

WHY IT'S TIME TO REFORM ENVIRONMENTAL ASSESSMENT IN BRITISH COLUMBIA

JANUARY 2018



TIME TO OVERHAUL ENVIRONMENTAL ASSESSMENT AND PLANNING IN BC

In the summer of 2017, the new provincial government promised to reform environmental assessment and planning in British Columbia. This commitment puts BC at the doorstep of a major opportunity to transform the way we assess and plan for development activities in the province, in order to better align provincial decisions with the needs of ecosystems, the vision of BC communities, and the exercise of jurisdiction by Indigenous nations.

The *Confidence and Supply Agreement* between the BC New Democrat government and the BC Green caucus acknowledges that British Columbians do not have faith in the province's environmental assessment process and, as a condition of support for the minority government, commits to revitalizing and modernizing environmental assessment in BC.¹

In keeping with this obligation, the mandate letter of Minister of Environment and Climate Change Strategy, George Heyman, directs that he "[r]evitalize the Environmental Assessment process and review the professional reliance model to ensure the legal rights of First Nations are respected, and the public's expectation of a strong, transparent process is met."² The mandate letter of Minister of Forests, Lands, Natural Resource Operations and Rural Development, Doug Donaldson, establishes a complementary priority to "[w]ork with the Minister of Indigenous Relations, First Nations and communities to modernize land-use planning and sustainably manage B.C.'s ecosystems, rivers, lakes, watersheds, forests and old growth."³

Both mandate letters also emphasize the government's commitment to "fully adopting and implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Calls to Action of the Truth and Reconciliation Commission."⁴ This commitment is highly relevant to transforming environmental assessment and planning in BC. In the words of the Truth and Reconciliation Commission, such processes must "[r]econcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions..."⁵

The BC government's promise of reform is welcome and sorely needed, because our current approach to environmental assessment and planning in BC is not working. This backgrounder considers some key problems with BC's current environmental assessment and planning regime that must be addressed.

KEY PROBLEMS WITH ENVIRONMENTAL ASSESSMENT IN BC

I. BC's environmental assessment regime is allowing cumulative effects to harm lands, waters and communities

Environmental assessment in BC is currently reactive, occurring on a piecemeal, project-by-project basis when a proponent proposes development activities defined in the *Reviewable Projects Regulation*.⁶ Ecosystems and human communities, however, are subject to a diverse array of activities, decisions and other factors that add up over time, the full impacts of which could never be meaningfully assessed and managed on a project-by-project (or even industry-by-industry) basis. Interconnected values like water, wide-ranging species such as salmon, and large-scale impacts such as climate change link together in complex ways that simply don't fit into the silo of a single project or permit.

The BC Forest Practices Board has noted that not only is there no legal framework for managing cumulative effects in BC, but “to the extent that there is an issue, there is no one to tell—there is no decision maker when it comes to cumulative effects of multiple developments.”⁷ These failings have been emphasized by BC's Auditor General, who found in 2015 that BC's “current legislation and directives do not effectively support the management of cumulative effects.”⁸



In an effort to address such criticisms, the BC government developed a cumulative effects framework policy, which it describes as enabling “office-based data analysis” that can act as a “source of information” on cumulative effects for environmental assessments, as well as other natural resource decisions.⁹ However, BC is clear that:

The cumulative effects framework does not create new legislative requirements; rather it informs and guides cumulative effects considerations through existing natural resource sector legislation, policies, programs and initiatives.¹⁰

In other words, the cumulative effects framework policy has no legal mechanism requiring that its outcomes be integrated into decision-making.¹¹ While BC’s *Environmental Assessment Act* (EAA) provides discretionary power to consider cumulative environmental effects in an assessment of a project, it does not set legal requirements and standards for assessing cumulative effects.¹² More importantly, the scope, resourcing and outcomes of a project-level assessment (i.e. rejection or approval of a project with conditions) simply do not provide a meaningful forum to manage cumulative effects. While improving access to data on cumulative effects is certainly welcome, it is not nearly enough.

West Coast’s research and analysis indicates that, to effectively manage cumulative effects, we sorely need *new legal requirements* for regional assessments and higher-level planning to set “big picture” management objectives at the ecosystem or regional level that are *legally required* to be integrated into the Province’s natural resource decision-making regarding permits, project-level assessments, regulatory activities and so on. Moreover, regional assessments co-governed between Indigenous nations and the Crown present a major opportunity to implement UNDRIP, and also offer meaningful avenues for affected communities, stakeholders and experts to share their expertise in setting strategic-level direction for their region’s desired future.¹³

Such cross-cutting regional assessments and linkages to land use plans are not provided for in the EAA or elsewhere in BC’s laws. As such, there are glaring holes in the Province’s ability to effectively manage the cumulative effects of the thousands of approvals that it grants every year for things like logging, mining exploration, water use, pipelines, roads, and more.¹⁴

PERSPECTIVES ON PROVINCIAL EA: **WILDSIGHT**

CUMULATIVE EFFECTS IN THE ELK VALLEY



GARTH LENZ, ILCP

The Elk Valley is located in the southeastern Kootenays of British Columbia in Ktunaxa Nation territory. It is a part of one of North America's most important and largest wildlife corridors, running from Yellowstone National Park in the south to the Yukon in the north and providing habitat for a diverse array of large animals such as grizzly bear, wolverine and lynx.

Ryland Nelson, the Southern Rockies Program Manager for Wildsight, has participated in a number of past and ongoing provincial environmental assessments of metallurgical coal mine projects in the Elk Valley – including the Line Creek Phase II, Coal Mountain Phase II, Crown Mountain Coking Coal, Michel Creek Coking Coal, Bingay Main Coal, Fording River Operations Swift and Baldy Ridge Extension proposals. There are currently five operating coal mines in the region, several of which have recently received provincial environmental assessment certificates for expanding operations, while some mines have also undertaken smaller extensions without an environmental assessment.

For Ryland, witnessing the failures of the current environmental assessment regime in BC has created a lack of faith in the process.

Failure to manage cumulative effects

Ryland:

"The failure to address cumulative effects in a rigorous manner is one of the most concerning shortcomings of the various environmental assessments that I've been involved in. This failure is leading to a fractured landscape in the Elk Valley. Wildlife populations are on the decline, water quality is on the decline."

"When we try to raise the broader issues about cumulative effects, or selenium, or fish habitat in an environmental assessment, it's always written off as if those are being dealt with in other ways and it's not part of the assessment. But the issues are not being properly dealt with anywhere, and it's causing real damage."

British Columbia Auditor General Carol Bellringer:

"Lack of sufficient and effective regulatory oversight and action by MoE [Ministry of Environment] to address known environmental issues has allowed degradation of water quality in the Elk Valley. Coal mining, which has been underway in the area for over 100 years, has resulted in high concentrations of selenium in the water system. As selenium accumulates up the food chain, it can affect the development and survival of birds and fish, and may also pose health risks to humans. For 20 years, MoE has been monitoring selenium levels in the Elk Valley and over that time has noted dramatic annual increases of selenium in the watershed's tributaries."¹⁵

Garth Mowat, Ministry of Forests, Lands and Natural Resource Operations & Clayton Lamb, University of Alberta Department of Biological Sciences:

"The grizzly bear population north of Highway 3 in the Elk, Bull and White river valleys of southeastern British Columbia (BC) declined about 40% between 2006 and 2013. [...]"

The grizzly bear population in the southern Rocky Mountains of BC and Alberta are integral to the connectivity of this species within its North American range... However, connectivity within the southern Rocky Mountain populations is hindered by linear human development in valley bottoms (Proctor et al. 2015, Lamb et al. In Review) where high mortality rates limit connectivity between populations on either side of the valleys. The corridor along Highway 3 has much greater development than any other corridor through the Canadian Rocky Mountains and is the main connectivity fracture for grizzly bear populations in the Rocky Mountains. Much of the non-hunting grizzly mortality in this area occurs in the Highway 3 corridor, where human settlement and other development occurs in close proximity to very good bear habitat in the surrounding mountains."¹⁶

Weak public engagement

Ryland:

"I've been working for Wildsight here in the valley for 10 years, participating in all these environmental assessments, and despite various attempts over the years to say we would like to be involved, we've never been included in a single environmental assessment working group. From my perspective, the working group process happens behind closed doors and none of their discourse is publicly available."

"We try to be heavily involved and stay on top of all these environmental assessments and the various stages they go through, but it's really hard. All of a sudden we'll realize that a public comment period has been open for two weeks and we didn't notice – we were at the open house and we gave them our email and we've provided comments before, yet no one thought to notify us. That lack of follow up feels bad. It feels like you're being purposely excluded and they don't want you to be involved. And that's from somebody who is trying to be professionally involved, never mind anybody else who is trying to participate from the general public."

Proponent-led process

Ryland:

"In my experience, the proponent is running the show during the environmental assessment, at open houses and so on, and they always say 'we've done these studies and it shows everything is going to be fine.' It feels like the fox guarding the henhouse. Maybe these companies are doing a really good job, but how do I have faith that they are? There's a lack of rigorous government oversight."

"We need to be confident that the government is the one assessing these projects, rather than relying so heavily on the proponent's own research and statements, which of course are going to say that everything will be okay. It's hard to have faith in the process because everything is so proponent-led."

II. BC's environmental assessment regime lacks transparency, accountability and credibility

Assessment processes and decisions need to be transparent and accountable in order to deliver credible results that advance environmental and socio-economic objectives and adhere to UNDRIP. Furthermore, information must be sufficient to inform both provincial and Indigenous decision-makers, i.e., to address the legal standards of both BC and potentially impacted First Nations.

The information upon which decisions are based, including the underlying data, needs to be easily and publicly accessible, and easy-to-digest summaries of key information should also be provided. Within a legal framework that provides protection for sensitive Indigenous knowledge, EA information should be subjected to rigorous, open testing by government officials, other jurisdictions and participants, with sufficient time provided to allow engagement to be meaningful. The legislative framework should establish clear objectives for assessments, along with criteria and rules to help proponents and decision-makers meet those objectives. Finally, both process (interim) and final decisions should be subject to a right of appeal.¹⁷

The current BC legislation falls short on all these fronts. It does not establish any substantive purposes of EA, nor does it set out an approval test or criteria for decision-making. Without an approval test, decision-making criteria or rules governing how to deal with trade-offs, including which trade-offs are unacceptable (such as crossing an ecological limit), decisions often appear arbitrary, politicized and unjust. For example, the environmental assessments of Taseko's proposed Prosperity Mine and BC Hydro's proposed Site C dam both concluded that the projects would result in significant adverse environmental impacts, and recognized the opposition of the Indigenous peoples in whose territories the projects are located. In both cases, the provincial government approved the project anyway, accepting the significant adverse impacts with little or no "justification" provided for the decision.¹⁸ In the case of Prosperity Mine (and the slightly revised New Prosperity Mine proposal), the seeming arbitrariness of BC's approval is highlighted by the federal government's rejection of the same project.¹⁹

Further undermining the credibility of EA decisions is the near-unlimited discretion Ministers have under the Act when making their decisions. Indeed, the courts have recognized EA decision-making under the current legislation as political and highly discretionary.²⁰ In addition to the lack of any legislated objectives or decision-making criteria, the legislation does not require decision-makers to base decisions on the best available science or Indigenous knowledge, or to provide reasons for their decisions. It also does not establish a right of appeal. As a result, courts have consistently held that decision-makers be accorded broad deference under the *EAA*,²¹ making it more difficult to challenge decisions that ignore important information or community concerns.

The lack of accountability and transparency in decision-making is especially concerning in light of the proponent-driven nature of BC's current EA processes. In environmental assessments, the proponent defines the scope of the project, conducts the environmental assessment, and participates in the government review of that assessment. The proponent prepares the Application Information Requirements (AIR), which is the outline of information to be included in its Application and the issues to be addressed in the assessment.²² After the Environmental Assessment Office (EAO) approves the AIR, the proponent then prepares the Application – the main body of information considered in the assessment – either by conducting the necessary studies itself, or by paying consultants to do so. While the Application is customarily subject to a public consultation period, restrictive timelines and lack of funding mean that the public and Indigenous groups often do not have sufficient time or resources to highlight gaps or errors in the proponent's Application.²³ As a result, assessment decisions are often based on inadequate information about the environmental, social and health implications of proposed projects, putting ecosystems and communities at risk.



PERSPECTIVES ON PROVINCIAL EA: **ANNA JOHNSTON**

SITE C ENVIRONMENTAL ASSESSMENT



Peace River Valley



Site C construction, 2017

BC Hydro's Site C dam proposal is currently under construction in the majestic Peace River Valley in northeastern BC, just west of Fort St. John in Treaty 8 territory. The third major dam on the Peace River, Site C would produce about 5,100 gigawatt hours per year. But not without a cost. Site C's reservoir would flood over 100 km of riverbed and almost 6,500 hectares of agricultural land, including 20 percent of the prime agricultural land located within the Peace River Valley.²⁴ It would result in significant adverse effects to important wetlands, species at risk, migratory birds and First Nations fishing opportunities and practices.²⁵ The dam is opposed by multiple Treaty 8 First Nations, whose territories and traditional land uses will be significantly affected by it, as well as by local non-Indigenous residents and farmers whose lands will be flooded.

In 2012, the BC and federal governments entered into an agreement to conduct a harmonized environmental assessment, including through co-appointing a Joint Review Panel.²⁶ Anna Johnston acted as legal counsel in the Site C environmental assessment for the Peace Valley Environment Association (she is now a lawyer at West Coast Environmental Law). In Anna's view, the environmental assessment of Site C, and the related decision-making process, illustrate a number of failings of the provincial regime. Two failings in particular stand out for her: the lack of accountability in decision-making, and inadequate public participation.

Lack of accountability in decision-making: significant impacts with no justification

Anna:

"Perhaps the most problematic aspect of the Site C assessment is how the provincial government was able to effectively ignore the recommendations of the Joint Review Panel when deciding to approve the project. In May 2014 the Panel concluded that Site C would have significant environmental and social costs that could only be justified by an unambiguous need for the power, and that BC Hydro had not proven that BC would need Site C's energy."

"In October 2014, the provincial government approved Site C. Neither of the issuing provincial ministers provided reasons for their decision, nor did they offer justification for the decision to proceed with the project despite the Panel's findings of significant adverse impacts and no proven need for the project."

"In many participants' eyes, the game was rigged. It's hard for an assessment process to inspire faith when the resulting conclusions can be so easily ignored by decision-makers, without so much as an explanation."

Public participation: too little, too late

Anna:

"Experts agree that public participation should begin at the earliest stages, before the proponent has submitted a detailed project description and when strategic decisions are still on the table. However, the first public participation opportunity for Site C did not arise until nearly a year and a half after BC Hydro had already finalized its project description. Even then, the public comment opportunity was for a different matter – the assessment did not engage the public on the Site C project description itself."

"Moreover, BC did not provide any participant funding to enable the public to engage meaningfully in the assessment. The only participant funding was provided by Canada, and it was insufficient to cover even a fraction of the full costs of participation, including retaining experts, travel and legal fees. My clients spent weekends and evenings holding fundraisers and picking cans out of ditches so they could afford to retain experts and have a meaningful say about this project that will flood their community and their lands. While BC and Canada appointed a working group for deeper consultation, no members of the general public, local landowners, or environmental or community groups were invited to participate in it. Finally, due to the restrictive timelines imposed on the assessment, the public had less than three weeks to submit written comments to the Joint Review Panel – including to review the thousands of pages of information BC Hydro had submitted."

III. Decision-making in BC's environmental assessment regime is not based on ensuring sustainability

As noted above, BC's current EA legislation does not include any substantive objectives, including environmental objectives, or an approval test. While the courts have recognized that a fundamental purpose of EA is environmental protection,²⁷ EA processes to date have tended to focus on mitigating significant adverse environmental effects, or justifying those effects through the short-term economic benefits enjoyed by a few (usually not those individuals and communities that bear the disproportionate burden of impacts). In other words, the unstated purpose of EA appears to be "making bad things less bad," and justifying any residual "badness." Instead, EA should seek to achieve the greatest amount of equitably-distributed net environmental, social and long-term economic benefits without allowing unacceptable trade-offs to occur.

The problems that arise when EA legislation has no substantive objectives is acutely demonstrated by the lack of legal linkages to BC's climate targets. While BC has a carbon reduction target of 80 percent below 2007 levels by 2050,²⁸ its EA legislation does not require projects to demonstrate how they will be consistent with achieving these goals. As a result, BC has approved projects like the proposed Pacific NorthWest liquefied natural gas (LNG) project, which if built, would make it impossible for BC to reach its climate change objectives.²⁹ Absent a clear, legislated climate objective and criteria for how decisions should ensure that proposed projects will help the province meet that objective, EA decisions may continue to put BC's ability to meet its climate targets at risk. The same concern applies to the EA regime's lack of other sustainability and reconciliation objectives, which puts other important rights and values at risk.





BUBBASS

Selecting the optimal outcome for the environment, Indigenous people and non-Indigenous communities requires the consideration of a range of alternatives, including the “no” option.³⁰ However, the *EAA* currently does not require the consideration of alternatives, and in practice EAs tend to focus narrowly on alternative means of carrying out a project, rather than broader alternatives to it. Further, the Act is silent on monitoring and follow-up, which are integral to ensuring ongoing sustainability and continual, ongoing improvement of processes.

At its core, environmental assessment is a series of predictions about the potential implications of a project. As decisions are based on these predictions (the likely consequences of going ahead, or not going ahead, with a project, and what conditions to impose on approved projects), it is important that predictions are reliable. In order to help future predictions in subsequent assessments, current projects should be subject to rigorous monitoring both to address any unexpected effects, and to determine whether predictions were accurate. But as BC’s Auditor General found in 2016, the Ministry of Energy and Mines and Ministry of Environment (now Ministry of Environment and Climate Change Strategy) have provided poor monitoring and enforcement of approved mining projects, and West Coast has reported on the decline in monitoring and enforcement generally in the province.³¹ As a result of this lack of monitoring and enforcement, provincial EA processes have not benefited from potential learning opportunities and are resulting in untracked impacts.

PERSPECTIVES ON PROVINCIAL EA: TAKU RIVER TLINGIT FIRST NATION

PLACER MINING



GAVIN SMITH



MARK CONNOR

The Taku River Tlingit First Nation's territory covers approximately 40,000 square kilometres encompassing portions of what is now known as British Columbia, the Yukon and Alaska. It includes high mountains, wild rivers and expansive forests full of living beings, which Taku River Tlingit people have cared for over millennia. The main Taku River Tlingit community is in Atlin, BC.

The Taku River Tlingit First Nation ("TRTFN") has long raised concerns that the BC government is failing to properly assess and manage the impacts of placer mining (the mining of stream beds for minerals, in this case gold) in its territories. Lynn Palmer, who until recently was the TRTFN Lands Engagement Coordinator, describes the placer mining process:

"The scale of placer mining activities range from digging test pits, to smaller-scale mining operations, to large industrial operations which completely destroy the creeks and streams they mine. These operations move water bodies and create temporary stream diversions and settling ponds that are very different in form from the original streams. They strip all the vegetation and create deep pits. This work requires a lot of heavy machinery and involves stockpiles of material. Once the material has gone through a wash plant, large trucks remove the gravel or small rock from the site with the gold still in it."

Lynn and TRTFN Lands Engagement Officer Charmaine Thom explain how a weak provincial environmental assessment regime has been a major contributor to the problems placer mining causes for TRTFN.

Lack of environmental assessment for activities with significant impacts

Taku River Tlingit First Nation Constitution:

"It is the land from which we came that connects all life. Our land is our lifeblood. Our land looks after us, and we look after our land. Anything that happens to Tlingit land affects us and our culture."³²

Charmaine:

"I've certainly seen a decline in the number of moose and the number of caribou in At Xa Koogu (Blue Canyon area), which includes my cabin and my hunting area. Just 15 or 20 years ago, when people would go up to visit my dad's camp at the end of Blue Canyon, they would pick and choose which moose they wanted. It was very unlikely that they wouldn't see moose. Yet it's very common today that you will not see one moose all the way up and back. I believe that it's due to the number of placer mine sites that have taken up that area.

At Xa Koogu is a breadbasket; we have many hunting trails and also gather traditional medicines there. Are we now going to have to go further out, scratch that area and accept that it has been wrecked now? Absolutely not. We need to be taking steps to collectively save the area, and as part of that work the provincial regime needs to be more stringent to satisfy TRTFN's interests. At Xa Koogu has reached a maximum disturbance threshold and is in need of rest and repair.

Ultimately it's for our next generation. We have to be able to provide them something when they become elders."

Lynn:

"Placer mining projects, which have ramped up in scale in TRTFN territory since 2011, are in practice not subject to environmental assessment under BC's legislation because the scale of each individual project has not been large enough to meet the high threshold at which an assessment is required. Yet these projects are having extensive and unacceptable impacts, including on TRTFN title and rights."

"The placer mining process can cause large amounts of sediment to go into waterways. Fish habitat is absolutely impacted. Wetland habitats are obliterated in the worst cases. There's not a good handle on baseline information because BC doesn't generally require it to be collected, but the one preliminary provincial study in the Atlin area showed elevated levels of metals released in proximity to these projects, which exceeded guidelines for drinking water and aquatic health."

"Environmental assessments need to be triggered at a much lower threshold. It makes no sense that industrial-scale placer mining operations aren't being subjected to assessment."

Inadequate monitoring and management of cumulative effects

Lynn:

"There hasn't been a requirement for any kind of baseline studies for BC's placer mining permitting. Reclamation to date has been inadequate, and there is a total lack of any approach to managing cumulative effects. It's shocking to me. There has been time spent through the government-to-government forum talking about cumulative effects, and I understand that BC has some pilot projects in other areas, but certainly in TRTFN's experience the province's response to monitoring and management of cumulative effects has been totally inadequate."

Charmaine:

"I think that the TRTFN Land Guardian program is one important step. I know that there's opportunity here to have something great. If we could get buy-in from the province for our Land Guardians to work with provincial officers and for everyone to learn from each other, it would be a first step toward positive changes. Expanded environmental assessment should connect to this, and it could also help address many other concerns such as managing cumulative impacts, improving baseline data and strengthening reclamation."

Failure to address whether projects create a net benefit

Lynn:

"TRTFN sees all the impacts of placer mining and virtually no benefit. There's almost no employment for Taku River Tlingit people and there's really nothing else coming to the Nation from these activities."

"There are no requirements for impact-benefit agreements and the province throws up its hands when it comes to any kind of benefit sharing from the proponent, saying there's nothing it can do. The province itself is hardly getting any revenue from placer mining, so there's basically no opportunity for revenue sharing with BC."

"Why are we allowing this gold to be taken out if there's no real benefit to the First Nation, the community of Atlin or the province? It's a fundamental question that is not being asked."

IV. BC's environmental assessment regime does not recognize Indigenous jurisdiction or meet UNDRIP standards

The provincial government has committed to “fully adopting” UNDRIP. This process will necessitate substantial changes to how environmental decision-making occurs in BC, including environmental assessment. In particular, the requirement for the Crown to cooperate with First Nations “in order to obtain their free, prior and informed consent” prior to undertaking new development projects on their territories has the potential to catalyze a new approach to environmental governance.³³ At the core of UNDRIP is the right of Indigenous peoples to self-determination.³⁴ In the BC context, this is relevant to the “nation-to-nation” relationship often spoken of between the Crown and First Nations.

Many Indigenous leaders emphasize that the implementation of UNDRIP constitutes an opportunity to “reset” the relationship between Indigenous peoples and the Crown – moving on from the colonial ideologies that have marred the relationship in the past, to a basis of genuine equality and mutual respect.³⁵

Unfortunately, BC's current environmental assessment regime does not reflect the role of Indigenous nations as decision-makers in their territories, and as such it acts as an obstacle to implementation of UNDRIP and respectful recognition of Indigenous rights, title and jurisdiction. In the words of the First Nations Energy and Mining Council:

To summarize, the BC Environmental Assessment Act is silent with respect to a number of important aspects, such as First Nations involvement in the process, objectives, standards and principles for delivery for the EA process, and methodological content for the conduct of reviews... A significant number of First Nations has lost the confidence in the process.³⁶

As well as being contrary to international and constitutional legal norms, this has caused extensive and costly legal conflict that serves the interests of no one.³⁷



As Métis legal scholar Brenda Gunn states:

The government should never be approaching Indigenous peoples with a yes or no question. It's actually about building new relationships: having Indigenous peoples involved at the very beginning in any project or process where their rights might be affected and sitting there as true partners in helping guide the decision-making process where their views and concerns are heard, taken into account and addressed.³⁸

This highlights the need for an environmental assessment regime in BC that recognizes First Nations as decision-makers at all stages, and reflects this in both assessment processes and outcomes through government-to-government agreement.

The implementation of UNDRIP necessitates explicit recognition and application of Indigenous law,³⁹ yet the current EA process continues to sideline Indigenous law and fails to work collaboratively with Indigenous decision makers. A new environmental assessment regime that accords with UNDRIP will need to take into account and work co-operatively with Indigenous peoples' own "laws, traditions, customs and land-tenure systems."⁴⁰ Implementing these new decision-making processes and governance structures will require time, effort, resourcing and, importantly, new environmental assessment legislation.

V. BC's environmental assessment regime fails to meaningfully engage and inform the public

Current EA processes also fail to enable or facilitate meaningful participation. As noted above, ensuring the rigour of information relied upon in assessments greatly depends on the engagement of the public, stakeholders and experts who may identify gaps, provide additional evidence, test existing evidence and identify important values. However, the current EAA does not include any public participation rights or requirements, and the *Public Consultation Policy Regulation* only requires, as a matter of general policy, that an assessment include one formal public comment period.⁴¹ The regulation puts primary responsibility on the proponent to facilitate public engagement by requiring the proponent to conduct a public consultation program, and present information on its consultation



activities for review by the EAO.⁴² This is problematic because the proponent clearly has a direct interest in the outcome of the assessment, thus members of the public are often rightly cautious that opportunities for their participation, and how their input is portrayed, will be limited or framed in a way that best serves the interests of the proponent.

Furthermore, the lack of participant funding is a significant barrier to meaningful participation, especially by community groups and individuals who do not have the resources to retain experts or time to review the thousands of pages of information provided by proponents.⁴³

As a result, individuals and communities often feel left out of assessment processes, with few options for meaningful public engagement and little opportunity to proactively plan what communities want and need. For example, West Coast conducted a series of dialogue sessions with residents across northern BC, from Prince Rupert to Fort St. John, between 2014 and 2016. The sessions engaged participants in discussions about the best-case and worst-case future scenarios for their regions resulting from past, current and future development, including multiple proposals for liquefied natural gas plants and supporting pipelines and infrastructure. Two of the key common themes that emerged from the dialogue sessions were “a feeling of alienation from meaningful input into environmental decision-making processes” and “a lack of trust in government at all levels to responsibly manage the cumulative impacts of development.”⁴⁴

PERSPECTIVES ON PROVINCIAL EA: **JOSETTE WIER**

AURORA LNG DIGBY ISLAND PROJECT ENVIRONMENTAL ASSESSMENT

Dr. Josette Wier's experience as a citizen engaging in the Aurora LNG Digby Island environmental assessment left her with significant concerns about the public participation process.

Josette:

“The Environmental Assessment Office's approach to public input felt like ticking a box. The public was not informed of important developments in the process, for example there was no notification or explanation sent to the members of the commenting public when the review process for the project was suspended. I couldn't get access to the information I wanted. As a member of the public, I had no access to the environmental assessment working group and there are lots of documents from the working group that were not available to the public, which I'm very concerned about. The website was an obstacle that made information difficult to locate and access. The public was cornered into providing comments in a limited way, and we had absolutely no indication how our comments would be taken into consideration. I felt that public input was totally devalued and discarded in the assessment. And I had no recourse.”

VI. BC's environmental assessment regime does not ensure coordination and collaboration among jurisdictions

While the *EAA* allows for agreements with other jurisdictions for collaborative assessments,⁴⁵ there are insufficient incentives and mechanisms in the legislative framework to ensure that BC assessments are collaborative and harmonized with federal and Indigenous jurisdictions. Experts agree that environmental assessments result in better decisions and reduce conflict when all relevant jurisdictions, including Indigenous jurisdictions, are actively involved throughout every stage of the assessment.⁴⁶ Yet BC's practice with the federal government, enabled by the *EAA*, is often to engage in substitution, whereby BC's assessment is entirely substituted for the federal process,⁴⁷ or sometimes vice versa. In some circumstances, BC even attempted to go a step further by substituting not just a federal EA process for its own, but also substituting a federal EA *decision* for the province's decision – however this practice was recently found by the BC Supreme Court to be legally impermissible.⁴⁸ Substitution, in contrast to collaborative assessment, does not ensure that the assessment standards of all jurisdictions are met and thus encourages a weaker process.

On the other end of the spectrum, under the *EAA* BC can and has conducted its own assessment in a manner totally disconnected from simultaneous assessment and decisions on the same project by other jurisdictions. In the cautionary tale of Taseko's Prosperity Mine (subsequently called the New Prosperity Mine in a second iteration), two disconnected provincial and federal assessments resulted in opposite conclusions: the federal government rejected the project (twice) due to unjustifiable adverse impacts, while BC approved the same project. The Tsilhqot'in Nation also forcefully rejected the proposal. The example of the New Prosperity Mine, and the mess of litigation it has caused, highlights the need for BC's assessment legislation to facilitate and prioritize collaborative assessment among all relevant jurisdictions.⁴⁹

Ensuring that decisions are based on the best available information, including Indigenous knowledge, requires all jurisdictions to be at the table at the earliest stages of assessment to identify the scope of information required, what studies are needed to provide that information, who should conduct and review those studies, and how to incorporate them into EA decisions. Those same jurisdictions should also be present throughout assessments to provide their expertise and ensure that areas of relevance to them are meaningfully addressed. Otherwise, those jurisdictions cannot be assured that they have adequate information on which to make decisions that are in the best interest of their environmental, social and long-term economic objectives.

SEIZING THE OPPORTUNITY FOR A NEW ASSESSMENT LAW

British Columbia can and must do better than its current approach to environmental assessment and planning. The provincial government's commitment to revitalize environmental assessment opens the door to replacing an assessment regime that is seriously broken. However, it bears emphasizing that meaningful reform cannot be achieved by tinkering around the margins of the current system.

Fortunately, the public, First Nations and other experts have already devoted significant time and resources to map out ideas for what a strong new environmental assessment regime should look like, including to a wealth of submissions and input into the recent federal environmental assessment review process, as well as numerous BC-focused proposals for provincial environmental assessment reform.⁵⁰ Building on this foundation, through nation-to-nation engagement with First Nations as well as robust public input, BC has a major opportunity to enact new environmental assessment legislation to achieve sustainability and reconciliation goals and to protect the interests of communities and ecosystems.

Gavin Smith, Anna Johnston and Hannah Askew
Staff Lawyers
West Coast Environmental Law



END NOTES

- ¹ BC New Democratic Caucus and BC Green Caucus, *2017 Confidence and Supply Agreement between the BC Green Caucus and the BC New Democrat Caucus*, online: <https://www.thetyee.ca/Documents/2017/05/30/BC%20Green-BC%20NDP%20Agreement_vf%20May%2029th%202017%20copy.pdf>.
- ² Office of the Premier, *Mandate Letter to the Minister of Environment and Climate Change Strategy* (18 July 2017), online: <<http://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/heyman-mandate.pdf>>.
- ³ Office of the Premier, *Mandate Letter to the Minister of Forests, Lands, Natural Resource Operations and Rural Development* (18 July 2017), online: <<http://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/donaldson-mandate.pdf>>. While this backgrounder focuses on the case for environmental assessment reform, legal linkages between environmental assessment and land use (and marine spatial plans) have the potential to improve the effectiveness of both tools.
- ⁴ *Ibid.*
- ⁵ Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015), online: <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf> at 5, Call to Action 45(iv).
- ⁶ *Reviewable Projects Regulation*, BC Reg 370/2002.
- ⁷ Forest Practices Board, *Board Bulletin, Volume 13: The Need to Manage Cumulative Effects* (February 2013), online: <<https://www.bcfpb.ca/wp-content/uploads/2016/04/013-VOLUME-13-Information-Bulletin.pdf>> at 3.
- ⁸ BC Auditor General, *Managing the Cumulative Effects of Natural Resource Development in BC* (May 2015), online: <<https://www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Cumulative%20Effects%20FINAL.pdf>> at 5.
- ⁹ Environmental Assessment Office, *Information Bulletin #1: Relationship between the Cumulative Effects Framework and Reviewable Project Environmental Assessment* (February 2017), online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/cumulative-effects/bulletin_1_cef-ea_feb_2017.pdf> at 1 and 4. See also British Columbia, *Information Bulletin #2: The Integrated Resource Management Context for the Cumulative Effects Framework* (8 February 2017), online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/cumulative-effects/bulletin_2_irm-cef_feb_2017.pdf>.
- ¹⁰ British Columbia, *Cumulative Effects Framework Interim Policy Frequently Asked Questions* (February 2017), online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/cumulative-effects/interim_policy_faq_3_feb_2017-1.pdf> at 2.
- ¹¹ West Coast Environmental Law, *Paddling Together: Co-Governance Models for Regional Cumulative Effects Management* (June 2017), online: <<https://www.wcel.org/sites/default/files/publications/2017-06-wcel-paddlingtogether-report.pdf>> ["WCEL, Paddling Together"] at 21.
- ¹² *Environmental Assessment Act*, SBC 2002, c 43, ["EAA"] s 11(2)(b).
- ¹³ See WCEL, *Paddling Together*, *supra*.
- ¹⁴ *Ibid* at 19-21, 32-38.
- ¹⁵ BC Auditor General, *An Audit of Compliance and Enforcement of the Mining Sector* (May 2016), online: <<https://www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Mining%20Report%20FINAL.pdf>> ["BC Auditor General, Mining Compliance"] at 9.
- ¹⁶ Garth Mowat and Clayton Lamb, *Population status of the South Rockies and Flathead grizzly bear populations in British Columbia, 2006-2014* (11 May 2016), online: <http://wild49.biology.ualberta.ca/files/2016/05/Recent-status-of-the-South-Rockies_final.pdf> at 2 and 4.
- ¹⁷ West Coast Environmental Law, *West Coast Environmental Law Submissions on Next Generation Environmental Assessment* (23 December 2016), online: <<https://www.wcel.org/sites/default/files/publications/wcel-submissions-to-ea-panel-final-16-12-23.pdf>>.
- ¹⁸ Environmental Assessment Office, *Recommendations of the Executive Director* (17 December 2009) at 8 and 22, online: <<https://projects.eao.gov.bc.ca/api/document/588693e0eed3c0016f855208/fetch>>; Environmental Assessment Office, *Environmental Assessment Certificate #14-02* (14 October 2014), online: <<https://projects.eao.gov.bc.ca/api/document/58868f49e036fb010576803d/fetch>>.
- ¹⁹ Canadian Environmental Assessment Office, *Notice of Decision* (16 November 2010), online: <<http://www.ceaa.gc.ca/050/document-eng.cfm?document=80044>>; Minister of Environment, *Decision Statement Issued under Section 54 of the Canadian Environmental Assessment Act, 2012* (25 February 2014), online: <<http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=98458>>.
- ²⁰ *Do Rav Right Coalition v. Hagen*, 2005 BCSC 991, para 34 (aff'd 2006 BCCA 571); *Peace Valley Landowner Association v British Columbia (Environment)*, 2015 BCSC 1129, para 94 (aff'd 2016 BCCA 377).
- ²¹ See, e.g., *ibid.*
- ²² Environmental Assessment Office, *Environmental Assessment Office User Guide: An Overview of Environmental Assessment in British Columbia* (January 2018), online: <<http://www.eao.gov.bc.ca/files/EAO-User-Guide-January-2018-FINAL.PDF>> at 14.
- ²³ Andrew Gage, *Lessons from the Prosperity Mine Environmental Assessment* (5 June 2010), online: <<https://www.wcel.org/blog/lessons-prosperity-mine-environmental-assessment>>.
- ²⁴ *Report of the Joint Review Panel, Site C Clean Energy Project* (1 May 2014), online: <<http://www.ceaa.gc.ca/050/documents/p63919/99173E.pdf>> at 145.
- ²⁵ *Ibid* at 64, 79-80, 84, 103.
- ²⁶ The Minister of Environment, Canada and Minister of Environment, British Columbia, "Agreement to Conduct a Cooperative Environmental Assessment, Including the Establishment of a Joint Review Panel, of the Site C Clean Energy Project" (13 February 2012), online: <<http://www.ceaa.gc.ca/050/documents/54272/54272E.pdf>>.
- ²⁷ *Friends of the Oldman River Society v Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3 at 71; *Friends of Davie Bay v Province of British Columbia*, 2012 BCCA 293, para 34.
- ²⁸ British Columbia, *Climate Action Plan 2016* (August 2016), online: <https://climate.gov.bc.ca/app/uploads/sites/13/2016/10/4030_CLP_Booklet_web.pdf> at 5.
- ²⁹ International Climate Change Experts and Climate Scientists, Letter to Catherine McKenna, Minister of Environment and Climate Change re: "Unjustified adverse greenhouse gas impacts of the Pacific Northwest LNG proposal" (26 May 2016), online: <<https://www.scribd.com/document/314292821/Climate-Scientists-Letter-to-Federal-Government>> at 1.
- ³⁰ Anna Johnston, *Federal Environmental Assessment Reform Summit Proceedings* (August 2016), online: <https://www.wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_proceedings_fnl.pdf> ["Johnston, EA Summit"] at 12.
- ³¹ BC Auditor General, *Mining Compliance*, *supra*; Andrew Gage and Justine Desmond, "Is BC's environmental enforcement plummeting because conservation officers are stuck at their desks?" (20 September 2015), online: <<https://www.wcel.org/blog/bcs-environmental-enforcement-plummeting-because-conservation-officers-are-stuck-their-desks>>.

- ³² Taku River Tlingit First Nation, *Taku River Tlingit First Nation Constitution Act, 1993*, online: <<http://trtfn.com/wp-content/uploads/2014/08/trtfn-constitution1.pdf>>, s 2.3.
- ³³ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/ RES/61/295, 46 ILM 1013 (2007) ["UNDRIP"], articles 10 and 19.
- ³⁴ See *ibid*, articles 3 and 4.
- ³⁵ See *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws – Special Report*, ed. Jennifer Goyder, Centre for International Governance Innovation (2017), online: <<https://www.cigionline.org/sites/default/files/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf>>.
- ³⁶ BC First Nations Energy and Mining Council, *Environmental Assessment and First Nations in BC: Proposals for Reform* (20 August 2009), online: <<http://fnemc.ca/?portfolio=ea-proposals-for-reform>> ["FNEMC, EA and First Nations in BC"] at 2-3.
- ³⁷ One need not look far for examples of litigation between BC and Indigenous nations related to BC's approach to environmental assessment: see e.g. *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34; *Taseko Mines Ltd v Phillips*, 2011 BCSC 1675 (legal proceedings related to this project and its provincial approval are still ongoing, see e.g. Tsilhqot'in National Government, "Tsilhqot'in Commend Federal Intervention to Permanently Stop Taseko Mines Limited's Drilling Program at Teztan Biny" (15 August 2017), online: <<http://www.tsilhqot'in.ca/PDFs/Press%20Releases/2017%2008%2014%20TNG%20Media%20Release%20-%20Federal%20Injunction%20Application.pdf>>); CBC News, "Squamish Nation Challenging B.C.'s Approval of Kinder Morgan Project in Court" (6 November 2017), CBC News, online: <<http://www.cbc.ca/news/canada/british-columbia/squamish-nation-taking-fight-against-kinder-morgan-to-court-1.4389746>>; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54; Sarah Cox, "'Deck Stacked' Against First Nations Seeking Site C Injunction, Experts Say" (19 January 2018), DeSmog Canada, online: <<https://www.desmog.ca/2018/01/19/deck-stacked-first-nations-site-c-injunction-experts>>.
- ³⁸ Cited in Stefan Labbé, "Why the UN's Declaration on Indigenous Rights has been slow to Implement in Canada" (21 July, 2017), OpenCanada.org, online: <<https://www.opencanada.org/features/why-uns-declaration-indigenous-rights-has-been-slow-implement-canada/>>.
- ³⁹ *UNDRIP*, *supra*, see in particular articles 4 (right to self-government), 5 (right to maintain and strengthen Indigenous institutions), 27 (states must recognize Indigenous laws) and 18 (right to participate in decision-making where rights are affected).
- ⁴⁰ *Ibid*, articles 18 and 27.
- ⁴¹ *Public Consultation Policy Regulation*, BC Reg 373/2002, s 7.
- ⁴² *Ibid*, s 4.
- ⁴³ Mark Haddock, *Environmental Assessment in British Columbia* (November 2010), online: <http://www.elc.uvic.ca/documents/ELC_EA-IN-BC_Nov2010.pdf> ["Haddock, *Environmental Assessment*"] at 38.
- ⁴⁴ West Coast Environmental Law and Northwest Institute, *Regional Strategic Environmental Assessment for Northern British Columbia: The Case and the Opportunity* (May 2016), online: <https://www.wcel.org/sites/default/files/publications/WCEL_NBCenviroAssess_report_FINAL_0.pdf> ["WCEL & NWI, *Regional Strategic EA*"] at 14.
- ⁴⁵ *EAA*, *supra*, s 27.
- ⁴⁶ Johnston, *EA Summit*, *supra* at 7.
- ⁴⁷ Canada and British Columbia, *Memorandum of Understanding Between the Canadian Environmental Assessment Agency (Agency) and British Columbia Environmental Assessment Office (EAO) on Substitution of Environmental Assessments*, 2013, online: <<http://www.eao.gov.bc.ca/files/EAO-CEAA-Substitution-MOU.pdf>>.
- ⁴⁸ National Energy Board and Environmental Assessment Office, *Environmental Assessment Equivalency Agreement* (21 June 2010), online: <http://www.eao.gov.bc.ca/pdf/NEB-EAO_Equivalency_Agreement_20100621.pdf>. The British Columbia Supreme Court found that part of the Equivalency Agreement was invalid in *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34.
- ⁴⁹ Andrew Gage and Katrine Andres, "Comparing Prosperity Mine Assessments" (27 July 2011), online: <<https://www.wcel.org/blog/comparing-prosperity-mine-assessments>>; Haddock, *Environmental Assessment*, *supra* at 58. Gavin Smith "Opinion: BC's Environmental Assessment Regime Needs an Overhaul" (14 August 2017), *Vancouver Sun*, online: <<http://vancouversun.com/opinion/op-ed/opinion-b-c-s-environmental-assessment-regime-needs-overhaul>>.
- ⁵⁰ See e.g.: FNEMC, *EA and First Nations in BC*, *supra*; Haddock, *Environmental Assessment*, *supra*; Johnston, *EA Summit*, *supra*; WCEL, *Paddling Together*, *supra*; WCEL & NWI, *Regional Strategic EA*, *supra*; Rachel Forbes et al, *Environmental Assessment Law for a Healthy, Secure and Sustainable Canada: A Checklist for Strong Environmental Laws* (February 2012), online: <<https://www.wcel.org/publication/environmental-assessment-law-healthy-secure-and-sustainable-canada-checklist-strong>>; Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (2017), online: <<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>>.



WEST COAST
Environmental Law

WEST COAST ENVIRONMENTAL LAW
200-2006 West 10th Avenue, Vancouver BC V6J 2B3
Tel: 604.684.7378 Toll-free: 1.800.330.WCEL
www.wcel.org

BC's Legal Champion for the Environment
www.facebook.com/WCELaw
twitter.com/WCELaw
Support our work: wcel.org/donate

West Coast Environmental Law harnesses the power of law to solve complex environmental challenges. We are transforming environmental decision-making and strengthening legal protection for the environment through collaborative legal strategies that bridge Indigenous and Canadian law. By putting the law in the hands of communities and creating legal risk for those who would harm our land, air and water, we are building the collective power to achieve a more just and sustainable future for all.