Prosperity Mine proposal, they addressed the New Prosperity Mine as an amendment of the original project, and were coming to a decision as to whether or not to extend the project's certificate (BCEAO, 2014a).

### **Duty to Consult Summary**

While the panel considered the impacts the project would have on Aboriginals and would inform the Crown of these impacts, it was emphasized it was the Crown's responsibility to assess the strength of Aboriginal claims and ensure that the duty to consult and accommodate was fulfilled (New Prosperity Gold-Copper Project Federal Review Panel, 2013). Aboriginal comments were heard during various stages of the EA process, such as for the draft Terms of Reference (New Prosperity Gold-Copper Project Federal Review Panel, 2013). Funding was provided by the federal authorities to assist Aboriginals in participating in the EA process (New Prosperity Gold-Copper Project Federal Review Panel, 2013).

### **Epilogue**

The federal government again determined that the project was likely to cause unjustifiable significant adverse impacts to the environment, and once again rejected the project proposal (Aglukkaq, 2014). The proponent has initiated a court case against the federal government, claiming that there was an error in the panel report and that undisclosed meetings transpired which affected the decision (Koven, 2014).

## **Arnaud Mine Project, Quebec**

### **Background & Context**

The Arnaud Mine Project, proposed by Mine Arnaud Incorporated, involves the construction of an open-pit apatite mine and associated phosphate processing and tailings facilities near Sept-Iles, Quebec (Mine Arnaud, 2012). The project would also feature the necessary infrastructure to process and distribute the ore, including an ore processing facility, transportation routes and a wharf and other buildings at the Port of Sept-Iles (Mine Arnaud, 2012). The project is currently undergoing a federal comprehensive study, though no report has been released yet (CEA Agency, 2013c). The project was also reviewed by the Bureau d'audiences publiques sur l'environnement (BAPE) (2013).

The proponent released the EIS in 2012 and the EIS reports that the company has consulted with the Innu community of Uashat mak Mani-Utenam (Mine Arnaud, 2012). The EIS also reports that Uashat mak Mani-Utenam and the proponent seek to negotiate an IBA in order to protect the environment and the Innu's traditional activities, create equal economic and training opportunities, and allow for a member of the Innu community to assist in integrating the workers in the community (Mine Arnaud, 2012).

### **Application of Framework**

*FQI:* In the draft federal guidelines, the proponent was required to consult the Aboriginals that would be impacted by the project and outline their consultation activities and discussions in their EIS (CEA Agency, 2012g). The proponent was also responsible for stating any treaty or other Aboriginal rights that would be infringed upon, and also to describe how their concerns would be accommodated (CEA Agency, 2012g).

Key concerns that were raised by the community of Uashat mak Mani-Utenam included ensuring equal opportunities for training and employment, protecting the natural environment and traditional activities, and the hiring of an Innu Coordinator from the community (Mine Arnaud, 2012). The proponent stated in the EIS that they will engage with the community to develop a consultation program and negotiate an IBA (Mine Arnaud, 2012).

*FQ2:* The proponent began their consultation regarding the proposed project in 2010 in order to gather preliminary information for the EIS (Mine Arnaud, 2012). Through their consultation, the proponent held approximately forty meetings with over one hundred attendees (Mine Arnaud, 2012). The proponent also performed pre-consultation activities with various stakeholders, through which they interviewed participants and recorded their concerns regarding the proposed project (Mine Arnaud, 2012).

*FQ3:* The proponent held forty meetings with project stakeholders, starting in 2010 (Mine Arnaud, 2010). Through the preliminary consultation, the proponent communicated by means of slideshows, telephone, website, hiring a local resource for communications, newsletters, brochures, and opening a Community Liaison Office in Sept-Iles (Mine Arnaud, 2012). Included in the target audience was the Innu community of Uashat mak Mani-Utenam (Mine Arnaud, 2012).

*FQ4:* The EIS guidelines required the proponent to assess alternative means of implementing the project, the socio-economic benefits of the project, cumulative and residual impacts, the various environmental impacts of the project including the socio-economic impacts of the project, and monitoring and follow-up plans (CEA Agency, 2012g).

The proponent's EIS features a list of alternative options that were considered, including alternative sites for mining infrastructure, tailings disposal options, access to the mining site, means of transporting the concentrate, water supplies, and relocating snowmobile trail near the mining site (Mine Arnaud, 2012).

One of the sections in the EIS discusses the consideration of sustainability principles (Mine Arnaud, 2012). The highlighted principles are protecting environmental integrity, improving social equality, and improving economic efficiency (Mine Arnaud, 2012). The section also contains a table with a larger list of sustainability principles from the Québec Sustainable Development Act (2006) and how the proponent will meet these principles (Mine Arnaud, 2012). Besides ensuring economic efficiency and appropriate engagement of the other stakeholders and government authorities, the strategies largely focus on mitigating adverse impacts to the environment (Mine Arnaud, 2012).

The EIS assessed the impacts on both the biophysical and human environments (Mine Arnaud, 2012).

Precaution is one of the sustainability principles outlined in the EIS. The proponent stated that they would develop and improve their risk management plan continually, as well as aspire to the principle of keeping risks "as low as reasonably practicable" (Mine Arnaud, 2012).

The EIS also examined the potential cumulative impacts of the project, using the guidelines provided by the CEA Agency (Mine Arnaud, 2012). The assessment took into account other projects and activities in the Pointe-Noire area, such as a hydroelectric project, projects in the port, industrial projects, and other mining activities (Mine Arnaud, 2012). The highlighted concerns in the EIS are housing, increased traffic, the need for

health and social services, and air quality (Mine Arnaud, 2012). The proponent plans to implement monitoring plans for air quality, and states that monitoring and managing traffic will require effort from all stakeholders in the area (Mine Arnaud, 2012).

Residual impacts were also assessed in terms of their severity, duration, and spatial extent, and would be addressed by the proponent's environmental and social management plan (Mine Arnaud, 2012).

*FQ5:* Through an environmental and social management plan, the proponent aims to mitigate and monitor the adverse impacts of the project, and maximize the project's benefits (Mine Arnaud, 2012). The proponent's EIS also mentions that a part of this plan will include the implementation of a social integration and inclusion plan (Mine Arnaud, 2012). Other aspects covered in the monitoring plan include monitoring air emissions, the management of noise and vibration, pollution prevention, managing waste and hazardous materials, land use, impacts on health, economics and employment, groundwater and surface water quality, benthos and fish, and revegetation (Mine Arnaud, 2012).

*FQ6:* Both federal and provincial assessments were conducted, though the federal comprehensive study report has not yet been released.

### **Duty to Consult Summary**

As stated earlier, the proponent conducted pre-consultation activities with the project stakeholders, including Aboriginals (Mine Arnaud, 2012). The proponent stated that they wish to collaborate with and engage the Innu community of Uashat mak Mani-Utenam and have proposed to negotiate an IBA with them (Mine Arnaud, 2012).

## **Epilogue**

While the federal authorities have yet to release their comprehensive study report (CEA Agency, 2013c), Quebec's BAPE has rejected the project (BAPE, 2013; CBC, 2014).

## **Kerr-Sulphurets-Mitchell (KSM) Project, British Columbia**

### **Background & Context**

The KSM project, proposed by Seabridge Gold Incorporated, involves the construction of an open-pit and underground copper-gold-molybdenum mine and ore-processing and tailings management facilities (Seabridge Gold Inc., 2013). Both the BCEAO and the CEA Agency have completed their assessment reports for the project (BCEAO, 2014d, CEA Agency, 2014e).

Seabridge has prepared and released their EIS report, which states that the Nisga'a First Nation has been consulted and provided with funds in order to participate, as required by the Nisga'a Final Agreement (Seabridge Gold Inc., 2013). It also identifies the Métis Nation, Tahltan First Nation, Skii km Lax Ha, Gitanyow First Nation, and Gitxsan First Nation as Aboriginal groups that would potentially be impacted by the project (Seabridge Gold Inc., 2013).

### **Application of Framework**

*FQI:* Like the Kitsault Mining Project, this project would partially occur on the traditional territory of the Nisga'a First Nation, thus the proponent was required to consult with them under the Nisga'a Final Agreement (BCEAO, 2014d; CEA Agency, 2014e; Seabridge Gold Inc., 2013). In addition to the public open houses conducted since mid-2010, the proponent consulted with the Nisga'a First Nation through community meetings in their communities, one-on-one meetings, site visits, and discussions with the Working Group (Seabridge Gold Inc., 2013). The proponent states in their report that they provided funding to the Nisga'a First Nation to cover participation costs, and that the Agency and the BCEAO provided the Nisga'a First Nation and other Aboriginal

participants funding as well (BCEAO, 2014d; CEA Agency, 2014e; Seabridge Gold Inc., 2013).

Under the Nisga'a Final Agreement, as with the case of Kitsault Mine, the Nisga'a First Nation receives more attention through the EA process, including an assessment of the direct socio-economic impacts of the project on their Nation (BCEAO, 2014d; CEA Agency, 2014e; Seabridge Gold Inc., 2013).

The proponent states that the primary concerns raised by the Aboriginal participants were for the impacts on the aquatic environment, wildlife such as the vulnerable moose population that may be hunted or killed on roads, potential spills and contamination, restricted use of traditional territory, culturally-significant sites, and the health and well-being of the communities (Seabridge Gold Inc., 2013). In response, the proponent proposed re-routing the access routes, taking measures to prevent leakage from the tailings facility, prohibiting employees from hunting, and implementing Environmental Management Plans to regulate project-related traffic and establish plans to respond to potential issues such as spills (Seabridge Gold Inc., 2013).

The Nisga'a First Nation, Gitksan First Nation, Gitanyow First Nation, and the Skii km Lax Ha participated in the Technical Working Group established by the BCEAO (BCEAO, 2014d).

The BCEAO applied the Haida spectrum to illustrate the appropriate level of consultation in this case, for instance stating that the Gitksan First Nation required a low level of consultation, while the Gitanyow First Nation were owed a medium level of consultation (BCEAO, 2014d). The BCEAO felt at first that a medium level of consultation was appropriate for the Tahltan First Nation, though by the end the

consultation was at the deeper end of the spectrum (BCEAO, 2014d). The BCEAO report also features a detailed account of the consultation activities with each First Nation involved in the EA process (BCEAO, 2014d).

The federal comprehensive study report outlines their consultation with the Aboriginal participants, stating that it was conducted cooperatively with the province's consultation as much as possible (CEA Agency, 2014e). The federal EA report also states that the CEA Agency was the only group who consulted with the Métis Nation of British Columbia (CEA Agency, 2014e), also made evident by the fact that they were not part of the Technical Working Group. The federal report also featured a table tracking all of the concerns raised by the Aboriginal participants and how they were addressed by both the proponent and the CEA Agency (CEA Agency, 2014e).

*FQ2:* The proponent stated that they were involved in the BCEAO's open houses since 2010, and also met with local governments and community representatives (Seabridge Gold Inc., 2013). The BCEAO notified Aboriginal communities of the onset of the EA process in April 2008 (BCEAO, 2014d). The federal EA report states that most of the Aboriginal participants received funding at the start of the EA process (CEA Agency, 2014e), implying that they were at least informed of the EA process from the beginning.

*FQ3:* The proponent's report also states that the proponent has responded to Aboriginal concerns through written correspondence, and plans to continue engaging the communities through the EIS review and comprehensive study process (Seabridge Gold Inc., 2013).

The Nisga'a First Nation, as well as the other First Nations involved in the EA process, received funding from both the proponent and the CEA Agency (CEA Agency,

2014e; Seabridge Gold Inc., 2013). The BCEAO also provided funding to assist Aboriginal communities as they participated in the EA process (BCEAO, 2014d).

*FQ4:* The federal EIS guidelines only mention the consideration of alternative means of implementing the project, not alternatives to the project (CEA Agency et al., 2010a). Alternatives are also mentioned in the BCEAO guidelines, but as a federal requirement for the Application (BCEAO, 2011). The BCEAO EA report discusses an alternatives assessment for the tailings storage facility (BCEAO, 2014d). Both alternatives to the project and alternative means of implementing the project are discussed in the CEA Agency comprehensive study report (CEA Agency, 2014e).

The EA guidelines do not mention making positive contributions through implementing the project, and do not establish contributions to sustainable development as a expectation for approval (CEA Agency et al., 2010a). The BCEAO Guidelines state that the proponent's Application must include any measures to improve the potential benefits of the project (BCEAO, 2011). The BCEAO EA report mentions the economic benefits of the project, including benefits for Aboriginal communities (BCEAO, 2014d). The federal EA report also highlighted the economic benefits of the project, for both Aboriginals and broader Canadian society (CEA Agency, 2014e).

The EIS states that the project should have a positive impact for the Nisga'a First Nation through employment and economic development during the life of the project, and that they will strive to sign a Benefits Agreement with the Nisga'a First Nation (Seabridge Gold Inc., 2013). Otherwise, the EIS focuses largely on the mitigation of adverse impacts (Seabridge Gold Inc., 2013). This is largely reflected in the BCEAO and CEA Agency reports (BCEAO, 2014d, CEA Agency, 2014e).

The federal EA requirements adopt the basic federal definitions of environment and environmental effects (CEA Agency et al., 2010a), which, as stated earlier, do not include direct socio-economic impacts of the project. The Nisga'a Final Agreement, however, requires the EA to assess the project's potential immediate and future socio-economic and cultural impacts on the Nisga'a First Nation, as well as indirect impacts resulting from changes in the biophysical environment (CEA Agency et al., 2010a).

The assessment considered the project's potential impacts on the chosen VECs, which included both environmental and socio-economic components (Seabridge Gold Inc., 2013). The highlighted components of the assessment were the moose population, the fish aquatic habitat, surface water quality, and the impacts of the increased traffic on the town of Stewart due to several projects that may be implemented in the region (Seabridge Gold Inc., 2013). Other VECs that were assessed include air quality, climate change, noise, groundwater, soils, terrain, surface geology, geohazards, terrestrial ecosystems, wetlands, land and resource uses, visual and aesthetic resources, traditional and heritage value of the land, and human health implications (Seabridge Gold Inc., 2013).

The BCEAO report features sections discussing the project's impacts on the biophysical, economic, and social environments, as well as potential heritage, health, and transportation effects (BCEAO, 2014d). The CEA Agency comprehensive study report also assesses both biophysical and socio-economic aspects of the environment, although more in-depth assessment of direct social, economic, and cultural impacts is reserved for the Nisga'a First Nation (CEA Agency, 2014e).

The EIS provides a table that lists all anticipated residual impacts of the project, and the strategy to mitigate and manage each impact (Seabridge Gold Inc., 2013). The proponent also gives some consideration to the long-term economic implications for the Nisga'a First Nation once the project concludes, and states that the training received through the project should aid community members seeking employment after the mine's closure (Seabridge Gold Inc., 2013).

The federal guidelines mentioned residual effects as a component of the cumulative impacts assessment (CEA Agency et al., 2010a). Cumulative and residual impacts were also covered in the BCEAO guidelines (BCEAO, 2011). Both cumulative and residual impacts were discussed in the federal comprehensive study report (CEA Agency, 2014e). These were also discussed for each VEC in the BCEAO report (BCEAO, 2014d).

The proponent assessed the cumulative impacts of the proposed project with other past, present, and future projects and activities in the region, on each of the selected VECs (Seabridge Gold Inc., 2013). These were assessed in two scenarios, which were "likely development scenario" and "unlikely development scenario," with the unlikely development scenario featuring the approval of several or all of the proposed projects in the region (Seabridge Gold Inc., 2013). Given the number of proposed projects in the region, which would be using the port in the nearby town of Stewart, there were impacts on the moose population and the well-being of the town of Stewart due to the increased traffic, though this was found in the proponent's "unlikely development scenario" (Seabridge Gold Inc., 2013).

*FQ5:* The proponent also proposed monitoring and follow-up-programs that would assess the validity of the predictions made in the EA process, and the proposed mitigation strategies (Seabridge Gold Inc., 2013). The follow-up plan would monitor geohazards, the quality and quantity of groundwater and surface water, fish and aquatic habitats, wetlands, and wildlife (Seabridge Gold Inc., 2013). A proposed follow-up plan was included in the federal comprehensive study report (CEA Agency, 2014e).

*FQ6:* The EA process was conducted cooperatively between the federal and provincial authorities, which included the working group (CEA Agency, 2014e). Federal and state representatives from the United States and Alaska respectively also participated in the EA process (CEA Agency, 2014e).

### **Duty to Consult Summary**

In this case, Aboriginals were consulted by the proponent, the CEA Agency, and the BCEAO (BCEAO, 2014d; CEA Agency, 2014e; Seabridge Gold Inc., 2013). Under the Nisga'a Final Agreement, the concerns of the Nisga'a First Nation received a more rigorous assessment, particularly of socio-economic and cultural impacts, than those of other First Nations and project stakeholders (BCEAO, 2014d; CEA Agency et al., 2010a; Seabridge Gold Inc., 2013).

### **Epilogue**

The project has received approval from the provincial (BCEAO, 2014c). However, in light of the Mt. Polley tailings spill, several groups, including Alaskan fishery organizations, Aboriginals, and politicians are pressing for Canada to conduct a more thorough review of the potential environmental impacts of the KSM project (Pollon, 2014).

## **Summary**

This chapter has used the framework based on the literature review in chapter two as a basis for presenting information about recent EAs in 22 Canadian mining cases. It is now possible to summarize the findings from these cases and determine if and how well EAs in these cases conformed to the established best practices from the literature. Chapter five will provide this analysis.

## 5. Case Study Analysis

On the basis of the review of 22 cases in chapter four, this chapter provides an analysis of the extent to which best practices in EA that may affect Aboriginal interests have been incorporated in mining project EAs in Canada since 2004, and identifies trends in EAs over time since 2004. The analysis considers practice related to each of the questions in the framework developed in chapter two. This will help determine if these cases are conforming to the established best practices for EA and the duty to consult, and what areas would need to be strengthened to ensure that the best practices are met in actual practice.

### **Adherence to Best Practices**

*FQ1: Were established Aboriginal rights acknowledged, and was there a substantive effort to accommodate Aboriginal interests where necessary?*

In all cases, both proponents and government agencies addressed Aboriginal rights – established through signed Treaties or land claims that were either negotiated or being negotiated, or non-ceded Aboriginal rights – that were applicable to the project.

In assessing and meeting the duty to consult, there is some uncertainty about roles and expectations for ensuring the duty is met in cases where a review panel has been established to conduct the EA review. Since a review panel is not a government agency, it does not necessarily bear the Crown's obligation to ensure that Aboriginals have been adequately consulted and accommodated where necessary (Anonymous, 2013). Though a panel may not bear the duty to consult, the Crown is still clearly responsible for ensuring adequate consultation has occurred before any infringement on an Aboriginal claim or title is made. Since panels conduct consultation as part of the EA process, the issue is

what each panel's mandate states regarding its role in ensuring that the duty to consult is met.

In cases of EA reviews performed by a panel, the main issues are whether the panel has a role in meeting the Crown's duty to consult, whether it can determine whether consultation is owed to Aboriginal groups under the duty to consult, and whether it can judge whether consultation and accommodation measures have met the duty to consult or not.

In the Jackpine Expansion Project case, the panel's mandate clearly stated that the panel was not responsible for assessing whether the Aboriginal consultation through the pre-approval proceedings, including EA, had met the duty to consult (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). This was also affirmed by the ruling of the Alberta Court of Appeal in *Métis Nation of Alberta Region 1 v Joint Review Panel* (2012), where the court stated that an assessment of whether the consultation performed had met the duty to consult was outside of the panel's mandate (*Métis Nation of Alberta Region 1 v Joint Review Panel*, 2012 at para. 6, 26). The Kemess North Copper-Gold Mine Joint Review Panel (2007) also stated that assessing the strength Aboriginal claims and titles or the adequacy of consultation was not within its mandate. A similar position was taken by the New Prosperity Gold-Copper Mine Project Federal Review Panel (2013), as well as the Joint Review Panel for the Lower Churchill Hydroelectric Generation Project (2011).

Despite this, the review panel in the Kearn Oil Sands Project case made an assessment and claimed that two Aboriginal groups who had raised a question of constitutional law were not recognized under the Indian Act as the groups claimed, and

thus not owed the constitutional duty to consult (Kearl Oil Sand Project Joint Review Panel, 2007). The report of the other review panel in this case study, the Joslyn North Mine Project Panel (2011), is not clear about whether its mandate included assessing whether Aboriginal titles and claims triggered the duty to consult or not.

Since the Kearl Oil Sands case is the oldest in this study, and the Kemess North (2007), Jackpine Extension (2013), New Prosperity (2013), and Lower Churchill (2011) projects all stated that assessing the strength of Aboriginal titles and claims is beyond their mandates, it may be suggestive of a trend towards panels universally not addressing the specifics of the duty to consult, though more panel cases should be reviewed to confirm this. It should be noted, however, that the New Prosperity Review Panel Report did state that the proposed project would interfere with asserted Aboriginal rights (New Prosperity Gold-Copper Project Federal Review Panel, 2013).

To date, uncertainties continue to surround the question of whether government-established tribunals or review panels do or should have roles in assessing the adequacy of efforts to meet the duty to consult is an evolving matter. A court case that has addressed this matter is *Rio Tinto Alcan Ltd. v. Carrier Sekani Tribal Council* (2010), where the Supreme Court of Canada ruled that tribunals, such as the British Columbia Utilities Commission in this case, have whatever powers and responsibilities are bestowed on them by their mandate and relevant legislation (*Rio Tinto Alcan Ltd. v. Carrier Sekani Tribal Council*, 2010 at para. 55). Dwight G. Newman (2014) comments that some administrative tribunals have addressed the duty to consult, and have commented on its application and presented conclusions about whether it has been met or not. These are presented as an alternative to relying on further court litigation to resolve

issues regarding the duty to consult (Newman, 2014). While review panel mandates have so far not asked panels to address the application of the duty to consult or the adequacy of government consultation, perhaps, with the adequate supporting expertise, panels could be asked to provide an assessment of the scope of the duty to consult, and whether the duty has been met or not. However, any final decisions regarding the project would still have to be made by the relevant government authority.

Another observation is that Métis groups are not covered by Alberta's Aboriginal consultation policy (Joint Review Panel for the Jackpine Mine Expansion Project, 2013), even though the Constitution Act of 1982 clearly states that Métis, along with First Nations and Inuit, are considered Aboriginals. The Métis Nation of Alberta was still consulted by the panel in this case, and one of the panels' recommendations was that the Government of Alberta should develop a Métis consultation policy (Joint Review Panel for the Jackpine Mine Expansion Project, 2013). No other cases in this study involving Métis raised similar concerns, perhaps suggesting that other jurisdictions include Métis in their consultation procedures, or at least perform more adequate consultation with Métis.

In most of the cases involving the BCEAO, the extent of consultation with each Aboriginal group was discussed by referring to the Haida spectrum, with each group receiving low, medium, or high levels of consultation, as the BCEAO felt was needed to satisfy the duty to consult. This may be a helpful practice for other jurisdictions to adopt in order to define clearly what level of consultation the Crown owes to Aboriginals and ensure that the duty is met through the EA process and any other consultation and accommodation activities undertaken.

In cases involving the MVRB in the NWT, the MVRB received a letter from the Minister of Aboriginal Affairs and Northern Development, which announced approval of the project and state that the MVRB's review process had satisfied the duty to consult.

In several cases, many of the accommodation measures for Aboriginals were presented by the proponent. In the KSM case, the proponent proposed to re-route access routes to the mine, prohibit their employees from hunting, manage project-related traffic, and enact measures to prevent spills and other incidents in order to address Aboriginal concerns (Seabridge Gold Inc., 2013). Similar measures were also found in the Eagle Gold (YESAB, 2013), Renard (CEA Agency, 2013g), and Kami (CEA Agency, 2013b) cases, and the rerouting of power lines was discussed in the rejected New Prosperity case by the review panel (New Prosperity Gold-Copper Mine Project Federal Review Panel, 2013). Many proponents would also have addressed Aboriginal concerns through the aforementioned IBAs, though as stated in the literature review, whether or not these agreements can be accepted as accommodation in light of the duty to consult is an ongoing issue (Newman, 2009).

In total, nine of the 22 EA reports reviewed mentioned that IBAs between Aboriginals and proponents were being discussed, negotiated, or had already been negotiated. Three IBAs were found and discussed. These all featured economic provisions, such as employment opportunities and training. The agreements also contained provisions for socio-economic monitoring, with the Mary River IBA featuring the creation of a fund to be used for the welfare of the Inuit in the region, and will be funded by both the proponent and the Qikiqtani Inuit Association (The Mary River Project Inuit Impact and Benefit Agreement, 2013). The Meadowbank and Mary River

IBAs also feature provisions for wildlife protection (Meadowbank Mine Inuit Impact and Benefit Agreement, 2011; The Mary River Project Inuit Impact and Benefit Agreement, 2013).

Of the nine IBAs that were either available or commented on in news releases, four were signed after the project's EA report and decision, four were signed before the release of the EA report, and the Kami IBA was signed between the EA report and the federal decision. As stated in Gibson and O'Faircheallaigh (2010), each of these timings presents different benefits and challenges. Negotiating and IBA before the EA typically allows for greater leverage for Aboriginals to negotiate for more favourable terms since the project has not received approval, but less information is available to be included in the negotiations (Gibson & O'Faircheallaigh, 2010). If negotiated afterwards, there is more information available from the EA, but there will be less leverage for Aboriginals since the project has been approved (Gibson & O'Faircheallaigh, 2010). Simultaneous EAs and IBA negotiations allow for both leverage and information sharing and input; however it may be strenuous for Aboriginal communities to pursue both processes at the same time (Gibson & O'Faircheallaigh, 2010).

From a best practices standpoint, both negotiating leverage and the sharing of information would be ideal to create the most encompassing agreement. In light of this, pursuing the terms of the agreement and the studies and discussions of the EA would seem to be the best option if it can be achieved. Since only three IBAs were publicly available, further investigation, if possible, would be ideal to determine the full impacts of negotiating and signing at different times in relation to the EA process.

While Aboriginal rights and claims are at least being acknowledged in these cases of EA, the panel cases demonstrate a need for greater oversight and clarity about which government agency is responsible for both assessing the scope of the duty to consult in each case and ensuring adequate consultation and accommodation of Aboriginals.

*FQ2: Were the EA and consultation initiated early in the process so that no Aboriginal rights were infringed on prior to consultation, and so that the matters discussed through consultation could be applied in project selection and design as well as implementation?*

In cases with EA reviews conducted by federal authorities, formal Aboriginal and public consultation opportunities began when the federal authorities released the draft EIS guidelines, with comments focusing on these guidelines and related issues. In six cases, the federal EA reports stated that the proponent began consultation with Aboriginal groups well before the EA process began. In the Renard case, this consultation was performed to allow for input to help the proponent prepare their EIS document.

The BCEAO and territorial EA processes featured this starting point for consultation as well, with Aboriginal and public comments being accepted when the responsible authorities drafted and released the draft Terms of Reference or EIS Guidelines. Federal review panel cases typically accepted public submissions from the onset of the review process through series of public comment periods, and then held public hearings to hear presentations from the project's stakeholders and Aboriginal communities. In most cases, it was not stated whether or not these hearings were specific to Aboriginals. The Kemess North case, however, featured additional hearings in Kwadacha, an Aboriginal community, to allow for input from the Tse Keh Nay (Kemess

North Copper-Gold Mine Joint Review Panel, 2007). The New Prosperity Joint Review Panel (2013) also held hearings in Aboriginal communities. There is also evidence from the Kemess North Copper-Gold Mine Joint Review Panel (2007) that there is also consultation between government agencies and Aboriginal communities.

Since at least some of these proponents began consulting with Aboriginals before the onset of the EA process, it is quite likely that the proponents have already at least started shaping the project, and have a good sense of what will need to be submitted in their EIS through the EA process. This is also demonstrated by the fact that some cases, such as Kami Iron Ore (CEA Agency, 2014f) and Donkin (CEA Agency, 2013a) featured EIS Guidelines and EIS submissions from the proponent within months of each other.

*FQ3: Was the consultation accessible and transparent, and was funding provided to communities that required financial assistance in order to participate in the EA process?*

The Participant Funding Program provided funding to Aboriginal groups in all the cases where federal authorities were involved. Funding from provincial authorities, particularly the BCEAO, was also common among these cases.

In some cases, the proponent provided funding to Aboriginal groups, usually for traditional knowledge and use studies. This was illustrated in the Mount Milligan, Joslyn North, Jackpine Expansion, Gahcho Kue, Nechalacho, Kami, and KSM cases, where proponent funding allowed Aboriginals to gather and present relevant knowledge and information in order to inform the proponent's EIS submission.

Overall, it seems that funding for Aboriginal participation in EAs is readily available in most of the covered jurisdictions, and proponent funding for traditional knowledge studies to inform the EA process seems to be growing more common.

*FQ4: Did the EA and Aboriginal consultation follow a sustainability-based agenda?*

Only the Kemess North panel review featured an adherence to well-established sustainability criteria (and found that the project could not be justified in light of the sustainability criteria). The cases of Kami Iron (CEA Agency & NLDOEC, 2012) and Gahcho Kue (MVEIRB: Gahcho Kue Panel, 2007) featured sustainability criteria in their guidelines; however, the final reports largely focused on impact mitigation as opposed to ensuring a net gain for the biophysical and human environments. While other EAs did not use sustainability criteria as featured in the Kemess North case, all the cases did, to some extent, incorporate some aspects of sustainability-based assessment (e.g. socio-economic factors, precautionary principle, legacy impacts) identified as best practices in the literature review.

All of the EAs in the case study featured an assessment of either alternatives to the project or alternative means of implementing the project, or both.

All of the EAs in the case study considered the socio-economic benefits the projects would provide, while the rest of the VEC discussion regarded the avoidance or mitigation of adverse biophysical environment impacts. The reviews performed in the territories typically featured a more rigorous examination of the actual anticipated socio-economic benefits of each project, as well as the potential costs and impacts. Further research may shed light on what the actual socio-economic costs and benefits are, and

how well they have been anticipated by both project proponents and government agencies.

Another interesting finding concerns the use of Socio-Economic Agreements and the Development Partnership Agreements in Northwest Territories and Nunavut respectively. In both territories, the territorial government negotiates the agreements with a project proponent (Nunavut: Department of Economic Development and Transportation, 2012; Northwest Territories: Industry, Tourism, and Investment, n. d.). While it is not stated whether the negotiations for these agreements are open to the public, the agreements themselves are posted on each government's website (Nunavut: Department of Economic Development and Transportation, 2012; Northwest Territories: Industry, Tourism, and Investment, n. d.). They are both designed to ensure long-term benefits for the territory and communities involved in the relevant projects, with their foci being employment, community and cultural well-being, and sustainable development (Nunavut: Department of Economic Development and Transportation, 2012; Northwest Territories: Industry, Tourism, and Investment, n. d.). In both territories, the descriptions state that these agreements should cover and enforce the commitments made by project proponents through the EA process (Nunavut: Department of Economic Development and Transportation, 2012; Northwest Territories: Industry, Tourism, and Investment, n. d.).

While both biophysical and human aspects of the environment are considered in each EA review report in this study, the federal scope is often quite narrow and does not address the direct socio-economic impacts of these projects. The territorial EA reports generally feature a more comprehensive assessment of socio-economic and cultural

impacts. In addition, the agreements mentioned above are put in place to ensure that proponents meet their commitments and predictions made in the EA process (Nunavut: Department of Economic Development and Transportation, 2012; Northwest Territories: Industry, Tourism, and Investment, n. d.).

While the precautionary approach may be addressed to some extent through monitoring and accident and malfunction plans, it is not universally mentioned, and usually pertains to one or a few aspects of the EA report. The appropriateness of its application was also questioned in the Kearn Oil Sands case, where uncertain mitigation means were deemed to provide adequate grounds for concluding that adverse environmental impacts would be insignificant (Chalifour, 2009).

While all the cases featured some discussion of the residual impacts of the projects, they were largely focused on biophysical concerns, such as tailings storage and wildlife monitoring. The limited life expectancy of these projects extracting non-renewable resources, and thus not promising a lasting source of income for local communities, was mentioned in only five of the cases.

Cumulative impacts were addressed in all of the cases, although not always in great detail and, in some cases, the cumulative effects discussion was focused largely if not exclusively on biophysical impacts.

Overall, the coverage of sustainability criteria was quite uneven, and adequacy of coverage was largely dependent on the jurisdiction and applicable EA legislation.

*FQ5: Does the EA facilitate continual learning through ongoing consultation and engagement, as well as a follow-up and monitoring regime?*

All of the cases included some discussion of a form of monitoring and follow-up, although as with the cumulative impacts assessments, some of these focused largely, if not exclusively, on biophysical aspects of the environment. In some cases, particularly those conducted in the Northwest Territories, Aboriginals were involved in developing and implementing monitoring strategies, such as monitoring sensitive caribou populations.

*FQ6: Is the EA undertaken cooperatively under the applicable EA regimes?*

Of the cases studied, seven featured either process consolidation or cooperation to varying degrees between provincial and federal authorities.

Five of the cases involved joint review panels, which were established to meet both provincial and federal EA requirements.

While the territorial EAs were not conducted with a federal EA process, federal agencies such as Environment Canada and Transport Canada were counted among the project's stakeholders, and in the case of the MVRB and NIRB EAs, the Minister of Aboriginal Affairs and Northern Development Canada issued approval for the project once the MVRB submitted their recommendations. In the case of Eagle Gold, assessed under YESAA, the responsible federal authorities issued the final decision document.

### **Trends Over Time**

Over time, since the Detour Lake case in 2011, the federal EA comprehensive study reports have adopted a more standardized format and use the same structure. They also

feature the same passage regarding the consultation of Aboriginals, highlighting the Crown's obligation to consult and accommodate Aboriginals, and noting that the CEA Agency, in most cases, was responsible for coordinating Aboriginal consultation in the EA process. While panel reports feature similar structure and content, they do vary based on each panel's mandate and the issues brought before the panel, such as questions of constitutional law. The EIS Guidelines are fairly consistent in their formatting and content, though some of the older guidelines, such as for Detour Gold, are now unavailable.

*FQ1:* As mentioned earlier regarding review panels and what their mandates state about meeting the duty to consult, more recent panel mandates seem to be consistent in not bestowing the Crown's responsibility for ensuring adequate Aboriginal consultation upon review panels. Since the Detour Gold case in 2011, federal comprehensive study reports have featured a common passage regarding the duty to consult, stating that the CEA Agency serves as the consultation coordinator in order to meet the duty to consult. Since the Kemess North case in 2007, the panel reports have also featured passages similar to one another, stating that responsibility for assessing the scope of the duty to consult or whether the Crown's consultation has met the duty to consult is not within the panel's mandate.

*FQ2:* All cases involving the CEA Agency featured formal consultation starting when the draft EIS guidelines were published to allow for input in the scoping of the EA.

Proponents, however, may commence their consultation well before the onset of the EA process, implying that the project is at least partially planned out prior to the EA process.

*FQ3:* Many of the relatively recent cases – such as KSM, Kami, Jackpine, Nechalacho, and Gahcho Kue – feature proponent funding for Aboriginal communities to conduct traditional knowledge and land use studies to inform their EIS submissions. Government funding for Aboriginal participation in the EA process has been consistently provided over time.

*FQ4:* The coverage of the sustainability criteria and factors varied more by jurisdiction than time, with territorial EAs generally featuring more attention to socio-economic factors and positive and adverse impacts, while federal EAs typically pay much less attention to these items.

*FQ5:* All of the cases featured a monitoring and follow-up plan, and there were no notable changes over time.

*FQ6:* There is no noticeable trend over time regarding cooperation between EA regimes. With the implementation of CEA Act 2012, process substitution will change the nature of cooperation in affected cases (Doelle, 2012; Gibson, 2012). The Kemess Underground case has been substituted with the BCEAO EA regime, so long as the EA process meets the provisions in substitution approval (CEAA, 2014c).

## **Actual Practices versus Best Practices**

In summary, this case study revealed that cases that better incorporated the best practices for the duty to consult generally featured better coverage of the best practices for EA as well. Cases such as Kemess North, Mary River, Eagle Gold, and Nechalacho were cases that better covered the best practices of both the duty to consult and EA, by providing a wider and more in-depth assessment of socio-economic factors, holding early and meaningful consultation, and, in the cases of Mary River and Eagle Gold, signing agreements between the proponent and Aboriginals or the territorial government and the proponent to ensure socio-economic benefits for Aboriginals. Cases involving the Nisga'a Final Agreement also ensured more in-depth assessment and accommodation of the project's impacts on Aboriginals, though this has resulted in uneven consideration of Aboriginal groups in the EA process.

If panel mandates are indeed shifting towards panels having no responsibility to assess Aboriginal rights or ensure that the duty to consult has been met, then a government agency such as the CEA Agency, or whoever is deemed "consultation coordinator" as outlined in the consultation guidelines by the Government of Canada (2011), should be accessible and accountable for ensuring that Aboriginals have been sufficiently consulted and accommodated. As stated in most recent panels' mandates, the Crown could use the panels' Aboriginal consultation activities and findings as contributions to the overall effort to meet the duty to consult. It is possible that the assessment of Aboriginal consultation is best performed outside of the EA process, while still in the overall decision-making process for each project. Such assessment of the

adequacy of Aboriginal consultation efforts could perhaps be a role for a separate independent tribunal, as suggested by Dwight Newman (2014).

As reflected in the commentary on the legislation in the literature, the federal EA process focuses largely on biophysical impacts. Federal assessment reviews in the cases examined here have been broader, perhaps mostly because of the breadth of Aboriginal interests to be address. However, even in these cases, narrow emphasis on biophysical impacts is nevertheless evident in the cumulative impact assessments and monitoring and follow-up plans, which have featured at best modest consideration of socio-economic impacts.

With this analysis in place, chapter six turns to concluding statements and suggestions, as well as guidance for future studies.

## 6. Conclusions

Through this thesis, I have sought to address the relationship between the duty to consult and the EA process, and to a lesser extent IBAs in Canada. The key questions have been as follows:

- In principle, can EAs and IBAs be used as methods for the Crown and other responsible parties to fulfill the duty to consult and accommodate Aboriginals?
- In practice, how well is the duty to consult and accommodate currently being met in EAs and related decision-making on non-renewable resource extraction projects?
- How well are cumulative effects and other sustainability concerns being assessed in EAs of current non-renewable resource extraction projects?
- How may the above factors be better addressed through the EA and IBA processes? Will this require significant alterations to the current mechanisms, or perhaps entirely new means of meeting these requirements?

To answer these questions, I reviewed the literature surrounding the duty to consult, EAs, and IBAs, established a set of best practices for the duty to consult and the EA process, and established a framework of questions to be applied to a selection of mining cases with EAs and Aboriginal consultation. This selection featured 22 cases of mining project EAs featuring Aboriginal consultation, drawn from seven provinces and all three territories.

In conclusion, I shall summarize the main findings of the literature review and case study analysis. I will also address the contributions of this thesis to the literature and to the government agencies, proponents, and Aboriginals who are involved in both

Aboriginal consultation and the EA process. Potential research directions for the future will also be noted.

### **Literature Review and Case Study Findings**

The literature review for this thesis focused on identifying the best practices for meeting the duty to consult and carrying out EAs. There were some key overlapping best practices in the two areas, such as early initiation (Carver et al., 2010; Noble, 2010; Government of Canada, 2011), transparency and accessibility (New Relationship Trust, 2009; Noble, 2010), and adequate consideration and accommodation of the concerns of those being consulted (New Relationship Trust, 2009; Noble, 2010), particularly for Aboriginal participants in the EA process. It was found that EA conforming to the established best practices had the potential to meet the duty to consult, answering the first of my research questions. The overall set of best practices was integrated into a framework of questions for analyzing cases of EA to determine whether the best practices for both the duty to consult and EA were applied to a selection of 22 EAs conducted for Canadian mining projects. The framework questions from the literature review are as follows:

- *Framework Question (FQ) 1:* Were established Aboriginal rights acknowledged, and was there a substantive effort to accommodate Aboriginal interests where necessary?
- *FQ2:* Were the EA and associated consultation initiated early in the process so that no Aboriginal rights were infringed on prior to consultation, and so that the matters discussed through consultation could be applied in project selection and design as well as implementation?

- *FQ3*: Was the consultation accessible and transparent, and was funding provided to communities that require financial assistance in order to participate in the EA process?
- *FQ4*: Did the EA and Aboriginal consultation follow a sustainability-based agenda? In particular,
  - i) Did the EA consider both alternatives to the project and alternative means of implementing the project?
  - ii) Was there a focus on providing positive contributions in addition to mitigating adverse impacts?
  - iii) Did the assessment consider both biophysical and human (social, cultural, and economic) components of the environment?
  - iv) Did the EA address complexity and uncertainty, and adopt a precautionary approach to the unknown implications of the project?
  - v) Did the EA consider legacy effects, long-term impacts and possibilities related to the project?
  - vi) Were cumulative effects considered on a broad scale, based on VECs, and in conjunction with the other impacts discussed in the EA?
- *FQ5*: Did the EA facilitate continual learning through ongoing consultation and engagement, as well as a follow-up and monitoring regime?
- *FQ6*: Was the EA coordinated with other applicable EA regimes?

By applying these questions to the selected cases, the next two research questions could be answered. I shall now summarize the findings of the case study.

Overall, the case studies found cases that conformed to the best practices for the duty to consult or EA practices typically also met the best practices for the other. More specifically, the case study findings provided the following answers to the framework questions:

*FQ1:* While the EA reports from all jurisdictions address the Aboriginal groups involved in the EA process and outline the relevant treaties and claims, there is discrepancy among the cases in how the duty to consult is assessed and met through consultation and accommodation. For example, the Nisga'a Final Agreement, which applied in the Kitsault and KSM cases, facilitated much more in depth assessment of the project's impacts, particularly the socio-economic impacts, on the Nisga'a First Nation than on other Aboriginal groups. Also, EA reports by the BCEAO generally outlined the required Aboriginal consultation in relation to the sliding scale established in the *Haida* court case, which was not featured in other jurisdictions. For instance, the BCEAO report would state that a particular group was owed "deep" consultation, as they had a strong claim and would be significantly impacted by the project. Cases that were assessed by a review panel presented challenges, as their mandates limited the panel's role in assessing if the duty to consult was met.

*FQ2:* In most jurisdictions, consultation began in the early phases of the EA process, such as during the drafting of the EIS Guidelines for the project proponents. However, six of the cases mentioned that the proponents consulted with Aboriginals before the onset of the EA process, which implies that the proponents had conceived at least part of their project before the formal EA process.

*FQ3:* Federal funding was provided to Aboriginal participants in all cases where federal authorities were involved, and most provinces provided funding to Aboriginals as well. In addition, seven cases mentioned that the proponents provided funding to Aboriginals, typically to facilitate traditional knowledge and land use studies to inform their EIS.

*FQ4:* The case studies confirmed expectations from the literature review's commentary on federal EA legislation that federal comprehensive study reports do not consider direct socio-economic implications of projects to the degree that best practices require.

Territorial EA processes tended to conform better to the best practices for both the duty to consult and the EA process in general. Most other sustainability criteria, such as attention to legacy effects, cumulative impacts, and the consideration of the precautionary principle were largely not performed in accordance with the best practices from the literature.

*FQ 5:* While all of the cases featured a monitoring and follow-up plan of some sort, many of them focused solely on the biophysical aspects of the environment, with socio-economic and cultural issues being largely omitted.

*FQ6:* Cooperation between different levels of government varied substantially from case to case, with some cases featuring review panels to satisfy both federal and provincial EA requirements, and others having EIS Guidelines or Terms of Reference being established to meet the requirements of both provincial and federal EA regimes. Other cases featured cooperation merely for procedural aspects of the EA process, such as public and Aboriginal consultation. Finally, some cases (e.g. the Prosperity Mine case in British Columbia) reflected significant conflict between federal and provincial EA authorities.

## **Contributions to Literature**

By compiling and reviewing the literature regarding the duty to consult and the EA process in Canada and its various jurisdictions, a framework for analyzing whether cases of EA meet the best practices for both the duty to consult and EA practices has been created. The framework proved to be valuable in guiding the case studies here and should be a useful tool for determining whether future cases of EA meet the best practices for the duty to consult and the EA process. Applying this framework in the case study helped to reveal the trends in consultation and EA practice that are outlined above, as well as implications for each party involved in EAs and Aboriginal consultation among different jurisdictions in Canada and over time.

## **Conclusions for Governments**

In addressing the duty to consult through EAs, the case of the Jackpine Expansion project suggests that there may be some confusion concerning who is responsible for ensuring that the duty to consult has been met. In this case, the court ruling stated that assessing the validity and strength of Aboriginal rights or the scope of the duty to consult was beyond the panel's mandate, a matter that is also discussed in the report of the Joint Review Panel for the Lower Churchill Hydroelectric Generation Project (2011). Since a review panel is not a government agency, it cannot be responsible for ensuring the duty to consult is met (Anonymous, 2013). This demonstrates a need for governments to be clearer with Aboriginal governments and communities in establishing who will be responsible for ensuring that the duty to consult has been met, including in cases where a review panel conducts an EA.

As this study indicates that recent panel mandates tend not to address the specifics of the Crown's duty to consult. In cases without panels, the duty-to-consult roles of agencies preparing comprehensive study reports are also unclear. Governments should be transparent and forthright about who is responsible for ensuring the Crown's duty to consult has been met and should clarify what role EA processes should or must play in this. The role of EAs, with or without panel reviews, in meeting the duty to consult seems inevitably to be important. Therefore, both panel members and those in agencies preparing comprehensive study reports will need training in how best to meet the duty to consult through EAs.

In addition to their own consultative efforts, review panels and comprehensive study report authors could address the issue of adequate consultation in part by recommending that the duty to consult be met prior to project approval and implementation and that consultation continue through overall approval, licensing, implementation and monitoring, and final closure and rehabilitation stages. While this has not specifically been done in the cases in this study, the Kemess North (2007), New Prosperity (2013), and Jackpine Extension (2013) panels recommended that should their respective projects be approved, the proponent should work collaboratively with Aboriginal groups to monitor and mitigate adverse impacts, to allow for access to areas where Aboriginals could harvest traditional plants, and to gain Aboriginal approval.

As stated earlier in the literature review, an EA conforming to the established best practices would be the best way to meet the duty to consult in decision-making concerning mining projects. This would entail a comprehensive and holistic assessment of the environmental implications of each project, including both biophysical and human

aspects of the environment (Gibson, 2005). Other important considerations of these assessments would be the long-term and uncertain impacts of these projects (Gibson, 2005). These matters are especially important for non-renewable resource projects, which deplete their resource base (orebodies) and cannot themselves be sustainable. All of these factors must be assessed and accounted for in order to accommodate Aboriginal interests and ensure that no infringements are made on their rights. In light of this, it is evident that most of these cases fell short of meeting the best practices for both the duty to consult and EAs, and that greater effort to assess these factors would better ensure that Aboriginal interests are met and that these projects contribute to sustainability instead of detract from it.

Conformance with the established best practices summarized in this thesis should be an important basis for determining the adequacy of EA efforts to help satisfy the duty to consult and accommodate Aboriginal interests. From a best practices standpoint, the federal EA regime in particular would benefit from adoption of a comprehensive, sustainability-based scope and agenda broad enough to cover the range of interrelated factors that affect long term and immediate Aboriginal interests. These matters have to be understood to provide a reasonable basis for identifying and responding to needs for accommodation of Aboriginal interests. Putting such a scope and agenda in place would entail legislative changes to

- adopt a broad definition of “environmental effects” to cover social, economic and cultural as well as biophysical effects and their interactions,
- require enhancement of positive effects as well as mitigation and avoidance of adverse effects, and

- require attention to legacy effects as well as project lifetime effects.

Also, to recognize and address the full range of factors affecting Aboriginal interests, amendments to federal, as well as provincial and territorial, EA legislation should

- provide for sustainability-based assessments at the strategic level of policies, plans and programs in consultation with Aboriginals, and
- provide for use of strategic level planning and assessment to ensure adequate attention to cumulative effects (e.g. the regional scale cumulative effects of multiple mining and infrastructure projects) and broad alternatives that are not addressed effectively enough in individual project assessments.

Finally, many cases involving potential effects on Aboriginal interests are inter- or multi-jurisdictional and trigger application of the EA requirements of two or more governments. In such cases, effective attention to Aboriginal interest is likely to depend significantly on the compatibility of the regimes involved, and the effective coordination of consultation efforts and accommodation measures. The research therefore points to needs for legislative changes to harmonize EA regimes across Canada to best practice standards.

The Socio-Economic Agreements and Development Partnership Agreements of Northwest Territories and Nunavut respectively may be a noteworthy consideration for the provinces and federal authorities, as these agreements are designed to help ensure the delivery of lasting socio-economic benefits to the project's stakeholders and mitigate any adverse socio-economic impacts that may arise.

The case study also demonstrated the rising frequency of IBAs being signed between Aboriginal groups and proponents. For governments, this raises questions about

the role of IBAs in meeting the duty to consult and accommodate, as the Crown alone is responsible for ensuring that the duty is met and yet governments are not involved in these negotiations. The confidentiality of IBAs is another complication, as the secretive nature of these agreements makes it more difficult to know whether adequate consultation and accommodation has been provided to Aboriginals between the agreements and the EA outcomes. Further cases and studies will be needed to clarify the role of IBAs and proponent initiatives in meeting the duty to consult.

### **Conclusions for Proponents**

This case study demonstrated that proponents, though not responsible for ensuring that the duty to consult is met, play a major role in engaging and consulting with Aboriginal groups and communities. In cases such as Galore Creek and Kearl Oil Sands, the proponents consulted with Aboriginal groups well before the formal onset of the EA process. A number of cases also involved the negotiation of IBAs between proponents and Aboriginals, as well as funding agreements under which traditional knowledge and land use studies were performed with support from proponents. As stated above, further research will be needed to determine what role IBAs play in meeting the duty to consult and how they interact with the EA process and best practices for EAs and the duty to consult.

### **Conclusions for Aboriginals**

As stated previously, this study shows that efforts to meet the duty to consult through the EA process in these projects were largely insufficient when compared to the best practices in the surrounding literature. In particular, greater attention to socio-economic

and legacy impacts and regional cumulative effects is needed to address Aboriginal concerns more fully and to sustain both local economies and natural environments.

One observation through this study is that efforts to assess projects' impacts on Aboriginals and accommodate their interests have been uneven, with different EA regimes and applicable agreements placing greater focus on Aboriginal interests. In the case of the Kitsault mining project, the Nisga'a Final Agreement required that the project's potential impacts on the Nisga'a First Nation be discussed in greater detail than was required for other Aboriginal groups, especially in terms of socio-economic and cultural impacts. It may be desirable for other Aboriginal groups to press governments to apply this higher level of assessment more universally not only to gain more equitable treatment of important interests, but also to help ensure that the duty to consult has been met and to ensure that the full range of potential project effects – socio-economic and cultural as well as biophysical – are addressed.

The number of IBAs being negotiated in these cases is also of interest to Aboriginal groups and communities, as these may serve as opportunities to address and accommodate for the long-term socio-economic implications for local economies dependent on non-renewable resource projects. It may be possible for Aboriginal groups to establish legacy funds or other means of avoiding a boom-and-bust scenario and ensuring an economic transition to a more sustainable system once the project is complete.

### **Areas of Further Research**

The issue of cases reviewed by panels and meeting the duty to consult is an ongoing issue that has caused lengthy court litigation and uncertainty for Aboriginals involved in these

cases. Further research and development will be needed to determine the best approach for ensuring that the duty to consult is met and that Aboriginal concerns have been addressed, accommodated, and reconciled with the needs of broader Canadian society.

From this study, further research could also investigate other countries, such as Australia or Russia, with indigenous populations who are impacted by non-renewable resource extraction projects such as mining. An analysis of how well indigenous populations are consulted in relation to these projects, as well as whether sustainability concerns are addressed in the assessment and implementation of these projects, could provide valuable insight into how to perform consultation and project assessment more effectively.

The role of IBAs in meeting the Crown's duty to consult is an area that will need further research and development to clarify. However, this investigation may be obstructed by the often confidential nature of IBAs, which is an existing topic of discussion and debate in further cases and research. The matter of accommodation in general, and what degree is needed in order to satisfy the Crown's obligation to deal honourably with Aboriginals, is another matter that will require future research, cases, and possibly court litigation in order to determine.

Since most of the cases assessed in this study were conducted under the old CEA Act of 1995, future research may provide new information about the performance of EAs carried out under the new federal legislation, especially considering changes such as provisions for substitution whereby provincial EA processes can be used to meet federal as well as provincial assessment requirements. These studies could analyze how well EAs

under the new legislation conform to the established best practices for EA and the duty to consult.

The impacts of recent and future court decisions that further address the duty to consult, such as *Tsilhqot'in Nation v. British Columbia* (2014), would also be an area for future research to investigate.

As noted in the literature review, there may be cases such as in Manitoba where separate consultation processes are being conducted along with EAs, which may feature poor coordination in terms of both subject matter and timing (Manitoba Law Reform Commission, 2015). Further investigation into any separate consultation efforts may provide more insight as to how to coordinate or merge these consultation processes and ensure adequate consultation and accommodation of Aboriginal interests and concerns.

## **Final Words**

EAs of non-renewable projects provide a particularly important test of efforts to meet the duty to consult and accommodate Aboriginal interests, since such projects have limited life expectancies and are typically initiated for short-term gain for a smaller group of people as opposed to long-term considerations for a much larger population. It is clear that if we are to leave behind sufficient means for future generations, Aboriginal and otherwise, to lead healthy and wholesome lives, the people of today must work collaboratively and cast our eyes to the future and determine of the future we are creating now is one that we ourselves would want to endure. If the perceived future is not one we would want to live in, now is the time to work together and change our planet for the better.

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## Appendix A: Review of EA Legislation

	Canada	Ontario	Manitoba	Saskatchewan	Alberta	British Columbia	Newfoundland and Labrador	Nova Scotia	New Brunswick	Quebec
<b>Environment Definition Includes Socio-economic and Cultural Factors</b>	Focus on biophysical, additional factors may be added	Yes	Biophysical only	Yes	Biophysical only	No definition in legislation	Yes	Yes (under environmental effects)	Yes	Yes
<b>Strategic Environmental Assessment Provisions</b>	No	No	No	No	No	Yes	No	No	No	No
<b>Alternatives Required in EA</b>	Yes	Yes	No	No	No	No	Yes	No	No	No
<b>Meaningful Public Participation</b>	Limited by fewer opportunities	Yes	Yes	Yes	Limited, late in process	Limited, late in process	Yes	Yes	Late in process	Late in process
<b>Cooperative EA Covered in Legislation</b>	Substitution	Yes	Yes	No	No	No	Yes	Yes	Yes	No
<b>Cumulative Impacts Required</b>	Yes, but only at the individual project level	No	No	No	Yes	No	No	No	No	Yes
<b>Unique Role of Aboriginals in EA</b>	Yes	No	No	Non-derogation of Aboriginal rights under Constitution Act 1982 s 35	Reference to Metis Settlements Act	Listed under consultation, provisions for final agreements eg. Nisga'a	Inuit Land Claims Agreement, Innu Agreement-in-Principle	No	No	Provisions for James Bay and Northern Quebec Region
<b>Monitor/Follow up provisions</b>	Yes	Yes (by order of Minister)	Yes (by order of Minister)	Yes (by order of Minister)	Yes	No	Yes	Yes	No	Yes

	Prince Edward Island	Northwest Territories	Nunavut	Yukon	Inuvialuit Final Agreement	Labrador Inuit Land Claims Agreement	Labrador Innu Land Claims Agreement-in-Principle
<b>Environment Definition Includes Socio-economic and Cultural Factors</b>	Biophysical only	Yes	Yes	Yes	Yes	Yes	Yes
<b>Strategic Environmental Assessment Provisions</b>	No	No	No	No	No	No	No
<b>Alternatives Required in EA</b>	No	Yes	No	Yes	Yes	Yes	Yes
<b>Meaningful Public Participation</b>	Limited, late in process	Yes	Yes	Yes	Procedures not covered in legislation	Procedures not covered in legislation	Procedures not covered in legislation
<b>Cooperative EA Covered in Legislation</b>	No	No	No	No	Yes	Yes	Yes
<b>Cumulative Impacts Required</b>	No	Yes	Yes	Yes	Yes	Yes	Yes
<b>Unique Role of Aboriginals in EA</b>	No	Yes	Yes	Yes	Yes	Yes	Yes
<b>Monitor/Follow up provisions</b>	S 25(1) Regulations made by Lieutenant Governor in Council	Considers need for follow-up program	Not in force	May be recommended by panel	Monitor Participation Agreement	Yes	Yes

## Appendix B: Application of Search Criteria to Cases

Project	Date	Assessment Type	Province/Territory	Provincial/Territorial EA	Guidelines	Cumulative Impacts Assessed	Duty to Consult Section	IBA Mentioned
Meadowbank Gold Mine	August 1, 2006	Hearing Report	Nunavut	Yes	Yes	Yes	Comments from local municipalities and residents	Yes, IIBA signed between Cumberland and Kivalliq Inuit Association
Galore Creek Gold-Silver-Copper Mine	January 19, 2007	Comprehensive Study	British Columbia	Yes	Not CEAA	Yes	First Nations Consultation, mentioned (Tahltan Central Council found consultation not up to Crown standard)	Participation Agreement (Tahltan Nation and proponent)
Kearl Oil Sands Project	February 27, 2007	Review Panel	Alberta		Review Panel Rationale	Yes	Yes, addresses whether groups require Crown consultation under DTC	No

<b>Project</b>	<b>Date</b>	<b>Assessment Type</b>	<b>Province/ Territory</b>	<b>Provincial/ Territorial EA</b>	<b>Guidelines</b>	<b>Cumulative Impacts Assessed</b>	<b>Duty to Consult Section</b>	<b>IBA Mentioned</b>
Kemess North Gold-Copper Mine	September 17, 2007	Review Panel	British Columbia	Yes	Not CEAA	Yes	Aboriginal Issues section, addresses constitutional requirement to consult	Mention Tse Khe Nay have benefits agreement with Kemess South project, not Kemess north
Mount Milligan Gold-Copper Mine	September 18, 2009	Comprehensive Study	British Columbia	Yes	Not CEAA	Yes	Aboriginal Engagement, DTC not specifically mentioned in CEAA report, DTC assessed in BCEAO report	Mentioned with McLeod Lake, discussions faltered
Joslyn North Mine Project	January 27, 2011	Review Panel	Alberta	Yes	Not CEAA, Alberta ToR	Yes	Traditional Land Use section, First Nations withdrew initial objections and dealt with Total (proponent)	Agreements with proponent

<b>Project</b>	<b>Date</b>	<b>Assessment Type</b>	<b>Province/Territory</b>	<b>Provincial/Territorial EA</b>	<b>Guidelines</b>	<b>Cumulative Impacts Assessed</b>	<b>Duty to Consult Section</b>	<b>IBA Mentioned</b>
Detour Lake Gold Mine	November 1, 2011	Comprehensive Study	Ontario	For power supply (permanent, temporary, & contingency), Disposition of Rights to Crown Land	Not CEAA	Yes	Yes, consultation integrated with EA process, Agency consultation coordinator	Yes (Moose Cree First Nation, Taykwa Tagamou Nation and Wahgoshig First Nation with proponent, memorandum of understanding between Metis Nation of Ontario and proponent)
Prairie Creek Mine	December 8 2011	Environmental Assessment	Northwest Territories	Yes	Yes	Yes (not in EA report)	Outlined as party to EA, party submissions discussed for each VEC	Negotiation of impact benefit agreements with two bands

<b>Project</b>	<b>Date</b>	<b>Assessment Type</b>	<b>Province/Territory</b>	<b>Provincial/Territorial EA</b>	<b>Guidelines</b>	<b>Cumulative Impacts Assessed</b>	<b>Duty to Consult Section</b>	<b>IBA Mentioned</b>
Mining and Milling for the Midwest Project	April 1, 2012	Transitional Comprehensive Study	Saskatchewan	Yes	Yes	Yes	Yes	Impact Management Agreements between First Nations and industries in northern Saskatchewan
Morrison Copper-Gold Project	August 21, 2012 (BCEAO Report)	Transitional Comprehensive Study	British Columbia	Yes	Description of Factors to be Considered in EA	Yes	Yes (BCEAO Report- was required to ensure DTC was met)	Interest in IBA between Lake Babine Nation and proponent
Eagle Gold Project	September 1, 2012	Screening Report	Yukon	Yes	Preliminary Statement of Scope of Project	Yes	Proponent required to consult with Aboriginals that will be impacted by project	Yes- CBA between proponent and Nacho Nyak Dun First Nation

<b>Project</b>	<b>Date</b>	<b>Assessment Type</b>	<b>Province/Territory</b>	<b>Provincial/Territorial EA</b>	<b>Guidelines</b>	<b>Cumulative Impacts Assessed</b>	<b>Duty to Consult Section</b>	<b>IBA Mentioned</b>
Mary River Project	September 1, 2012	Hearing Report	Nunavut	Yes	Yes	Yes	Proponent subject to obligations to protect rights under Nunavik Inuit Land Claims Agreement and James Bay & Northern Quebec Agreement	Yes- IIBA between Baffinland and Qikiqtani Inuit Association
Donkin Coal Mine	April 1, 2013	Comprehensive Study	Nova Scotia	Yes	Yes (CEAA)	Yes	Aboriginal Consultation Activities section, DTC mention, agency as consultation coordinator	Proponent and Aboriginals to negotiate mutual benefits agreement
Renard Diamond Mine Project	May 1, 2013	Transitional Comprehensive Study	Quebec		Description of Factors to be Considered in EA	Yes	Yes- Agency conducted consultations with Aboriginals	Yes- proponent signed IBA with Mistissini Band Council (Mechshoo Agreement)

<b>Project</b>	<b>Date</b>	<b>Assessment Type</b>	<b>Province/Territory</b>	<b>Provincial/Territorial EA</b>	<b>Guidelines</b>	<b>Cumulative Impacts Assessed</b>	<b>Duty to Consult Section</b>	<b>IBA Mentioned</b>
Jackpine Mine Extension Project	July 9, 2013	Review Panel	Alberta	No	Yes	Yes	Effects on Aboriginal Traditional Land Use, Rights, and Culture	Mentioned, no discussion of signing
Gahcho Kue Diamond Mine	July 19 2013	Environmental Impact Review	Northwest Territories	Yes	Yes	Yes	Outlined as party to EIR, party submissions discussed for each VEC	IBAs being negotiated, nothing formal at time of EIR
Nechalacho Rare Earth Elements Project	July 26 2013	Environmental Assessment	Northwest Territories	Yes	Yes	Yes	Outlined as party to EA, party submissions discussed for each VEC	IBAs being negotiated

<b>Project</b>	<b>Date</b>	<b>Assessment Type</b>	<b>Province/Territory</b>	<b>Provincial/Territorial EA</b>	<b>Guidelines</b>	<b>Cumulative Impacts Assessed</b>	<b>Duty to Consult Section</b>	<b>IBA Mentioned</b>
Kitsault Mine	August 1, 2013	Comprehensive Study	British Columbia	Yes		Yes	Yes- CEAA served as consultation coordinator	No
Kami Iron Ore Project	October 1, 2013	Transitional Comprehensive Study	Newfoundland & Labrador	Yes	Yes	Yes	Yes- CEAA served as consultation coordinator	Innu Nation stated IBA needed to compensate for impacts on traditional activities

<b>Project</b>	<b>Date</b>	<b>Assessment Type</b>	<b>Province/Territory</b>	<b>Provincial/Territorial EA</b>	<b>Guidelines</b>	<b>Cumulative Impacts Assessed</b>	<b>Duty to Consult Section</b>	<b>IBA Mentioned</b>
Prosperity Gold-Copper Mine	July 2, 2010	Review Panel	British Columbia	Yes	Guidelines for EIS	Yes	Yes- panel information used by federal government to meet DTC, panel not responsible for ensuring DTC is met	No agreements between Aboriginals and proponents at time of report
Arnaud Mine Project	December, 2012 (EIS)	Transitional Comprehensive Study	Quebec		Yes (CEAA)	Yes	Yes- Proponent to outline consultation means and results through EIS	Proponent intends to establish consultation strategy and negotiate IBA with the Innu community Uashat mak Mani-utenam
Kerr-Sulphurets-Mitchell (KSM) Project	July 1, 2014	Transitional Comprehensive Study	British Columbia	Yes	Description of Factors to be Considered in EA	Yes	Yes- CEAA served as consultation coordinator, section for Nisga'a First Nation Consultation	No

## Appendix C: Case Study Summary

Cases	Acknowledged and Accommodated Aboriginal Rights	Early Consulting	Consultation Accessible, Transparent, Funding	Alternative	Positive Contribution	Biophysical and Human Environment	Precautionary Approach	Legacy Impacts	Cumulative Effects	Ongoing Consultation Follow-up/ Monitoring	Harmonized or Cooperative
Meadowbank	Consultation with Kivalliq Inuit Association	Began with circulation of Draft EIS to project stakeholders	Not mentioned in report	Yes (in EIS Guidelines, not discussed in hearing report)	Economic benefits	Yes	Yes (required in proponent's EIS)	Yes, residual effects assessed	Yes	Yes	No
Galore Creek Gold-Silver-Copper	Complaints from Tahltan FN	Proponent 2003, CEAA & BCEAO 2006	Funding provided by BCEAO	Yes	Economic benefits	Yes, separate assessment required for socio-economic impacts on Tahltan FN by BCEAO	Adaptive follow-up plans	Yes, residual effects assessed	Yes, some complaints from Aboriginals regarding boundaries	Yes	Yes
Kearl Oil Sands	Proponent signing Memorandums of Understanding with various Aboriginal groups	Proponent consultation since filing of project	Possibly funding from CEAA	Yes	Economic benefits	Yes	Mentioned in regards to Water Management Framework, Aboriginals argued that the framework did not adhere to the precautionary principle	Some long-term effects of oil sands development mentioned	Report states need for cumulative impacts monitoring for tar sands development	Yes	Joint Review Panel

Cases	Acknowledged and Accommodated Aboriginal Rights	Early Consulting	Consultation Accessible, Transparent, Funding	Alternative	Positive Contribution	Biophysical and Human Environment	Precautionary Approach	Legacy Impacts	Cumulative Effects	Ongoing Consultation Follow-up/ Monitoring	Harmonized or Cooperative
Kemess North Gold-Copper	Complaints from Aboriginal groups regarding lack of Crown consultation, panel accommodated by recommending delaying the review	Panel hearings in 2007, proponent gathered information prior to hearing	Funding provided by CEAA	Yes	Economic benefits, though not in favour of Aboriginals due to lack of support for project	Yes	Partial (uncertainties and precaution mentioned throughout report)	Report outlines concerns for long-term impacts of the project	Yes, focus on biophysical environment	Yes	Joint Review Panel
Mount Milligan Gold-Copper	BCEAO stated conduct of deep consultation and accommodation	BCEAO at pre-application phase	Proponent funded traditional use studies, BCEAO and CEAA provided funding	Yes	Economic benefits	Yes	Not explicitly mentioned	Yes, residual impacts assessed	Yes	Yes, focus on biophysical environment	Yes
Joslyn North	Evidence untested, Aboriginals dealt with proponent, some signed Memorandums of Understanding	Proponent consultation	Funding provided by CEAA, proponent funded traditional knowledge and land use study with Athabasca Chipewyan First Nation	Yes	Economic benefits	Yes	Mentioned the approach in relation to habitat loss, the impacts on species at risk, and the minimum threshold of water flowing through the Athabasca River	Yes	Yes	Yes	Joint Review Panel

Cases	Acknowledged and Accommodated Aboriginal Rights	Early Consulting	Consultation Accessible, Transparent, Funding	Alternative	Positive Contribution	Biophysical and Human Environment	Precautionary Approach	Legacy Impacts	Cumulative Effects	Ongoing Consultation Follow-up/ Monitoring	Harmonized or Cooperative
Detour Lake Gold	IBAs between several Aboriginal participants and proponent	Onset of EA process by CEAA	Funding provided by CEAA	Yes	Economic benefits	Yes	Site management plan based on precautionary principle	Follow-up plan, possibly in IBAs	Yes, less detailed than other comprehensive study EAs	Yes	No
Prairie Creek	Traditional knowledge assessment submitted by Nahanni Butte Dene Band	Technical sessions and public hearings	Not mentioned in report	Yes	Economic benefits	Yes	Specifically applied to tailings and waste rock management	Attention to long-term impacts on groundwater and water quality from leaching	Required in EIS Guidelines, not discussed in EA report	Yes	No
Midwest	Report outlines several Aboriginal concerns regarding the consultation process	CEAA consultation at onset of EA process	Funding provided by CEAA	Yes	Economic benefits	Yes	EA report mentions and addresses uncertainties associated with the disposal of mill tailings and the Fish Habitat Compensation Plan	Residual impacts assessed	Yes	Yes	Yes, federal and provincial collaboration through consultation

Cases	Acknowledged and Accommodated Aboriginal Rights	Early Consulting	Consultation Accessible, Transparent, Funding	Alternative	Positive Contribution	Biophysical and Human Environment	Precautionary Approach	Legacy Impacts	Cumulative Effects	Ongoing Consultation Follow-up/ Monitoring	Harmonized or Cooperative
Morrison Copper-Gold	Outlines Aboriginal activities and rights, require deep consultation, signing of one IBA with proponent, proponent to discuss economic benefits with Yekoochoe FN	BCEAO consultation for draft Terms of Reference, proponent engagement since 1992	Funding provided by BCEAO	Required in federal EIS Guidelines	Economic benefits	Yes	Uncertainty among the stakeholders regarding the project's impact on water quality and aquatic ecosystems, the location of the mule deer's winter habitat, the impacts of the mine beyond the mine's footprint, and the security of the site	Residual impacts assessed	Yes	Yes	Joint consultation with CEAA
Eagle Gold	Proponent conducted traditional use study with Na-Cho Nyak Dun FN, negotiation of CBA	Proponent meetings with Na-Cho Nyak Dun FN 2009-2010	Not mentioned in report	Yes	Economic benefits	Yes	Precaution mentioned when developing regulated arsenic levels, uncertainty with water treatment, long-term impacts, baseline data, Supplementary Information Reprt for feasibility	Residual impacts assessed	Yes	Yes	No

Cases	Acknowledged and Accommodated Aboriginal Rights	Early Consulting	Consultation Accessible, Transparent, Funding	Alternative	Positive Contribution	Biophysical and Human Environment	Precautionary Approach	Legacy Impacts	Cumulative Effects	Ongoing Consultation Follow-up/ Monitoring	Harmonized or Cooperative
Mary River	Concerns of Aboriginals and other participants acknowledged for each component assessed in the EA	Consultation began at screening phase of EA	Not mentioned in report	Yes	Economic benefits	Yes	Addresses uncertainty, stresses need for precautionary action in face of uncertain impacts	Residual impacts assessed, signing of Development Partnership Agreement for sustained economic benefits	Yes	Yes	No
Donkin Coal	Various accommodation measures stated, Mi'kmaq to sign IBA with proponent	CEAA consultation at onset of EA process	Funding provided by CEAA	Yes	Economic benefits	Yes	Follow-up plan designed to accommodate for uncertainties	Residual impacts assessed	Yes	Yes	Yes
Renard Diamond	Proponent signed IBA with Mistissini community, covers various socio-economic impacts and concerns	Proponent held pre-consultation activities to provide input for EIS	Possibly funding from CEAA	Yes	Economic benefits	Yes	Not mentioned in EA report	Residual impacts assessed	Yes, focus on biophysical environment	Yes, focus on biophysical environment	Not mentioned in report

Cases	Acknowledged and Accommodated Aboriginal Rights	Early Consulting	Consultation Accessible, Transparent, Funding	Alternative	Positive Contribution	Biophysical and Human Environment	Precautionary Approach	Legacy Impacts	Cumulative Effects	Ongoing Consultation Follow-up/ Monitoring	Harmonized or Cooperative
Jackpine Extension	Dissatisfaction among Aboriginals with adequacy of Crown consultation, court litigation, Alberta consultation does not apply to Metis	Comments on proponent application and EIS, another comment period, and final hearing	Funding provided by CEAA, proponent funding to some Aboriginal groups for land use study	Yes	Economic benefits	Yes	Use of precautionary principle, specifically applied to biodiversity loss	Residual and long-term impacts assessed	Yes	Yes	Joint Review Panel
Gahcho Kue	Project area subject to Treaty 11 and various land claims being negotiated	Throughout EA process, parties reviewed EIS	Funding provided by MVRB, proponent funded traditional knowledge and land use studies	Yes	Economic benefits	Yes	Various uncertainties addressed and accounted for in EA report	Yes	Yes	Yes	No
Nechalacho	Concerns regarding shortcomings of prior mining projects, proponent to hire Aboriginal workers and structure work schedule to allow for traditional activities, mitigation measures, Socio-Economic Agreement	Drafting of Terms of Reference, scoping, information requests, technical session, technical report, hearing, and closing comments phases of the EA process	Proponent support for traditional knowledge studies	Yes	Economic benefits	Yes	Specifically applied to monitoring water quality	Yes, specific concerns for tailings storage and water quality	Yes	Yes	No

Cases	Acknowledged and Accommodated Aboriginal Rights	Early Consulting	Consultation Accessible, Transparent, Funding	Alternative	Positive Contribution	Biophysical and Human Environment	Precautionary Approach	Legacy Impacts	Cumulative Effects	Ongoing Consultation Follow-up/ Monitoring	Harmonized or Cooperative
Kitsault	Consultation through various means, consultation with Nisga'a First Nation and specific assessment of project impacts required under Nisga'a Final Agreement	Proponent and CEAA consultation	Funding provided by CEAA	Yes	Economic benefits, though both positive and negative impacts for Aboriginals anticipated	Yes	Adaptive follow-up and monitoring plans	Residual impacts assessed	Yes	Yes, focus on biophysical environment	Yes
Kami Iron Ore	Aboriginal concern regarding no specific mention of section 35 of the Constitution Act of 1982	CEAA consultation to comment on draft EIS,	Funding provided by CEAA, NunatuKavut Community Council accepted funds for traditional use study	Yes	Economic benefits	Yes	Mentioned in regards to tailings and waste management, as well as encountering unexpected archaeological sites	Residual effects assessed	Yes	Yes	Joint federal and provincial consultation
New Prosperity Gold-Copper	Report states that there would be significant impacts on Aboriginal rights, recommends ongoing consultation and monitoring if project proceeds	Comments on EIS Guidelines and Terms of Reference, 45-day comment period for EIS, another comment period, and final hearing	Funding provided by CEAA	Yes	Economic benefits	Yes	Adaptive follow-up and monitoring plans	Residual impacts assessed	Yes	Yes	Joint Review Panel

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Arnaud	EIS stated Aboriginal concerns, ongoing consultation and negotiation of an IBA	Proponent consultation started in 2010	Not mentioned in proponent EIS	Yes	Economic benefits	Yes	Continual improvement of risk management	Yes	Yes	Yes	
Kerr-Sulphurets-Mitchell	Proponent outlines Aboriginal concerns and accommodation means	Proponent held open houses since mid-2010	Funding provided by proponent and CEAA	Yes	Economic benefits	Yes	BCEAO: Magnitude and frequency of impacts on food and water consumption post-closure, uncertainty of long-term impacts of selenium, water quality and aquatic impacts, climate change, wildlife effects	Residual impacts assessed, mention of economic impacts after project closure	Yes	Yes	Yes