

# **An LNG Engagement Strategy for Industry: How to Develop Working Relationships with B.C. First Nations.**

by

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## **Abstract**

This paper explores ways for the proposed LNG industry to build successful engagement procedures with BC First Nations. The process starts with the LNG industry's Corporate Social Responsibility with regards to developing and maintaining a Social License to Operate. This paper provides an overview of the sociopolitical landscape in British Columbia, with a brief examination of Section 35 jurisprudence; fulfilling the requirements of Consultation & Accommodation when dealing with First Nations' rights. As well, to enhance the LNG proponents' engagement strategies there is a review of the current governance models that are available to First Nations. Finally, this paper shows how the consensus approach to resolving multi-stakeholder issues can lead to the development of lasting relationships between the proposed LNG industry and the First Nations in BC.

**Keywords:** Corporate Social Responsibility; Social License to Operate; Section 35 jurisprudence; Consultation & Accommodation; First Nations in BC

## **Dedication**

I dedicate this to my families: my biological; my adopted; and, the one I married into. Especially, to my wife, Celeste Haldane, who provides support, guidance and a gentle nudge when I need some motivation. To my three children, Asia, Paul and Brendan, and to my grandson, Ryder, who remind me about the importance of post-secondary education for the First Nations people in BC and Canada. Education is empowering and is the key to creating opportunities for all First Nations people.

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## List of Acronyms

AIP	Agreement in Principle
BC	British Columbia
BCAFN	British Columbia Assembly of First Nations
BCTC	British Columbia Treaty Commission
CSR	Corporate Social Responsibility
CBSR	Canadian Business for Social Responsibility
EA	Environmental Assessment
ECDA	Economic Community Development Agreement(s)
IBA	Impact Benefit Agreement(s)
IPP	Independent Power Project(s)
ISO	International Organization for Standardization
IT	Information-Technology
FCRSA	Forest Consultation and Revenue Sharing Agreement(s)
FNFMA	First Nation Financial Management Act
FNLMA	First Nation Land Management Act
LNG	Liquefied Natural Gas
NGPBA	Natural Gas Pipeline Benefit Agreement(s)
NGO	Non-governmental Organization(s)
SEA	Strategic Engagement Agreement(s)
SFU	Simon Fraser University
SL	Social License
SLO	Social License to Operate
TKS	Traditional Knowledge Study
TUS	Traditional Use Study
WFN	Westbank First Nation



## Glossary

<b>Term</b>	<b>Definition</b>
Fiduciary	<p>An individual in whom another has placed the utmost trust and confidence to manage and protect property or money. The relationship wherein one person has an obligation to act for another's benefit</p> <p>Court's Fiduciary definition in <i>R. v. Sparrow</i>, [1990] 1 S.C.R. 1075: The Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.</p>
Fracking	<p>The process of injecting liquid at high pressure into subterranean rocks, boreholes, etc., so as to force open existing fissures and extract oil or gas.</p>
Honor of the Crown	<p>Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: <i>R. v. Sparrow</i>, [1990] 1 S.C.R. 1075</p>
Sui Generis	<p>A Latin phrase, meaning of its (his, her, or their) own kind; in a class by itself; unique</p>

# **Chapter 1.**

## **Introduction**

The intent of this paper is to provide the Liquefied Natural Gas (LNG) industry with guidelines for managing their relations with BC First Nations so the industry can continue their energy-based project development initiatives in British Columbia. I will achieve this by examining how Corporate Social Responsibility (CSR) is one avenue for managing their stakeholder relations and how understanding that social media connects stakeholders will allow the LNG proponents to develop a strategy to use the platforms to engage stakeholders. Unlike the majority of existing resource extractions in BC that are site specific, the LNG industry will be traversing the province with a significant amount of proposed resource developments to complete the LNG supply chain, and the Crown and Industry must have meaningful engagements with every First Nation community that will be impacted by the proposed LNG projects. The LNG industry will need to understand the evolution of the legal landscape in Canada with regards to modern Aboriginal law and how this shapes the procedural duties of the Consultation & Accommodation doctrine in BC. Reviewing the various governance models that First Nations can implement will provide the LNG industry proponents with an understanding of the socio-political dynamics that may be going on in the various First Nations communities they will encounter. This paper will then review the consensus approach to resolving multi-stakeholder issues, which can potentially be a process for the LNG industry to adopt. In the end this paper will provide the LNG Industry with an engagement framework which will not only create certainty for BC's anticipated LNG resource developments but will result in lasting economic benefits for the LNG industry proponents and their partner First Nations in BC.

## Background

Currently, the world's developed and developing nations rely on fossil fuels such as coal, petroleum, and natural gas for their energy needs. "In 2005 a whopping 86 percent of energy used worldwide came from fossil fuel combustion."<sup>1</sup> Fossil fuels are supplied by the capital intensive mining sector and "[e]nergy represents 25% of Canada's total exports. At present, Canada depends almost entirely on the United States market for our energy exports."<sup>2</sup> The steady decline of America's reliance on importing oil<sup>3</sup> is the precursor for Canada to look to the world market for other countries to buy their energy resources: the "anticipated global trends mean declining U.S. demand for Canadian oil and natural gas and rapidly expanding opportunities for energy exports overseas, particularly in Asia."<sup>4</sup> For energy exports like Canadian natural gas<sup>5</sup> to continue to be an important component of our economy, Canada will need to start building the necessary infra-structure to be able to move its land-locked energy resources to tidewater for export to the world's markets. However, LNG projects are capital intensive and could cost anywhere between \$ CAD 10-20 billion<sup>6</sup> to build the entire value chain.<sup>7</sup>

<sup>1</sup> Energy and Global Warming article found at:

[http://www.biologicaldiversity.org/programs/climate\\_law\\_institute/energy\\_and\\_global\\_warming/](http://www.biologicaldiversity.org/programs/climate_law_institute/energy_and_global_warming/)

<sup>2</sup> Eyford, Douglas. Forging Partnerships Building Relationships: Aboriginal Canadians and Energy Development. Report to the Prime Minister, November 29, 2013. At pg. 10. [hereinafter, "*Eyford Energy*"]

<sup>3</sup> In 2005, the U.S. relied on foreign oil for 60% of its daily consumption. By 2011, that had dropped to 45%, and is projected to fall further, to 34% in 2019 [due to] Shale oil being successfully mined" Found at: [http://useconomy.about.com/od/suppl1/f/Shale\\_Oil.htm](http://useconomy.about.com/od/suppl1/f/Shale_Oil.htm).

<sup>4</sup> *Eyford Energy*, *Supra*, note 2 at pg. 10

<sup>5</sup> The focus of this paper will be on the Liquefied Natural Gas (LNG) plans that the Province of B.C. is developing.

<sup>6</sup> The cost for an entire LNG value chain would be anywhere from 10-20 Billion: where the Upstream gas extraction (Approx. 30%), Liquefaction and storage (50%), Shipping (Approx. 12%) and Regasification (Approx. 8%).

LNG facilities are expensive to build because all equipment must meet high safety standards and because many costly components, including large amounts of stainless steel, are needed to resist the embrittling effects of extreme cold. The liquefaction plant is the most expensive part, costing \$1-2 billion or more depending on the size and location. The cost of receiving terminals varies widely, from about \$500 million to \$2 billion, depending on factors such as the number of storage tanks. LNG tankers cost \$150 million or more. In addition, there are high energy and maintenance costs for the liquefaction plants, plus significant operating costs for the ships and terminals. Aboriginal Pipeline Group: Natural Gas Facts found at: <http://www.mvapg.com/natural-gas-lng.php>

<sup>7</sup> The value chain provides a rigorous way to understand the sources of buyer value. Porter, Michael E. (1985). *Competitive Advantage: Creating and Sustaining Superior Performance*. New York.: Simon and Shuster.

The British Columbia government considers that “fracking” will be able to unlock the potential natural gas reserves in the province.<sup>8</sup> The recent discoveries in British Columbia’s Horn River, the Liard and Cordova gas plays and the Alberta’s Montney gas plays where the “natural gas potential is estimated at over 2,933 trillion cubic feet mean LNG has the potential to become a leading commodity for British Columbia’s International Exports. To put it in perspective, each year industry extracts about 4 trillion cubic feet of natural gas.”<sup>9</sup> The British Columbia government believes that “[t]he potential LNG export industry is a generational opportunity to enable strong economic growth and provide excellent employment opportunities throughout B.C.”<sup>10</sup> To make the most of the LNG potential in BC means bringing in international corporations; those have expertise in the extraction of this provincial resource.

Moreover, the proposed LNG proponents will have to pay special attention to the socio-political climate in BC because having government support for big energy companies to develop the natural gas resource in BC is only one part of the process to build the natural gas supply chain. This is due to the fact that the provincial government only provides regulatory licenses to resource extraction companies to operate, but cannot guarantee the support of stakeholders affected by the operations of these companies. This chapter will review Corporate Social Responsibility (CSR)<sup>11</sup> practices to demonstrate how they can become the basis for the proposed LNG industry proponents to engage and gain the permission of the various stakeholders<sup>12</sup> in the areas of BC in which they plan to operate. This segment will then demonstrate how social media tools can connect the various stakeholders in BC and how social media can also become a tool for the LNG proponents to engage stakeholders. This segment will conclude with a review of the

<sup>8</sup> LNG Pipeline Map see Appendix A – Map provided by the Carrier Sekani Tribal Council

<sup>9</sup> Everything you want to know about LNG in BC. BC Government Website found at: <http://engage.gov.bc.ca/lnginbc/b-c-s-lng-story/#environmental-leadership>

<sup>10</sup> B.C.’s Natural Gas Sector: Significant Opportunities for Growth found at: [http://engage.gov.bc.ca/bcjobsplan/files/2014/09/3yearUpdate\\_NaturalGas.pdf](http://engage.gov.bc.ca/bcjobsplan/files/2014/09/3yearUpdate_NaturalGas.pdf)

<sup>11</sup> Corporate Social Responsibility (CSR) may be viewed as an umbrella term because as corporations adapt to meet the ever-changing atmosphere within which they operate so will the CSR definition be modified to keep up with the innovative solutions developed by industry.

<sup>12</sup> Stakeholders are external change agents and can be: politicians, bureaucrats, investors, consultants, suppliers, sub-contractors, financial analysts, social and ecological activists as well as, key stakeholders such as community groups, consumers and regulators.

Haisla First Nation's LNG agreement to provide contextual evidence on how the future LNG proponents can work with BC's First Nations.

## Corporate Social Responsibility (CSR)

Clearly, the doctrine of Corporate Social Responsibility (CSR)<sup>13</sup> has been around for a number of years because Milton Friedman claims in a 1970, article that;

...there is one and only one social responsibility of business- to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception and fraud.<sup>14</sup>

Friedman even goes on to state that CSRs "...are notable for their analytical looseness and lack of rigor."<sup>15</sup> Equally, the "lack of rigor" is what allows corporations enough flexibility to voluntarily create innovative CSR initiatives or policies that will fit their enterprise to generate benefits for any corporation or organization and society. Businesses may opt to follow any one of the four prevailing justifications for Corporate Social Responsibility (CSR) and use: moral obligation, sustainability, license to operate and reputation.<sup>16</sup> Probably the most prevalent CSR approach is sustainability because companies are voluntarily practicing the triple bottom line where people, planet and profits are used to assess their operation.<sup>17</sup> However, this section will focus on how the

<sup>13</sup> Corporate Social Responsibility Evolution of a Definitional Construct. "In this article, the author traces the evolution of the CSR construct beginning in the 1950s, which marks the modern era of CSR. Definitions expanded during the 1960s and proliferated during the 1970s. In the 1980s, there were fewer new definitions, more empirical research, and alternative themes began to mature." Carroll, Archie B. Corporate Social Responsibility *Evolution of a Definitional Construct*. BUSINESS & SOCIETY, Vol. 38 No. 3, September 1999 found at: [http://molar.crb.ucp.pt/cursos/2%C2%BA%20Ciclo%20-%20Mestrados/Gest%C3%A3o/201315/EERS\\_1315/2Sess%C3%A3o%20dia%201%20Fevereiro/Artigo%20para%20mestrados%20recensionarem/CSR%20%20Evolution%20of%20a%20definitional%20construct%20-%201999.pdf](http://molar.crb.ucp.pt/cursos/2%C2%BA%20Ciclo%20-%20Mestrados/Gest%C3%A3o/201315/EERS_1315/2Sess%C3%A3o%20dia%201%20Fevereiro/Artigo%20para%20mestrados%20recensionarem/CSR%20%20Evolution%20of%20a%20definitional%20construct%20-%201999.pdf)

<sup>14</sup> The Social Responsibility of Business is to Increase Profits. Milton Friedman. The New York Times Magazine. September 13, 1970. Copyright©1970 by The New York Times Company Found at: <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>

<sup>15</sup> *Ibid*

<sup>16</sup> Porter, Michael E. and Mark R. Kramer. Strategy and Society: the link between competitive advantage and corporate social responsibility. Harvard Business Review. December 2006. Found at: <https://hbr.org/2006/12/strategy-and-society-the-link-between-competitive-advantage-and-corporate-social-responsibility>

<sup>17</sup> From Business 660 Sustainability class notes.

best CSR approach for the proposed LNG industry in BC is the Social License to Operate<sup>18</sup> because this policy allows corporations to adapt to the changes that stakeholders are creating in the social and political fields in which they will operate.

Evidently, CSR has critics because there are times when the CSR policy has provisions that cannot be adequately measured as in the case of sustainability:

[The problem with] the triple bottom line is that the three separate accounts cannot be easily added up. It is difficult to measure the planet and people accounts in the same terms as profits- that is, in terms of cash.<sup>19</sup>

Also corporations may even misrepresent their sustainability efforts and this is known as “greenwashing”.<sup>20</sup> But, these problems can be overcome by having credible third parties validate their business’ training and development, for example the International Organization for Standardization (ISO) offers training in a wide variety of subjects in order to meet organizational requirements in an ever-shifting business setting.

The proposed LNG industry in BC should look at business’ training and development by taking standards and certification programs from a credible and external third party. Undertaking, the ISO 26000:2010 Corporate Responsibility program will show the various stakeholders they are training their people to maintain CSR in their day-to-day business activities.<sup>21</sup>

[B]ecause there is no specific external reward- certification- explicitly tied to ISO 26000. ISO recommends users say for example that they have used ISO 26000 as a guide to integrate social responsibility into our values and practices.”<sup>22</sup>

<sup>18</sup> “The concept of a Social license to Operate (SLO) was first proposed by Jim Cooney 1997 as an essential requirement for the future survival of the mining industry.” Corporate Social Responsibility- The Social Licence to Operate a Mine. The International Resource Journal. Monday, May 4, 2015. Found at: [http://www.internationalresourcejournal.com/mining/mining\\_november\\_12/the\\_social\\_licence\\_to\\_operate\\_a\\_mine.html](http://www.internationalresourcejournal.com/mining/mining_november_12/the_social_licence_to_operate_a_mine.html)

<sup>19</sup> Triple bottom line it consists of three Ps; profit, people and planet. The Economist Nov. 17, 2009. found at: <http://www.economist.com/node/14301663>

<sup>20</sup> Greenwashing is the practice of making unsubstantiated or misleading claims about the environmental benefits of a product, service, a technology or company practice. Evidently, aspirational goals are expressed in 100% even though the organization may not be close to the 100% mark in its day-to-day actions. From Business 660 Sustainability class notes.

<sup>21</sup> ISO 26000:2010 found at: <https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en>

<sup>22</sup> Definition found at: [http://en.m.wikipedia.org/wiki/ISO\\_26000](http://en.m.wikipedia.org/wiki/ISO_26000)

Having ISO offer Corporate Responsibility training illustrates the fact that organizations and corporations around the globe are currently expected to act in socially responsible way.

[The ISO 26000 Social Responsibility] standard was launched in 2010 following five years of negotiations between many different stakeholders across the world. Representatives from government, NGOs, industry, consumer groups and labour organizations around the world were involved in its development, which means it represents an international consensus.<sup>23</sup>

Plus having an international consensus on CSR means more companies and organizations will be incorporating CSR into their operating policies in response to greater scrutiny by various direct and indirect stakeholders.

Another way for the LNG companies to meet stakeholders' concerns is to join a national program like the Canadian Business for Social Responsibility (CBSR) which is "a non-profit member organization with a mission to accelerate and scale corporate social and environmental sustainability in Canada and challenge the "business as usual" model."<sup>24</sup> Joining a national organization similar to CBSR will provide guidance and support for any of the LNG proponents that become members and use CBSR to develop a Corporate Social Responsibility policy. Because CBSR provides their members with Good Company Guidelines and:

assistance to member companies seeking to implement policies and practices which contribute to the long term, sustained and responsible success of their business while balancing the claims of key stakeholders, investors, employees, customers, business partners, communities and the environment.<sup>25</sup>

The CBSR members are confident that their Good Company Guidelines provide a framework that any organization can use regardless of size.<sup>26</sup> The CBSR's goals allow this to be a suitable program for any of the proposed LNG companies planning to operate in BC.

<sup>23</sup> ISO 26000:2010 found at: <http://www.iso.org/iso/home/standards/iso26000.htm>

<sup>24</sup> Founded in 1995 Canadian Business for Social Responsibility (operating as CBSR) is a non-profit member organization and the CBSR information page is found at: <http://www.cbsr.ca/>

<sup>25</sup> Good Company: Guidelines for Corporate Social Performance Found at: <http://www.cbsr.ca/sites/default/files/GoodCompany-SummaryDocument.pdf> [hereinafter, 'Good Company']

<sup>26</sup> *Ibid*

Moreover, “[c]ompanies have traditionally considered as stakeholders their shareholders, employees, customers, suppliers, business partners, and other key influencers.”<sup>27</sup> On the other hand, the CBSR provides the broadest definitions for stakeholders because their definition is

any person, group, or entity that is impacted directly or indirectly by a business’ activities or that directly or indirectly impacts the business’ activities. This includes but is not limited to community members, employees and their families, customers, suppliers, shareholders, community and environment groups, politicians, professional and academic organizations, the biosphere, world population, and future generations.<sup>28</sup>

This all-inclusive list of stakeholders shows that the CBSR clearly appreciates how significant the stakeholders’ role is in the day-to-day activities of any organization. And, the CBSR believes, “if a sufficient number of companies adopt these guidelines, they could provide a common language between customers, suppliers, regulators, and other stakeholders for discussion and information sharing.”<sup>29</sup> This demonstrates the need for a common platform to increase the understanding between stakeholders and the LNG proponents. With the CBSR including future generations this appears to align with First Nations’ values although they would not define themselves as stakeholders. Since, Aboriginal communities have been here since time immemorial, Aboriginals or First Nations are more than stakeholders as they have a special constitutionally recognized standing in Canada as per *Section 35* of the *Constitution*<sup>30</sup>. That is why when industry or the Crown engages with Aboriginal groups, it is best not to refer to Aboriginals as stakeholders but rather give the recognition of their unique status as per *Section 35*<sup>31</sup> and refer to them as “rights holders”.

The usual role of government agencies is to deliver regulations for companies to follow, but even Canada’s Federal government supports the CSR approach with how it expects the extractive sector to operate internationally.<sup>32</sup> The Federal government outlines this understanding

<sup>27</sup> Bekefi, Tamara, Beth Jenkins, and Beth Kytly. 2006. “Social Risk as Strategic Risk.” Corporate Social Responsibility Initiative, Working Paper No. 30. Cambridge, MA: John F. Kennedy School of Government, Harvard University. found at: [http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_30\\_bekefieta.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_30_bekefieta.pdf) [hereinafter, “*Social Risk*”]

<sup>28</sup> *Good Company*, *Supra*, note 25

<sup>29</sup> *Good Company*, *Supra*, note 25

<sup>30</sup> For further analysis of *Section 35* of the *Constitution*, See text accompanying note 131

<sup>31</sup> *Ibid*

<sup>32</sup> Because the resource extraction industry is an inherently dirty business Canada’s Federal government should have CSR guidelines for all domestic resource extraction operations.



in their “2009, launch of Canada’s first CSR strategy, “Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector Abroad.”<sup>33</sup> Also, part of Canada’s Federal government strategy’s outcome is implementing how CSR is “defined as the voluntary activities undertaken by a company over and above legal requirements, to operate in an economically, socially and environmentally sustainable manner.”<sup>34</sup> Canada’s CSR strategy clearly shows the expectation of the voluntary participation of the extractive sector companies to act over and above legal requirements. But, Canada’s CSR strategy also penalizes the extractive sector companies that do not meet the best practices.

Canadian companies found not to be embodying CSR best practices and who refuse to participate in dispute resolution processes contained in the CSR Strategy, will no longer benefit from economic diplomacy of this nature. Furthermore, such a designation will be taken into account in the CSR-related evaluation and due diligence conducted by the Government of Canada’s financing crown corporation, Export Development Canada (EDC), in its consideration of the availability of financing or other support.<sup>35</sup>

Moreover, Canada’s CSR guidelines go on to illustrate how challenging the international arena can be for the extractive sector and describe it as follows:

given the challenging environments in which the extractive sector operates, disputes can and do arise. Disagreements can divide communities, keep them from obtaining resolutions to their concerns, and can create a negative cycle of disputes, limiting the community’s access to the benefits of natural resource development. Unresolved disagreements with communities can also affect businesses through expensive project delays, damaged reputations, high conflict management costs, investor uncertainty, and in some cases, the loss of investment capital.<sup>36</sup>

The numerous ideologies of the various stakeholders makes the political environment that the proposed LNG industry will encounter in BC similar to the international arena. By understanding the socio-political dynamics of doing business in the international markets “Canada has a multifaceted approach to help Canadian extractive companies mitigate social and environmental risks and improve their CSR performance, as well as their contribution to host country benefits.”<sup>37</sup>

<sup>33</sup> Canada’s Enhanced Corporate Social Responsibility Strategy to Strengthen Canada’s Extractive Sector Abroad found at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng#5>

<sup>34</sup> *Ibid*

<sup>35</sup> *Supra*, note 33

<sup>36</sup> *Supra*, note 33

<sup>37</sup> *Supra*, note 33

The risks present two issues that the proposed LNG industry in BC needs to address because “[s]ocial and environmental issues are emerging as troublesome sources of strategic risk”<sup>38</sup> for corporations because they are “characterized by complex origins and equally complex, far reaching impacts.”<sup>39</sup> Clearly, the LNG proponents will have to address the social and environmental issues associated with their industry and “acting beyond the minimum requirements of regulatory approvals is an important component of establishing a company’s long-term reputation and brand among stakeholders and communities.”<sup>40</sup>

Noticeably, risk management is already part of any corporations’ existing operations but, “[t]raditional risk management programs focus on operational and compliance risks and are generally composed of point solutions: mitigation actions specific to particular sources or impacts of risk.”<sup>41</sup> The proposed LNG industry in BC needs to develop their risk management programs beyond point solutions, because “the emergence of social risk is characterized by four components in combination: an issue, a stakeholder or group of stakeholders, a negative perception about the company, and the means to do damage.”<sup>42</sup> Having four components working together to create social risk illustrates how complex this subject can be and “[g]iven the complexity that is characteristic of a strategic risk, social risk can arise in numerous ways.”<sup>43</sup> On the other hand, “[m]any companies have, within their corporate social responsibility, public affairs, or other departments, the necessary capabilities and expertise to manage strategic risks stemming from social and environmental issues.”<sup>44</sup> Basically, the proposed LNG industry in BC needs to understand the four components that give rise to the emergence of social risk and respond with a comprehensive solution that takes this into account. This means that an effective remedy will be outside of point solutions.

<sup>38</sup> *Social Risk, Supra*, note 27

<sup>39</sup> *Social Risk, Supra*, note 27

<sup>40</sup> Yates, Brian F. and Celesa L. Horvath. *Social License to Operate: How to get it, and How to Keep it*. Pacific Energy Summit 2013: Summit Working Papers. Found at: <http://www.nbr.org>. [hereinafter, “*SLO how to keep*”]

<sup>41</sup> *Social Risk, Supra*, note 27

<sup>42</sup> *Social Risk, Supra*, note 27

<sup>43</sup> *Social Risk, Supra*, note 27

<sup>44</sup> *Social Risk, Supra*, note 27

Further, the proposed LNG industry in BC will have to face the reality that “[i]t is time to think about a new expanded business ecosystem. Companies must begin to monitor, assess, and manage strategic risk and opportunity in the context of a broad suite of social and environmental issues and stakeholders.”<sup>45</sup> In order to be successful the proposed LNG industry needs to be aware of the expanded business ecosystem in which they operate. And, that “[o]ne dimension of social risk’s complexity is that it is often a function of strategic or operational decisions companies have made that affect issues that stakeholders care about.”<sup>46</sup> Understanding how their corporate decisions can create issues or social risks will allow them to use the capabilities they already have within their organization to resolve such issues. Indeed, “[a] strategic risk that is anticipated early and mitigated well can be converted into a new market, a competitive advantage, a stock of goodwill, or a strategic relationship.”<sup>47</sup>

Additionally, this “multifaceted approach to help Canadian extractive companies mitigate social and environmental risks and improve their CSR performance” is coming from a government of Canada website for international business and is not on their Aboriginal engagement sites.<sup>48</sup> The Federal government of Canada should be doing additional work to improve the socio-economic conditions and address the trepidations of BC First Nations in regards to the proposed LNG projects. Even “[i]ndustry questions why Canada is not doing more to address unresolved Aboriginal rights claims in British Columbia, and why it does not engage with Aboriginal groups on project development in advance of or outside regulatory processes.”<sup>49</sup> Beyond the questions, the LNG proponents should insist that Canada and BC start working in

<sup>45</sup> *Social Risk, Supra*, note 27

<sup>46</sup> *Social Risk, Supra*, note 27

<sup>47</sup> *Social Risk, Supra*, note 27

<sup>48</sup> The interesting take-away from this is that the BC First Nations’ aspirational goals are to have nation-to-nation dialogues about resource development with Canada in their respective traditional territories and this really does not take place. Let alone dealing with the larger issue of the reconciliation of their outstanding land claims in BC.

<sup>49</sup> *Eyford. Energy, Supra*, note 2

collaboration with BC's First Nations to work on lasting reconciliation agreements that will increase the level of certainty for the proposed LNG industry's projects.<sup>50</sup>

## The Social Licence

Remarkably, the proposed LNG industry in BC is closing in on:

“a time when access to international markets remains the sector's biggest problem, and the eyes of the world focus on how Canada relates to its First Nations peoples, replacing a still largely one-sided, outdated approach to CSR with one focused on mutual respect and shared value offers a unique opportunity to earn not only the social licence to operate, but also enormous economic and social returns—and the trust and respect of an increasingly skeptical public.”<sup>51</sup>

“The term, “social license to operate”<sup>52</sup> or “social license,” generally refers to a local community's acceptance or approval of a company's project or ongoing presence in an area.”<sup>53</sup> This is outside of the regulatory compliance of a corporation because social license is not given by a government. And, the “process of acquiring social license demands early and ongoing investment of effort by proponents to develop and maintain social capital within the context of trust-based relationships with aboriginal people, local communities, and other interested groups.”<sup>54</sup>

<sup>50</sup> The Federal and Provincial governments appear to be making decisions that make it easier for LNG companies to come to Canada. “In 2012, Petronas purchased Calgary-based Progress Energy for \$5.5 billion...At first Ottawa rejected the takeover, saying it wasn't in Canada's best "net interest" for one foreign firm to mine unconventional gas, liquefy it, and then export the fractured gas to Asia through its own terminals and ships. But Ottawa later approved the deal.” Nikiforuk, Andrew. Who Is BC's Big LNG Partner? A Petronas Primer: Group led by Malaysia's national oil company aims to build terminal near Prince Rupert. The Tyee: News. Culture Solutions, May 21, 2015. found at: <http://thetyee.ca/News/2015/05/21/Who-Is-Petronas-LNG/> And, “The B.C. government, which wants to see three projects built by 2020, has lowered natural gas royalties, corporate taxes and LNG taxes to entice Asian investors.” Nikiforuk, Andrew. BC LNG Lost Its Window of Opportunity, Study Finds: Projects unlikely to be economic for another decade: Oxford Institute energy report. The Tyee: News. Culture. Solutions. found at: <http://thetyee.ca/News/2015/05/22/BC-LNG-Lost-Opportunity/>

<sup>51</sup> Avram, Joni. Reinventing Corporate Social Responsibility. Oilweek: Canada's Oil and Gas Authority. Apr. 28, 2014 [hereinafter, “*Reinventing CSR*”]

<sup>52</sup> “The concept of a Social license to Operate (SLO) was first proposed by Jim Cooney 1997 as an essential requirement for the future survival of the mining industry.” Corporate Social Responsibility- The Social Licence to Operate a Mine. The International Resource Journal. Monday, May 4, 2015. Found at: [http://www.internationalresourcejournal.com/mining/mining\\_november\\_12/the\\_social\\_licence\\_to\\_operate\\_a\\_mine.html](http://www.internationalresourcejournal.com/mining/mining_november_12/the_social_licence_to_operate_a_mine.html)

<sup>53</sup> *SLO how to keep*, *Supra*, note 40

<sup>54</sup> *SLO how to keep*, *Supra*, note 40

“The challenge for corporations is that social license to operate is a subjective concept, not a piece of paper. There is no issuing organization or agency. The terms are different for every business and vary considerably, even within the same industry. Ultimately, SLO is based on who your stakeholders are and what they think of you.”<sup>55</sup>

This issue may not be easy for the LNG proponents to address: “[o]ften intangible and informal, social license can nevertheless be realized through a robust suite of actions centered on timely and effective communication, meaningful dialogue, and ethical and responsible behavior.”<sup>56</sup> The aforementioned presents guidelines to help explain what Social License to Operate is and how the LNG proponents need to effectively engage with various stakeholders to gain their SLO. In any event the LNG proponents need to also understand that the dynamics of a “[s]ocial license may manifest in a variety of ways, ranging from absence of opposition to vocal support or even advocacy, and these various levels of social license (as well as, of course, the absence of social license) may occur at the same time among different interested parties.”<sup>57</sup> All of these differing stakeholders’ viewpoints combine to create a complex business ecosystem within the province of BC.

## **The BC Stakeholders and Benefits of the Social License**

Evidently, as part of the new expanded business ecosystem “[o]rganisations can no longer choose if they want to engage with stakeholders or not; the only decision they need to take is when and how successfully to engage.”<sup>58</sup> In order to do this the proposed LNG industry needs to fully appreciate the socio-political dynamics of the various BC communities and use this as the foundation for their engagements with the various stakeholders.

“To be effective in terms of building social capital and social license, stakeholder engagement must be timely, inclusive, complete, and meaningful. Timelines refers to

<sup>55</sup>Klein, Paul. Three Ways to Secure Your Social License to Operate in 2013. Found at: <http://www.forbes.com/sites/csr/2012/12/28/three-ways-to-secure-your-social-license-to-operate-in-2013/>

<sup>56</sup> *SLO how to keep*, *Supra*, note 40

<sup>57</sup> *SLO how to keep*, *Supra*, note 40

<sup>58</sup> Jeffery, Neil. Stakeholder Engagement: A Road Map to Meaningful Engagement. #2 in the Doughty Centre ‘How to do Corporate Responsibility’ Series. July, 2009. found at: <http://www.som.cranfield.ac.uk/som/dinamic-content/media/CR%20Stakeholder.pdf>

ensuring that engagement commences before a stakeholder is affected by a corporation's actions and continues until legitimate issues are resolved or the effect ceases.”<sup>59</sup>

The BC LNG industry proponents will need to engage with each one of the local communities' stakeholders prior to them being affected by the LNG proponents' activities. And, the broadest possible conception of “stakeholder”<sup>60</sup> is required because “the scope and depth of engagement may vary by stakeholder group, corporations must recognize that stakeholders will self-identify. Thus, there is rarely any legitimate basis for choosing to exclude a stakeholder group from engagement.”<sup>61</sup> The LNG industry proponents need to also maintain an understanding that the circumstances can vary considerably from one community to the next. “These regional and cultural differences demand a flexible and responsive approach and must be understood early in order to enable the development and implementation of an effective strategy to earn and maintain social license”<sup>62</sup> for the proponents of the proposed BC LNG industry.

Since the BC “stakeholders can range from indigenous peoples with ancient claims to traditional use and occupation of the land to outside environmental groups who are interested in the project because of conservation goals.”<sup>63</sup> These two stakeholders can have quite an impact on the proposed LNG pipeline project because as it traverses the province it will cross numerous First nations' traditional territories and impact numerous ecosystems. The LNG industry will need to develop effective strategies to meet the needs of these two groups as they will be at the forefront of community engagements.

On the one hand, the BC First nations have assorted political alliances and diverse local traditions. The new companies coming to BC to start their LNG operations may want to look to another energy company to see what their policy is with regards to First Nations. Enbridge has a policy that “lays out key principles for Aboriginal relations, such as respect for traditional ways and land, heritage sites, the environment, and recognition of unique legal and constitutional

<sup>59</sup> *SLO how to keep, Supra*, note 40

<sup>60</sup> *Good Company, Supra*, note 25

<sup>61</sup> *SLO how to keep, Supra*, note 40

<sup>62</sup> Gaurangkumar, Barot C. Cost benefit analysis of Corporate Social Responsibility (CSR). *Advances In Management*. Vol. 8 (5) May (2015). found at: <http://shankargargh.org/mngmntcurriissue/2.pdf>

<sup>63</sup> *SLO how to keep, Supra*, note 40

rights.”<sup>64</sup> The Enbridge policy reflects the unique socio-political positions that BC First Nations currently hold and tries to mitigate the interactions. The proposed LNG industry will need to be prudent and gather as much relevant information as possible. This will help the LNG industry to develop their operating policies to address the unique socio-political environment in BC.

Moreover, environmental groups have an interest in the BC LNG projects because “[w]ater, fugitive gas and seismic concerns weigh on the natural gas boom.”<sup>65</sup> The LNG proponents should already have a profound understanding of the long-held concerns of the environmentalists because “[f]racking has serious environmental impacts, including the exploitation and contamination of freshwater resources, and greenhouse gas emissions (both of CO<sub>2</sub> and methane)<sup>66</sup> causing global warming.”<sup>67</sup> Even though the environmentalists have apprehensions with the natural gas projects, they may not permanently reside in any of the local communities in BC. This illustrates the point that the LNG industry may have to contend with the transitory activist that can show up in any location and temporarily increase the local population’s opposition. This presents a problem for the LNG proponents because they may never be able to mitigate the environmentalists’ concerns for two reasons; environmentalists can be transient and move around the province, and using the principled approach or absolutist perspective where saving the Earth is the goal they will never yield their opposition to LNG development. Still, by examining just two BC stakeholders exemplifies a wide assortment of perspectives and ideologies that cannot be addressed with just one corporate undertaking. The proposed LNG proponents need to use a flexible and responsive approach in their development and implementation of an effective strategy to earn and maintain a social license in each one of BC’s communities.

<sup>64</sup> Enbridge.com site found at: <http://enbridge.com/AboutEnbridge/CorporateSocialResponsibility/CR-Policies.aspx>

<sup>65</sup> Baird, Jim. Obtain and Maintain a Social License to Operate, or Turn Out the Lights. September 24, 2013. found at: <http://theenergycollective.com/jim-baird/239581/social-license-operate-required-or-else-lights-go-out>

<sup>66</sup> “Significant carbon dioxide is released from combustion to provide compression at liquefaction plants, to provide power aboard ships, and to re-gasify LNG at terminals and Methane is a greenhouse gas 21 times as potent as carbon dioxide.” Source is the Aboriginal Pipeline Group: Natural Gas Facts found at: <http://www.mvapg.com/natural-gas-lng.php>

<sup>67</sup> Sierra Club BC. Fracking and LNG: What is Fracking? found at: <http://www.sierraclub.bc.ca/our-work/mining-energy/fracking>

Likewise, the LNG proponents should commit to taking appropriate measures to gain their Social License to Operate in the numerous BC communities for the following reasons:

where stakeholder relationships are particularly strong, these bonds can sometimes be leveraged to engage other stakeholders or to overcome opposition. This can happen when relationships become sufficiently advanced that the manifest benefits cause the stakeholders to become advocates, instead of neutral parties or outright opponents.<sup>68</sup>

Within the BC context leveraging the strong relationships with one stakeholder group to engage other stakeholders to overcome opposition is a benefit of gaining a Social License in one area. The LNG proponents should not overlook the fact that when they have taken appropriate measures to develop a stock of goodwill, and/or a strategic relationship with one stakeholder group in BC, it can help mitigate concerns in another area. Especially, when one considers how interconnected the BC First Nation communities are through familial ties and their social gatherings.

Moreover, the Social License to Operate once achieved can continue to benefit the LNG proponents because it can have a positive influence over the various stakeholders in the following ways:

Assures shareholders and investors that a company is managing social and other risks associated with its projects and activities; Minimizes the risks of costly delays in regulatory approvals due to opposition; Enhances trust by demonstrating to regulators and other stakeholders that the company is genuinely striving for good performance, and Protects a company's reputation in times of crises.<sup>69</sup>

In addition to other benefits for the LNG proponents, a Social License to Operate will: “ensure a stable operating environment; enable faster permitting and approvals; strengthen reputation; and more effectively use corporate resources.”<sup>70</sup> The Social License to Operate is worth pursuing because of the many benefits it will provide the LNG proponents. And, as noted earlier this “illustrates how the new expanded business ecosystem begins with monitoring, assessing, and

<sup>68</sup> *SLO how to keep, Supra*, note 40

<sup>69</sup> *SLO how to keep, Supra*, note 40

<sup>70</sup> Parker, AR, et al. *Managing Risk and Maintaining License to Operate: Participatory Planning and Monitoring in the Extractive Industries*. July 2008. Found at: [http://commdev.org/files/2037\\_file\\_Concept\\_Paper.pdf](http://commdev.org/files/2037_file_Concept_Paper.pdf) [hereinafter, “*Managing Risk*”]



managing strategic risk and opportunities in the context of a broad suite of social and environmental issues and stakeholders”<sup>71</sup> to achieve the benefits of a Social License to Operate.

In addition, the benefits of a Social License are not just one-sided because they can “positively impact host communities and companies themselves through increased morale, more productive employees, and long term benefits as a partner of choice. Thus there is a dual business case: increased productivity (value creation) plus risk mitigation (value protection).”<sup>72</sup> But, as the LNG industry projects unfold and become operational, the LNG proponents will want to continue embarking on measures to maintain their Social License within each community. As a result “[t]he trust developed through effective engagement provides a crucial cushion for an organization facing any kind of crisis... such trust will buffer the company from an immediate loss of social license, provided that the company continues to effectively engage.”<sup>73</sup> The LNG proponents’ effective engagement with stakeholders is essential to maintaining their Social License within each community. But understanding how technology is connecting stakeholders is yet another key element in developing the proponents’ overall understanding of the various stakeholders.

## **Social Media Connects Stakeholders**

Prior to 1990, corporations really had no need to take any steps towards a Social License to Operate because most extraction sites were remote and far from mainstream society. But, now “[s]ocial license has gained importance in the extractive industries largely because of the explosion in information and communication technologies during the 1990s, which forever changed the context for extractive operations.”<sup>74</sup> Clearly, the main change is that the remote communities are no longer isolated by geography:

The Internet opened up unprecedented opportunities for communication across worlds that were previously exclusive of each other. Through an increasingly connected but decentralized media, host community images and concerns are amplified in the extractive industry’s home country and to global stakeholders. The ability of civil society to become

<sup>71</sup> *Social Risk, Supra*, note 27

<sup>72</sup> *Managing Risk Supra*, note 70

<sup>73</sup> *SLO how to keep, Supra*, note 40

<sup>74</sup> *Managing Risk Supra*, note 70

networked from the local to the global, and vice versa, increases the operational and reputational risks of multinational corporations and changes the balance of power between firms and localities.<sup>75</sup>

The current information<sup>76</sup> and communication technologies allow people from all over the world to connect and access information. “Social media gives voice to previously isolated or remote stakeholders, who often come to the social media landscape with disproportionate credibility and trust, due in part to their perceived authenticity.”<sup>77</sup> This just creates another concern for LNG proponents in the newly expanded business ecosystem because of the exposure to reputational risks.

Nevertheless, the LNG proponents’ expanded business environment needs to include the impact of social media on the LNG proponents’ efforts to gain a Social License to Operate because a “significant factor affecting social license is the emergence of social media as a tool for communication, dialogue and activism.”<sup>78</sup> In late 2012, people witnessed how social media can unite people across the country to join a political action group like the “Idle No More” movement which was started by four women from Saskatchewan. In fact, “[t]he first tweet sent with the “#IdleNoMore” hashtag was sent Nov. 4, by co-founder Jessica Gordon. Within a few weeks the political movement gained traction and #IdleNoMore was trending on twitter.”<sup>79</sup> Another measurable outcome of their political action is the Idle No More Facebook group has around 45,000 members and their purpose is “to support and encourage grassroots to create their own forums to learn more about Indigenous rights and our responsibilities to our Nationhood via teach-ins, rallies and social media.”<sup>80</sup> The aforementioned illustrates how just one of the LNG proponents’ focus groups has been able to use social media as a tool for communication, discourse and political action.

<sup>75</sup> *Managing Risk*, note 70

<sup>76</sup> Indeed, “[t]he lightning spread of communication technologies has enabled the dissemination of information ideas that mainstream media have been unwilling or unable to publish.” The Transformative Power of Online Activism. found at: <http://www.hertieschool.org/mediaandevents/events/events-pages/04052015-the-transformative-power-of-online-activism/>

<sup>77</sup> *SLO how to keep*, *Supra*, note 40

<sup>78</sup> *SLO how to keep*, *Supra*, note 40

<sup>79</sup> CBC News. “9 questions about Idle No More”. Jan. 05, 2013. found at: [www.cbc.ca/news/canada/9-questions-about-idle-no-more-1.1301843](http://www.cbc.ca/news/canada/9-questions-about-idle-no-more-1.1301843)

<sup>80</sup> *Ibid*

Indeed, the use of any of the social media platforms can empower the various stakeholders in BC because they can quickly connect and share information on any topic that they feel is important.

“Social media tools empower stakeholders and communities to access and share information on company behaviors, technologies, and projects as they are implemented around the world. Understanding and managing this reality will be important for companies seeking social license.”<sup>81</sup>

The LNG proponents should not underestimate the power of social media due to the fact that “[t]oday, one blogger can reach as wide an audience as a large ad campaign. Where previously isolated issues and trends are no longer necessarily confined to a single region, discipline, or economic sector; rather, they spread and evolve quickly.”<sup>82</sup> Any issue can grow using social media when the topic is centred on peoples’ opinions which warrant the attention of other stakeholders including “those who may be affected by or have an effect on an effort. They may also include people who have a strong interest in the effort for academic, philosophical, or political reasons.”<sup>83</sup>

Certainly the ease of accessing information can empower individuals which in turn creates problems for the LNG proponents, because “[m]obile technologies make it much easier for stakeholders to quickly access information about companies and their behaviour, and social media makes it much easier for stakeholders to share information and their opinions – favourable or not – with their networks.”<sup>84</sup> As a result, when any of the stakeholders’ issues remain unchecked or unaddressed by the corporation or in this situation an LNG proponents, the outstanding issues can attract more distant stakeholders, especially, when the stakeholders are using social media which:

<sup>81</sup> *SLO how to keep, Supra*, note 40

<sup>82</sup> *Social Risk, Supra*, note 27

<sup>83</sup> Rabinowitz, Phil. How do you identify and analyze stakeholders and their interests? Section 8. Identifying and Analyzing Stakeholders and Their Interests. Community Tool Box. 2014. found at: <http://ctb.ku.edu/en/table-of-contents/participation/encouraging-involvement/identify-stakeholders/main>.

<sup>84</sup> Horvath, C. Social Media and the Extractive Sector: The changing currency of a modern license to operate. Canadian Institute of Mining Magazine. Sept/Oct 2011. Canadian Institute of Mining, Metallurgy and Petroleum. 2011 Found at: [http://www.cim.org/en/PublicationsandTechnicalResources/Publications/CIMMagazine/SeptemberOctober2011/upfront/Social\\_media\\_and\\_the\\_extractive\\_sector.aspx](http://www.cim.org/en/PublicationsandTechnicalResources/Publications/CIMMagazine/SeptemberOctober2011/upfront/Social_media_and_the_extractive_sector.aspx) [hereinafter, “*Social Media/Extractive*”]

allows users to self-organize quickly into communities with shared interests. Trust can also be generated rapidly within online communities, and such trust creates opportunities for collaboration and action much more quickly than would be possible through traditional engagement.<sup>85</sup>

The social media tools not only allow the various stakeholders to take control of their message, but they are also able to establish their own networks and communities on the web, which helps them to gain support and find other like-minded collaborators to work with.

## **Social Media for the LNG Proponents**

The social media platforms can also be useful to the LNG proponents because they can connect to any one of the various stakeholders in BC that are online. However, for LNG proponents to make the best use of the social media platforms they will have to overcome many of their internal issues preventing their development of an effective social media strategy. As paraphrased from the “Five reasons corporations are failing at social media”<sup>86</sup> are due to the following reasons:

1. They cannot talk about anything broader than their own products:  
If a company is only talking online about its specific products and not looking for ways to connect to the bigger picture, It is difficult for people to be engaged.
2. They listen to customers but do not take any action:  
If a company creates an online presence that is open and allows customer feedback, it creates the expectation that the company is going to do something with that feedback. “Worse than not being heard; is being heard and then ignored.”
3. Corporations are not calibrated internally with the technology:  
Customers expect interaction. Content creation is the key to social media success, and every company should have a Web site with a content management system that allows for quick, easy content creation without the IT department needing to recode a Web site. And, companies cannot expect to have a strong social media presence when social sites are blocked internally to stop access by their employees.
4. Their internal culture is not aligned for social media success:  
When policies, procedures, products and processes become more important than the customer, there is no way social media efforts can be effective. When your employees are more concerned doing what is in their job description than doing the right thing to help the customer that is not a culture that is likely to build trust and advocacy for your brand
5. They are not framing risk accurately:

<sup>85</sup> *SLO how to keep, Supra*, note 40

<sup>86</sup> Mengel, Amy. Five Reasons Corporations are Failing at Social Media. Social Media Today. October 12, 2009. found at: <http://www.socialmediatoday.com/content/five-reasons-corporations-are-failing-social-media>

The risk of social media is not abated by not participating. And, while there have certainly been some issues and miscues along the way, social media participation has yet to be the undoing of any company.<sup>87</sup>

The previous five explanations highlight some of the internal issues that the proposed LNG industry will have to overcome when they implement their social media strategy. But “none of the examples required hyper-specialized knowledge or technology for a company to connect with people.”<sup>88</sup> And, “[i]ndustry may be tempted to regard these characteristics of social media as risks, and indeed it is easy to take a wrong step. However, the difference between risk and opportunity is largely one of perception and strategy.”<sup>89</sup>

Although, the LNG proponents may want to focus their social media strategy to specifically address the various BC stakeholders’ concerns it would be better if their strategy suits a general audience. A company should create an online existence that is open and not catering to just one group because it will leave many other groups out. “Stakeholders now increasingly expect corporations not only to communicate their corporate responsibility (CR) initiatives, but also to engage in on-line dialogue about environmental, social and governance issues.”<sup>90</sup> This illustrates some of the issues that the LNG proponents should be able to discuss through their social media. Even if the online or social media exchange is not centered on the LNG proponents’ interests or products the communications are connecting their business with various stakeholders. “Being a constructive and contributing member of the social web not only builds social capital, but also allows a company to engage broad and diverse talent towards the achievement of shared goals.”<sup>91</sup>

Moreover, the LNG industry proponents need to appreciate that they can utilize the various social media platforms to further their own goals.

Social media tools make it possible like never before to collaborate with stakeholders throughout the value chain to identify challenges, innovate solutions and achieve sustainability goals. However, to step into this space requires not only the enabling technologies and networks, but a new organizational mindset as well – there needs to be a

<sup>87</sup> *Ibid*

<sup>88</sup> *Supra*, note 86

<sup>89</sup> *Social Media/Extractive, Supra*, note 84

<sup>90</sup> *Social Media/Extractive, Supra*, note 84

<sup>91</sup> *Social Media/Extractive, Supra*, note 84

culture of openness and collaboration that enables a company to look outside of itself for ideas.<sup>92</sup>

Stakeholders can be a wealth of information as long as the LNG industry proponents take the necessary steps to encourage this interaction. This can mean that their internal corporate policies, procedures and processes may have to undergo a shift to include any relevant input from social media sources. Without the internal adaptations of their organization it can undermine the LNG proponents' social media strategy detracting from their stakeholder engagement efforts.

Likewise, there are many ways for companies to conduct stakeholder engagement and the use of social media to complement traditional engagement methods should make sense. However,

[c]ompanies that ignore this opportunity and do not engage in dialogue in social media are increasingly conspicuous in their absence. They are likely to experience declining levels of trust and respect from stakeholders, who are already complementing their own learning, networking and activity with social media tools.<sup>93</sup>

As previously stated and reinforced by the above quote the LNG proponents need to understand that “the risk of social media is not abated by not participating.”<sup>94</sup> And, once the decision is made to participate in social media there needs to be a genuine effort put-forth by the LNG proponents. The impacts of “technological and entrepreneurial innovation is creating an ever-changing menu of new communication channels. Facebook and Twitter are the most obvious ways the latest technologies have transformed corporate communications.”<sup>95</sup> The LNG proponents' social media strategy should be able to engage with the stakeholders on any of the platforms currently in use. And, the LNG proponents need to show they are listening to the stakeholders concerns by acting on the most relevant and consistent items being mentioned on social media. “[S]takeholder expectations increasingly shift away from company-controlled communication towards balanced, two-way dialogue in which stakeholders themselves have the opportunity to define both the scope of exchange and the terms by which it is conducted.”<sup>96</sup> Having a social media strategy that

<sup>92</sup> *Social Media/Extractive, Supra*, note 84

<sup>93</sup> *Social Media/Extractive, Supra*, note 84

<sup>94</sup> *Supra*, note 86

<sup>95</sup> Kathuria, Seema. The Chief Communications Officer: Guiding Your Business in a Chaotic World found at: <http://www.russellreynolds.com/content/chief-communications-officer>

<sup>96</sup> *Social Media/Extractive, Supra*, note 84

addresses these concerns will only assist the LNG proponents to engage stakeholders that want to interact through social media on-line.

Moreover, the LNG proponents can look to social media to gain insight into the sociopolitical underpinnings of each BC community that they will have to engage as their projects traverse the province. It will be important for the LNG proponents to come up with an appropriate social media strategy that will incorporate both technological and entrepreneurial innovations that will help them to engage the various stakeholders. The on-line social media platforms will allow for the LNG proponents to have dialogue that is not limited to just corporate undertakings with various stakeholders, which builds social capital and relationships. With the majority of social media content being user-generated, the LNG proponents can gain valuable insight into the local opinions of stakeholders. Even though social media can provide a lot of benefits to the LNG proponents it should only be used to complement traditional engagement methods, which means the proponents still need to engage stakeholders one-on-one as illustrated in the next section.

## **Kitimat LNG Project & the Haisla First Nation**

The Kitimat LNG project illustrates how the LNG industry should engage with the BC First Nations. The Kitimat LNG terminal<sup>97</sup> and associated pipeline has two owners; Chevron Canada and Apache Canada are each 50% owners. And, Kitimat LNG has been developing the project with community and First Nations consultation with strict adherence to both Provincial and Federal government environmental review processes. “In 2005, Kitimat LNG and the Haisla Nation signed an Agreement in Principle (AIP)<sup>98</sup> and entered a mutually supportive and precedent-setting partnership for the development of LNG facilities in the Haisla’s territory.”<sup>99</sup>

The Haisla people are a BC First Nation located on the north coast of British Columbia and have been in that area since time immemorial. Various sites and areas within the Haisla

<sup>97</sup> *Eyford Energy*, *Supra* note 2 Appendix B found at: <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/www/pdf/publications/ForPart-Online-e.pdf>

<sup>98</sup> The Kitimat LNG terminal and the Haisla Nations’ Agreement in Principle is found at: [http://a100.gov.bc.ca/appsdata/epic/documents/p244/1137189645610\\_5f08234ed4754316b54f925e36601e44.pdf](http://a100.gov.bc.ca/appsdata/epic/documents/p244/1137189645610_5f08234ed4754316b54f925e36601e44.pdf)

<sup>99</sup> *Ibid*

Nation's traditional territory have been identified as potential locations for the proposed LNG facilities. The LNG proponents have actively engaged with the Haisla to advance specific project proposals, and the Haisla have been working towards community benefits associated with these projects.<sup>100</sup> The Kitimat LNG project includes facilities for natural gas liquefaction, LNG storage, and marine loading adjacent to Douglas Channel near Kitimat, BC.

Indeed, “[o]ne of the key aspects of the partnership was Kitimat LNG’s willingness to alter their original location of their facility to an area that the Haisla Nation have already developed as an industrial site.”<sup>101</sup> By engaging with the Haisla Nation early in the process, Kitimat LNG has secured a partner in and advocate for the project, and established the company’s social license to operate in the Haisla’s territory.<sup>102</sup> Likewise, through working effectively with Kitimat LNG, the Haisla Nation has emerged as a substantial beneficiary of LNG development in its territory. “The relationship includes a range of project-related benefits, such as economic growth, training opportunities, employment, other community and social benefits.”<sup>103</sup>

In sum, the aforementioned chapter reviews how proposed LNG proponents will have to pay specific attention to the socio-political climate in BC. Having government support for big energy companies to develop the natural gas resource in BC is only one part of the process to build the natural gas supply chain because the provincial government provides the regulatory licenses to allow resource extraction companies to operate. This section reviews how Corporate Social Responsibility (CSR)<sup>104</sup> practices are the basis for the LNG industry proponents to engage with the public to gain their Social license to Operate in specific areas in BC. This segment then shows how social media tools can unite BC stakeholder groups with similar attitudes and shared beliefs. The LNG industry proponents will have to keep in mind that the advances in social media communications can also benefit their efforts if they can develop an effective social media strategy to engage the various stakeholders and/or rights holders found in this province. The section concludes with a review of the Haisla First Nation’s LNG agreement, which illustrates

<sup>100</sup> *Supra*, note 97

<sup>101</sup> *Supra*, note 97

<sup>102</sup> *Supra*, note 97

<sup>103</sup> *Supra*, note 97

<sup>104</sup> Corporate Social Responsibility (CSR) may be viewed as an umbrella term because as corporations adapt to meet their ever-changing business climate in which they operate so will the CSR definitions be modified to keep up with the innovative solutions developed by industry.



how Kitimat LNG using early engagement practices has secured a partner with the Haisla Nation and established the company's social license to operate in the Haisla's territory. Developing effective engagement practices is important for the future LNG proponents and Chapter 2 will be reviewing the evolution of the legal landscape in BC to enhance the LNG proponents understanding.

## Chapter 2.

# The Evolution of the Legal Landscape in BC

This segment will provide a brief overview of the legal landscape with regards to First Nations in BC.<sup>105</sup> The intent is to illustrate how *Section 35 of the Canadian Constitution*<sup>106</sup> is only one component of modern Aboriginal case law and, will review the principles discussed by the Courts that enhance the understanding of the various doctrines that provide guidance to the Federal and Provincial Crowns on how they interact with First Nations. There will be a review of what the Federal and Provincial Crowns are required to do ensuring they have proper consultation and accommodation with BC First Nations. This will provide the LNG industry proponents with a superior understanding of what constitutes proper consultation and accommodation of BC First Nations' interests in the land. There will also be a review of the agreements between First Nations, industry and BC which are economic partnerships based on pre-existing Aboriginal rights and title. This section will conclude with reviewing two examples of consultation: one following the right path and the other not so much. All of the aforementioned will benefit the proposed LNG industry's understanding of the legal landscape with regards to First Nations in BC.

### Section 35

It is important for the LNG industry to have an understanding of how *Section 35 of the Canadian Constitution*<sup>107</sup> plays a role in the legal landscape of BC with regards to First Nations. *Section 35 of the Constitution* reads:

- (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.

<sup>105</sup> This is not a paper confined to the legal analysis of *Section 35* and Aboriginal case law; the intent is to provide a brief overview to illustrate some of the factors contributing to the socio-political climate in BC's resource development initiatives.

<sup>106</sup> *Constitution Act*, 1982 found at: [http://laws.justice.gc.ca/eng/Const/Const\\_index.html](http://laws.justice.gc.ca/eng/Const/Const_index.html) [hereinafter, "Section 35"]

<sup>107</sup> *Ibid*

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.<sup>108</sup>

Evidently, the “Constitutional drafters purposively left the wording of s.35 vague as it was in the interest of the government to give these rights as small a scope as possible.”<sup>109</sup> This results in First Nations relying on subsequent Aboriginal case law to bring clarity to *Section 35*. The Supreme Court of Canada has affirmed in several cases that Aboriginal rights exist in common law and the Court will continue to address other First Nations' issues as they arise. But, having one First Nation’s rights or title recognized does not mean that all First Nations in Canada will benefit from the Court’s decision. In any event the Supreme Court of Canada’s decisions are about helping build positive relationships and furthering the goal of reconciliation between First Nations' rights holders and both the Federal and Provincial crowns. As stated by Chief Justice Lamer:

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by judgments of this Court, that we will achieve... a basic purpose of s. 35(1) — “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.<sup>110</sup>

The notion of reconciliation is further reinforced by the court in the *Mikisew*<sup>111</sup> where Justice Binnie states:

“The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people’s concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.”<sup>112</sup>

<sup>108</sup> *Section 35, Supra*, note 106

<sup>109</sup> David C. Nahwegahbow and Nicole D.O. Richmond. “Impact of the 1982 Constitution on First Nations: Reflections on Section 35: Whether the Constitution Act has made a difference for First Nations?” *National Journal of Constitutional Law* 23. (2007/2008):153-171. Pg.165

<sup>110</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter, “*Delgamuukw*”].

<sup>111</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.C. 69 [hereinafter, “*Mikisew*”]

<sup>112</sup> *Ibid*, at paragraph 1.

The Court's decisions also address the underlying values that the Federal and Provincial Crowns should be following as they interact with the First Nations in BC. The Court offers direction to the Federal and Provincial Crowns by referring to Constitutional doctrines like the Honour of the Crown and the Crown's Fiduciary obligation with regards to its interaction with First Nations. The Courts refer to the doctrine of the Honour of the Crown and the Crown acting honourably in the reconciliation of pre-existing Aboriginal sovereignty and is addressed by the court in *Haida*<sup>113</sup> at paragraph 20:

Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger, supra*, at para. 41).<sup>114</sup>

The Fiduciary duty definition comes from two sources first is the dictionary definition and the second definition is how the courts have defined fiduciary. The lexical definition is as follows:

Fiduciary duty is a legal duty to act solely in another party's interests. Parties owing this duty are called fiduciaries. The individuals to whom they owe a duty are called principals. Fiduciaries may not profit from their relationship with their principals unless they have the principals' express informed consent. They also have a duty to avoid any conflicts of interest between themselves and their principals.<sup>115</sup>

The court in *R. v. Sparrow* states the following with regards to fiduciary:

The Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.<sup>116</sup>

The Honour of the Crown and Fiduciary duty are two Constitutional doctrines that are continually referred to by the Courts when they are making their opinions known in modern Aboriginal case

<sup>113</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [hereinafter, "*Haida*"]

<sup>114</sup> *Ibid*, at paragraph 20

<sup>115</sup> Fiduciary duty definition: found at: [https://www.law.cornell.edu/wex/fiduciary\\_duty](https://www.law.cornell.edu/wex/fiduciary_duty)

<sup>116</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter, "*Sparrow*"].

law. The next section will review how reconciling Aboriginal rights and interests in the land with other interests has created the Crown's duty to consult and, if appropriate, accommodate.

## Consultation & Accommodation

A fundamental obligation of the Crown is to uphold their duties pursuant to *Section 35* of the *Constitution*. As a result the BC Government has guidelines to assist when consulting with First Nations in BC premised on the fact that "government is legally required to consult with First Nations and seek to address their concerns before impacting claimed or proven aboriginal rights (including title) or treaty rights."<sup>117</sup> The Federal government also recognizes their obligations and in an attempt to guide officials by stating in the Federal Guidelines:

The Crown's efforts to consult and, where appropriate accommodate Aboriginal groups whose potential or established Aboriginal or Treaty rights may be adversely affected should be consistent with the overarching objectives of reconciliation. Reconciliation has two main objectives: 1) the reconciliation between the Crown and Aboriginal peoples and; 2) the reconciliation by the Crown of Aboriginal and other societal interests. Consultation and accommodation play a key role in the fulfillment of these two objectives.<sup>118</sup>

Further, the reconciliation of pre-existing Aboriginal sovereignty is addressed by the court in *Haida*<sup>119</sup> at paragraph 20:

This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.<sup>120</sup>

<sup>117</sup> Updated Procedures for meeting Legal Obligations when consulting with First Nations Interim dated May 2010 found at:

[http://www2.gov.bc.ca/gov/DownloadAsset?assetId=9779EDACB673486883560B59BEBE782E&fileName=legal\\_obligations\\_when\\_consulting\\_with\\_first\\_nations.pdf](http://www2.gov.bc.ca/gov/DownloadAsset?assetId=9779EDACB673486883560B59BEBE782E&fileName=legal_obligations_when_consulting_with_first_nations.pdf). [hereinafter, "*BC Consultation Guide*"]

<sup>118</sup> Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult. March 2011 at page 6 of Part A: Overview. found at: pg.6

<sup>119</sup> *Haida, Supra*, note 113

<sup>120</sup> *Haida, Supra*, note 113

This in fact is a place the Province of British Columbia finds itself in needing to honourably negotiate land claims and truly reconcile the pre-existence of Aboriginal peoples who had their own way of governance and land holding system prior to the Crown asserting sovereignty.

Significantly, in the most recent case dealing with the modern law of Aboriginal and treaty rights, the Supreme Court of Canada's findings in *Tsilhqot'in*<sup>121</sup> addresses and for the first time in Canada declares that Tsilhqot'in<sup>122</sup> hold Aboriginal title to a tract of their ancestral land. The Court uses the principles established in *Calder*<sup>123</sup>, *Guerin*<sup>124</sup>, *Sparrow*<sup>125</sup> and *Delgamuukw*<sup>126</sup> to determine the Tsilhqot'in have indeed established Aboriginal title to their ancestral lands.<sup>127</sup> In *Tsilhqot'in* the Court cites *Delgamuukw*<sup>128</sup> "including non-traditional purposes provided these uses can be reconciled with the communal and ongoing nature of the group's attachment to the land."<sup>129</sup> And in *Tsilhqot'in* the Court states:

In other words, Aboriginal title is a beneficial interest in the land: *Guerin* at p.382. In simple terms, the title holders have the rights to the benefits associated with the land – to use it and profit from its economic development.<sup>130</sup>

Moreover, in *Tsilhqot'in* the Court notes that that Aboriginal title comes with an "important restriction--it is collective title held not only for the present generation but for all succeeding generations."<sup>131</sup> This is worth consideration because during the consultation process with government over proposed developments there may not be enough deliberation given to the future generations' use of the collective title land. In fact:

Aboriginal groups consulted on individual projects have increasingly expressed concern over aggregate adverse cumulative effects of developments on their asserted or established section 35 rights. The courts have held that only new adverse impacts trigger a duty to consult but that the cumulative effects of past events must be considered as

<sup>121</sup> *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [hereinafter, "*Tsilhqot'in*"].

<sup>122</sup> *Ibid*

<sup>123</sup> *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313 [hereinafter, "*Calder*"].

<sup>124</sup> *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [hereinafter, "*Guerin*"].

<sup>125</sup> *Sparrow*, *Supra*, note 116

<sup>126</sup> *Delgamuukw*, *Supra*, note 110 at paragraph 110

<sup>127</sup> *Tsilhqot'in*, *Supra*, note 121 at paragraph 6

<sup>128</sup> *Delgamuukw* *Supra*, note 110 at paragraph 110

<sup>129</sup> *Tsilhqot'in*, *Supra*, note 121 at paragraph 67

<sup>130</sup> *Tsilhqot'in*, *Supra*, note 121 at paragraph 70

<sup>131</sup> *Tsilhqot'in*, *Supra*, note 121 at paragraph 74

“contextual evidence” to determine the seriousness of the potential impacts of the proposed development under consideration.<sup>132</sup>

First Nations, governments and proponents who are involved with the consultation process should understand the restrictions on their current use of the land because the use and benefit of collective title lands includes future generations.

Evidently, there is only one example of a British Columbia First Nation launching a lawsuit alleging its treaty rights have been violated by the adverse cumulative effects caused from decades of development. “The Blueberry River band’s lawsuit argues the cumulative effect of development in its traditional territory has harmed its way of life in violation of Treaty 8, which was ratified in 1900.”<sup>133</sup> Their traditional territory is the location for many developments including: “two existing hydro dams in the region, there are roughly more than 16,000 oil and gas wells, 28,000 kilometres of pipelines, 4,000 square km of coal tenures, 5,000 square km of logging cut-blocks and 45,000 km of road.”<sup>134</sup> The Blueberry River band’s location is where future LNG pipelines are planned and is also the future site of BC Hydro’s site C dam. In fact, their lawsuit “could affect B.C.’s planned Site C hydroelectric dam, as well as oil and gas development both inside and outside the band’s territory.”<sup>135</sup> Because this British Columbia First Nation is a member nation to Treaty 8, it triggers a high duty to consult and accommodate where appropriate. The provincial government should not erode or diminish treaty rights through excessive developments due to the fact that treaties fall under *Section 35*<sup>136</sup> and are constitutionally protected.

The Court in *Tsilhqot’in*<sup>137</sup> reaffirms the duty to consult doctrine established in *Haida*<sup>138</sup> and the spectrum that the Court set out in its earlier ruling. In addition, the Court re-asserts their

<sup>132</sup> See *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650.

<sup>133</sup> Hume, Mark. First Nations seek injunction barring development in Fort St. John region The Globe and Mail (Vancouver) Wednesday, Mar. 04 2015

<sup>134</sup> *Ibid*

<sup>135</sup> Blueberry River First Nations lawsuit threatens Site C, fracking in B.C. Found at: <http://www.cbc.ca/news/canada/british-columbia/blueberry-river-first-nations-lawsuit-threatens-site-c-fracking-in-b-c-1.2981820>

<sup>136</sup> *Section 35*, *Supra*, note 106

<sup>137</sup> *Tsilhqot’in*, *Supra*, note 121

<sup>138</sup> *Haida*, *Supra*, note 113

position with regards to how the duty to consult is a procedural duty that arises from the Honour of the Crown. The Court in *Taku*<sup>139</sup> states:

In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s.35 (1).<sup>140</sup>

This results in the provincial government having to undertake consultation with all First Nations regardless of established Aboriginal title.<sup>141</sup> Although the province has policy guidelines with regards to consultation, these are a penurious implementation of the case law when the Crown delegates some of their consultation obligations to industry. As stated in the Provincial Guidelines:

Proponents (any party, including industry, local governments, federal agencies and Crown Corporations, seeking decisions from the Province in support of activities related to land or resource development) are encouraged to engage First Nations as early as possible when seeking a decision. In some cases, the Province may delegate certain procedural aspects of consultation to proponents. Proponents are often in a better position compared to the Province, to exchange information about their decision requests and directly modify plans to mitigate any concerns.<sup>142</sup>

The court suggests that industry should engage with First Nations as soon as possible and in some cases they can take on procedural aspects of consultation. If the LNG proponent is going to undertake any of the procedural aspects of consultation they should keep accurate records of their discussions with the First Nations. This way the LNG proponents will have a record of their consultation with the First Nations by documenting their discussions' on issues raised and how the LNG proponent tried to address the issues. The duty to consult does not mean the parties have to reach an agreement. But, the outcome of early and ongoing engagement by the LNG proponents with First Nations can help them develop a strong working relationship built on respect.

However, as indicated in *Tsilhqot'in* “[i]f the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation

<sup>139</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74 [hereinafter, “*Taku*”] at paragraph 24

<sup>140</sup> *Ibid* at paragraph 24

<sup>141</sup> *Tsilhqot'in*, *Supra*, note 121 at paragraph 77 to 79

<sup>142</sup> *BC Consultation Guide*, *Supra*, note 117



or accommodation be carried out.”<sup>143</sup> So, the Crown must be careful when relying on industry to carry out their fiduciary duty to consult, because the court might find that the procedural aspects delegated to industry within the consultation process are not adequate resulting in the duty to consult not being properly carried out by the Provincial Crown. This lack of certainty can jeopardize energy and resource development projects in British Columbia, which is a concern for any proponent wanting to do business in BC.

Although, the consultation process is about making reconciliation agreements between the Crown and the First Nations’ rights holders it is also taking a toll on the First Nations. This is due to the fact of the large scope that developing an entire LNG supply chain entails.

Given the pace and breadth of developments in Alberta and British Columbia, and the corresponding consultation demands placed on Aboriginal communities, many are facing “process fatigue”. They are also encountering challenges in terms of their capacity to participate in project assessments and reviews.<sup>144</sup>

The challenges and “process fatigue” that First Nations are encountering involve both their personnel capacity and their financial capacity. For example, some First Nation communities in BC have small populations and in these communities you will have their members doing more than one of the community’s administrative tasks. As well the First Nations’ financial capacity can be impacted because in most cases each party is responsible for their own participation costs in the consultation process.

In fact, government referrals can have a significant detrimental impact on a First Nation’s operating budget because they receive transfer payments or block funding from the government that is already earmarked for their existing services and programs. Meanwhile,

[t]he courts have yet to rule on assigning costs for consultation. In limited circumstances, such as the environmental assessment process, the province will provide limited financial support directly to First Nations to help off-set consultation participation costs.<sup>145</sup>

This is one example where the proponents can offer financial resources to support the First Nations with their participation in the consultation process in a meaningful way without having the courts intercede. This will minimize risk and potential downstream project delays for the LNG proponents because offering financial resources while still in the initial consultation stage

<sup>143</sup> *Tsilhqot’in*, *Supra*, note 121

<sup>144</sup> *Eyford Energy*, *Supra*, note 2

<sup>145</sup> *BC Consultation Guide*, *Supra*, note 117 at page 3

will help the First Nation participate in project assessments during the proponent's scheduled time. When the LNG proponent makes a financial offer to help with the First Nation's participation in the consultation process they should be mindful of the *First Nations Financial Transparency Act*<sup>146</sup>. This will provide the LNG proponents guidelines to follow which they can rely on if their payments are ever questioned by other members of a First Nation or other organizations.

It is evident that the BC Government has a multitude of legal obligations in order to meet its own regulations under policy and more importantly to ensure they uphold *Section 35* of the *Constitution*. Given the fact that First Nations in British Columbia have not given up, ceded or surrendered their Aboriginal title or rights claims it is evident that First Nations will be seeking remedies both through the courts particularly post *Tsilhqot'in*<sup>147</sup> and in the form of reconciliation agreements through consultation. Therefore, the Provincial Government should be following the five fundamental components of the duty to consult as developed by what are known as the "trilogy cases"; *Haida*, *Taku* and *Mikisew* which are:

1. the duty to consult arises prior to proof of an Aboriginal rights or title claim or in the context of uncertain affects on a treaty right;
2. the duty to consult is triggered relatively easily, based on a minimal level of knowledge on the part of the Crown concerning a possible claim which government action potentially interferes;
3. the strength or scope of the duty to consult in particular circumstances lies along a spectrum of possibilities, with a richer consultation requirement arising from a stronger prima facie Aboriginal claim and/or a more serious impact on the underlying Aboriginal right or treaty right;
4. within this spectrum, the duty ranges form a minimal notice requirement to a duty to carry out some degree of accommodation of the Aboriginal interests, but it does not include an Aboriginal veto power over any particular decision, and;

<sup>146</sup> *First Nations Financial Transparency Act* S.C. 2013, c.7 found at: [laws-lois.justice.gc.ca/PDF/F-11.66.pdf](https://laws-lois.justice.gc.ca/PDF/F-11.66.pdf) [hereinafter, "FNFTA"]

<sup>147</sup> *Tsilhqot'in*, *Supra*, note 121

5. failure to meet a duty to consult can lead to a range of remedies, from an injunction against particular government action altogether (or, in some instance, damages) but more commonly an order to carry out the consultation prior to proceeding.<sup>148</sup>

Moreover, the issue of overlapping and shared territory by BC First Nations is a situation that can impact the duty to consult, but the Provincial Government should still follow the five fundamental components of the duty to consult. Currently, there are 18 overlapping and shared territory agreements between BC First Nations.<sup>149</sup> When The LNG proponents are taking part in the consultation phase they should take the approach of being inclusive and transparent, as this will allow the LNG proponent to benefit from any existing agreements or protocols that the First Nations may already have in place with regards to their overlapping territory and shared territory. Also, the LNG proponents need to understand their role during the consultation stage with First Nations is to share information about their plans and to listen to the First Nations' feedback. The LNG proponents are never in a position to determine which one of the First Nations' claims is stronger than the others. This means the LNG proponents should engage with all First Nations that can be impacted by their projects because this is the best time for the LNG proponents to alter their plans to mitigate the First Nations' concerns.

Likewise, the First Nations' concerns look at addressing the potential impacts of the proponents' activities starting with general terms and then moving to specific terms. The environment is a general term which includes the region's flora, fauna and water. The specific terms are linked to one First Nation and include their cultural sites, archaeology sites and specific areas within their traditional territory where hunting and gathering takes place. During the initial consultation stage is when the LNG proponents should ask if the First Nation has a Traditional Use (TU) study or Traditional Knowledge (TK) study in place for their reference. These studies will provide the LNG proponents with a great deal of insight and understanding for that specific First Nation. But, the LNG proponents should understand the costs and benefits associated with undertaking any one of these studies because if the First Nation has no TU/TK studies in place this has the potential to become a bargaining chip in their negotiations. The LNG proponents need

<sup>148</sup> Newman, Dwight G. "The Duty to Consult: New Relationships with Aboriginal Peoples". 2009. Purich Publishing Ltd. Saskatoon, Saskatchewan.

<sup>149</sup> BC Treaty Commission 2014 Annual Report found at:  
[http://www.bctreaty.net/files/pdf\\_documents/2014\\_Annual\\_Report.pdf](http://www.bctreaty.net/files/pdf_documents/2014_Annual_Report.pdf)

to also gain an understanding of how to secure First Nations' consent through economic partnerships.

## **Gaining Consent through Agreements**

The Court in *Tsilhqot'in* provides further guidance to both the Crown and Industry when it comes to pursuing economic development initiatives in British Columbia and suggests the optimal way forward is to secure First Nations' consent when it comes to major resource development.<sup>150</sup> Having BC First Nations' consent is the ultimate objective to safeguarding reconciliation and more importantly to guaranteeing that resource development initiatives move forward with certainty in British Columbia (and Canada). Gaining BC First Nations' consent around the doctrine of the duty to consult can be what drives the creation of Impact Benefit Agreements and, Economic Community Development Agreements which are economic partnerships based on pre-existing Aboriginal title and rights. The next section will review various economic partnerships currently available in BC for the LNG industry which secure First Nations' consent.

Moreover, Impact Benefit Agreements or IBAs are agreements between Industry and First Nations typically dealing with natural resource development. Each IBA has distinct parameters but they generally operate on two premises:

First, is to accommodate aboriginal interests by ensuring that benefits and opportunities flow to the community. Second, is to address social risk factors within the community such as adverse socio-economic and biophysical effects of rapid resource development.”<sup>151</sup>

IBAs are the formal contracts that outline the roles and responsibilities of the parties, which often include the following: revenue sharing; the scope and the length of each project; jobs skills and training opportunities within the Industry; and any other potential economic opportunities available to the First Nations partner.

“From a corporate perspective, IBAs align with corporate interests and operate on a business model whereby proponents complete IBAs to minimize risk and potential

<sup>150</sup> *Tsilhqot'in* *Supra*, note 121 at paragraph 90 to 92

<sup>151</sup> Fidler, Courtney and Michael Hitch. Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice . *Environments Journal* Volume 35(2) 2007 found at: <http://www.infomine.com/publications/docs/Fidler2007.pdf> [hereinafter, "IBA Contentious Issue"]

downstream project delays (i.e. costly litigation) and, in doing so, improve relationships with local residents and enhance their business reputation.”<sup>152</sup>

Even though the above-mentioned appears to just benefit corporate interests one cannot overlook the fact that IBA agreements provide mutually beneficial certainty for all of the parties because they create benefits for the potential impacts to local First Nations, as well as allow the First Nations to participate in the project’s Environmental Review process.<sup>153</sup> In the end, “the impetus for mineral exploration companies to seek aboriginal approval has come from an absence of government intervention--a political vacuum--rather than the imposition of laws and policies.”<sup>154</sup>

Similarly, there are other specific agreements that are meant to set out formal relationships between First Nations, BC and industry where the goal is to have resource revenue sharing. In one type of agreement BC enters into Economic and Community Development Agreements or ECDA's with First Nations communities and they are for sharing the mineral tax revenue on new mines and major mine expansions. These agreements are meant to set out the formal relationship with the goal of long term successful economic initiatives for First Nations, BC and the Mining Industry.<sup>155</sup> A further example of BC resource revenue sharing is the Forest and Consultation and Revenue Sharing Agreements or FCRSAs. These agreements "provide First Nations communities with economic benefits returning directly to their community based on harvest activities in their traditional territory."<sup>156</sup> A different instance of a BC agreement is the Strategic Engagement Agreements or SEAs. These arrangements deal specifically with consultation and accommodation and set out mutually agreed upon terms for how the consultation and accommodation process will transpire. This is a great way for First Nations to incrementally build governance and is one way for First Nations to be a part of the overall decision making process.<sup>157</sup> According to Minister Rustad: “[e]ight or nine years ago, the province had virtually no

<sup>152</sup> *Ibid*

<sup>153</sup> What are Impact Benefit Agreements: found at: <http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-%28IBAs%29/>

<sup>154</sup> *IBA Contentious Issue, Supra*, note 151 pg.57

<sup>155</sup> for more information and to see which First Nation communities in BC have ECDA's found at: <http://www2.gov.bc.ca/gov/topic.page?id=00D9B39C169B4E95BAAB740A9B52D54A>

<sup>156</sup> for more information and to see what BC First Nations have FCRSA's please see: <http://www2.gov.bc.ca/gov/topic.page?id=5633DE296BAC46098E130A382AAF9D03>

<sup>157</sup> for more information on SEA's or to see a list of First Nations who have SEA's please go to: <http://www2.gov.bc.ca/gov/topic.page?id=00C8FEF3481D4028B1EF0FD67B1695C4>

agreements with First Nations[...]. Today, we probably have--just on the resource side alone--over 200 significant agreements and another 100 or 200 minor agreements.”<sup>158</sup> The aforementioned demonstrates BC’s response to address *Section 35*<sup>159</sup> jurisprudence through the various resource revenue sharing policies.

Moreover, the future LNG companies in BC need to work on collaborative approaches to include the numerous First Nations in the development of the LNG industry. The most recent addition to BC’s agreements are the Natural Gas Pipeline Benefits Agreements or NGPBAs. These include:

agreements between Government and First Nations that are part of the B.C. Government's comprehensive approach to partnering with First Nations on liquefied natural gas (LNG) opportunities, which also includes development skills training and environmental stewardship projects with First Nations.<sup>160</sup>

These are recent additions to the slate of BC Agreements with First Nations.<sup>161</sup> But, each one of the agreements meets a specific goal of the Provincial government’s approach to include First Nations in some aspect of resource development. This ensures the Provincial government is also meeting their fiduciary obligation to consult and where appropriate accommodate First Nations’ interests.

## **Examples of Consultations:**

This next portion will briefly review two projects that have utilized significantly different paths to engaging or addressing First Nations’ interests with their project proposals. The first company called HEC B<sup>162</sup> works on developing run of the river power projects also known as Independent Power Projects (IPPs) that, once operational, will sell the power they generate to BC

<sup>158</sup> Meissner, Dirk. Historic land claims ruling urges B.C. to forge closer ties with First Nations. The Globe and Mail. July 01 2014. Found at: <http://www.theglobeandmail.com/news/british-columbia/in-wake-of-ruling-bc-forging-ties-with-first-nations-takes-on-urgency/article19408627/>

<sup>159</sup> *Section 35, Supra*, note 106

<sup>160</sup> For more information on the Natural Gas Pipeline Benefit Agreements please go to: <http://www2.gov.bc.ca/gov/topic.page?id=A81A6F172BE94B798B0F8C540ED26D04>

<sup>161</sup> for more information and to view the comprehensive list of the First Nations who have signed the NGPBA's can be found at: <http://www2.gov.bc.ca/gov/topic.page?id=A81A6F172BE94B798B0F8C540ED26D04>

<sup>162</sup> The company name is fictitious due to non-disclosure agreements however, the facts presented are accurate and the Vancouver Island Green Energy Limited Partnership (VIGELP) is also a false name.

Hydro. The second company is Taseko Mines Ltd., a mid-tier copper mining company trying to open its prosperity mine in BC.

## **A Successful Consultation with an Independent Power Producer**

On the one hand, HEC B was very active and engaging to enable First Nation Indian Band A (FNIB A)<sup>163</sup> to become involved in the Vancouver Green Energy limited Partnership (VIGELP). HEC B and FNIB A were able to reach an agreement to develop an IPP together. However, each party took the necessary time to getting to know each other; this was a reciprocal relationship building exercise; HEC B spent a lot of time getting to know the First Nation community and FNIB A spent a lot of time getting know HEC B. The process of relationship building and taking the necessary time is critical to a successful partnership. A majority of the time these parties spent together was on relationship building at the leadership level; so FNIB A Chiefs were able to get to know the HEC B CEO and Board, whereas only a small fraction of the time was spent on the actual negotiations. And, to be clear, there is no prescribed time limit on building lasting relationships. Parties will need to put in the time to build mutually respectful relationships because project negotiations will fall apart if a relationship has not been properly built and appropriately maintained.

After their relationship had been effectively built it was during the negotiations when it was decided that HEC B would provide the following: FNIB A's legal costs were covered by HEC B with regards to the negotiations of the VIGELP. FNIB A needed to come with 10% for their capital contribution and HEC B would give them a gift of 5%. This would mean that FNIB A would start out with 15% equity in VIGELP. However, FNIB A would need \$423,500<sup>164</sup> as their capital contribution to receive 635,250 units of VIGELP. Although the original cost per unit of VIGELP is 1\$/unit the FNIB A receives their initial units at 0.67/unit.<sup>165</sup> The other option negotiated was to take a straight royalty rather than buying into the 15% equity if FNIB A was unable to fund their capital contribution. At the end of the engagement and consultation process

<sup>163</sup> FNIB A has been placed in 3<sup>rd</sup> party management from time to time because of poor financial management on numerous occasions which may have impacted their capital contribution.

<sup>164</sup> A funding agency that a BC first Nation can turn to for funding arrangements is The First Nations Finance Authority which provides funds to eligible First Nations in Canada. Found at: <http://www.fnfa.ca/en/>

<sup>165</sup> This is a savings of 0.33/unit for FNIB A right from the beginning.

HEC B and FNIB A came to an agreement. They successfully concluded an IBA and also a Joint Venture. FNIB A decided that the royalty, with a first right of refusal if the HEC B decides to ever sell all or part of the IPP, was a more viable option for their First Nation at that time.

### **An Unsuccessful Consultation - Taseko Mines Ltd.**

Taseko Mines Ltd. is a mid-tier copper mining company trying to open its Prosperity mine in BC. However, Taseko's New Prosperity mine has been delayed because “[a]fter a second lengthy and costly federal review, the federal government has once again stood in the way of the development of an important project to B.C.”<sup>166</sup> The planned gold and copper mine has once again failed to pass or meet the environmental concerns expressed by the federal government and others. In fact, the “New Prosperity project could not proceed after federal Environment Minister Leona Aglukkaq decided it would cause significant adverse environmental effects that could not be mitigated.”<sup>167</sup> Rather than accept defeat Taseko has challenged those conclusions, and in December applied for a federal judicial review. It is evident that Taseko is more concerned with the regulatory frameworks than dealing with the local First Nations who are rights and title holders.

The Tsilhqot’in Government following their recent Supreme Court of Canada case, which is the first case to declare title in Canada, has significantly expanded aboriginal land title rights and is further establishing ground rules for mining projects within its traditional territory. The Tsilhqot’in National Government’s mining policy also follows the group’s successful fight against the New Prosperity mine, proposed by Taseko Mines Ltd., which the federal government rejected earlier this year due to the potential impact on a lake considered sacred by surrounding First Nations.<sup>168</sup> The Tsilhqot’in Nation said it is not opposed to mining on its territory, but resource companies need to respect the rights of aboriginals if they want their projects to proceed. “We had the example of Taseko Mines, who showed us what not to do. We need proponents and industry to begin showing a lot more respect for our people and our nation if they want to build

<sup>166</sup> Taseko president Russ Hallbauer said in an interview with Justine Hunter and Wendy Stuek. Taseko brushes off Ottawa’s rejection of B.C. gold-mine proposal. *The Globe and Mail*. February, 27, 2014

<sup>167</sup> Hunter, Justine and Wendy Stuek. Taseko brushes off Ottawa’s rejection of B.C. gold-mine proposal. *The Globe and Mail*. February, 27, 2014

<sup>168</sup> Keller, James. Tsilhqot’in Nation Establishes rules for mining in its Territory near Williams Lake, B.C.. *Globe and Mail*. July 31, 2014



partnerships in our territory.”<sup>169</sup> It is clear that Tsilhqo’tin are not opposed to economic development nor are they opposed to creating lasting partnerships with industry. They are, however, opposed to embarking on a project that damages the environment and impacts the land in a way that it can no longer support the generations to come. There must be a balance of working with industry in creating jobs, wealth and that of being stewards of the land.

## Chapter 2 Summary

In summation, the previous section provides a brief overview of the legal landscape with regards to First Nations in BC. The intent is to illustrate how *Section 35*<sup>170</sup> of the *Canadian Constitution*<sup>171</sup> is only one component of modern Aboriginal case law. Reconciliation of the First Nations’ interests in their traditional territories is one of the outstanding issues in BC. The case law shows that the Court supports reconciliation of Aboriginal interests’ in the land and develops constitutional doctrines such as Honour of the Crown and Fiduciary duty. These doctrines provide guidance to crown actors on how to address reconciliation and meet the procedural requirements to properly carry out consultation and accommodation. In fact, the “trilogy cases”; *Haida, Taku* and *Mikisew* provide the guidelines for when the Crown has a duty to consult First Nations. This section also provides the LNG proponents with guidance on how they can best participate in the consultation and accommodation process. The reviews of the agreements between First Nations, industry and BC which are economic partnerships based on pre-existing Aboriginal rights and title provide contextual evidence of working agreements in BC. This section concludes by providing two examples of consultation: One approach tries to rely on just the regulatory approach and ignores any input from the First Nations or other community members. While the other one takes the time to follow the regulatory process and engage with the local First Nation community to gain their insight on the proposed IPP’s impact on their traditional territory. The two distinct outcomes speak to which approach is better suited for resource development in BC.

Indeed, the previous chapter’s discussions benefit the LNG industry by increasing their understanding of the legal landscape with regards to First Nations in BC; specifically with how the LNG proponents can best participate in the consultation and accommodation process. The

<sup>169</sup> Chief Russell Myers-Ross of Yunesit’in found in the James Keller. Tsilhqot’in Nation Establishes rules for mining in its Territory near Williams Lake, B.C.. *Globe and Mail*. July 31, 2014

<sup>170</sup> *Section 35, Supra*, note 106

<sup>171</sup> *Section 35, Supra*, note 106

upcoming chapter will provide the LNG proponents with a review of the First Nations' governance models that can be obtained in today's socio-political climate.

## Chapter 3.

### First Nations Governance Models

This chapter will briefly review First Nations' governance models that can be obtained in today's political climate in BC and they are as follows<sup>172</sup>:

- a. *Indian Act*<sup>173</sup> alone with no delegated jurisdictions
- b. *Indian Act* with *FNLMA*<sup>174</sup> (Land Code) and/or Taxation [eg.s.83/ *FNFMA*<sup>175</sup>]
- c. *Indian Act* with Self Government<sup>176</sup> [eg. Westbank, Sechelt models]
- d. *Pre-Confederation Treaties in BC*: [eg. Treaty 8<sup>177</sup>, Douglas Treaties<sup>178</sup>]
- e. *Modern BC Treaty Negotiation Process*<sup>179</sup> [eg. Nisga'a<sup>180</sup>, Tsawwassen<sup>181</sup>and, Maa-nulth<sup>182</sup>]

Although, gaining independence through the various governance models is a positive move by the BC First Nations, this chapter will examine which models best foster economic development. My supposition is the more governance jurisdiction a First Nation has will increase their autonomy, improve their decision making, and increase their self-reliance which will have a positive impact on their economic development initiatives. Explicit is that good governance and jurisdictional powers enables a First Nation to not only build their community but also prepares a First Nation to engage in multi-stakeholder conversations that will advance their communities' economic growth.

<sup>172</sup> The First Nations' governance chart below is formatted to fit this document

<sup>173</sup> *Indian Act*, (R.S., 1985, c I-5) found at: <http://laws-lois.justice.gc.ca/eng/acts/I-5/index.html> [hereinafter, "*Indian Act*"]

<sup>174</sup> *First Nations Land Management Act* (S.C. 1999 c. 24) found at: <http://laws-lois.justice.gc.ca/eng/acts/F-11.8/> [hereinafter, "*FNLMA*"]

<sup>175</sup> *First Nations Fiscal Management Act*, (S.C. 2005 c. 9) found at: <http://laws-lois.justice.gc.ca/eng/acts/F-11.67/> [hereinafter, "*FNFMA*"]

<sup>176</sup> For analysis of the *Indian Act* with Self Government agreements see text accompanying notes 208,209

<sup>177</sup> For further analysis of Treaty 8 see text accompanying notes 221,222

<sup>178</sup> For further analysis of the Douglas Treaties see text accompanying notes 219,220 and 223

<sup>179</sup> For further analysis of the BC Treaty process see text accompanying notes 236,238 and 240

<sup>180</sup> For further analysis of the Nisga'a Treaty see text accompanying notes 225,227 and 230

<sup>181</sup> For further analysis of the Tsawwassen Treaty see text accompanying note 242

<sup>182</sup> For further analysis of the Maa-nulth Treaty see text accompanying notes 243,244

Another important consideration for the LNG industry proponents is that each First Nation in BC has a unique historical, cultural, geographical, political and economic situation which needs to be respected. Having an understanding of the various First Nations' governance models will support the LNG proponents' obligation of engaging with the various First Nations. After all, the LNG industry will not be able to pick and choose the First Nations that are ready willing and able to engage. The LNG proponents will have to be able to work collaboratively with every First Nation on their pipelines' path and also work with any First Nations impacted by any of the LNG developments. Knowing the five possible First Nations' governance models will help the LNG industry proponents achieve mutually beneficial outcomes.

## **Background:**

A majority of British Columbia has not concluded land claims agreements leaving the province hindered by outstanding First Nations' land claims. There are approximately 200<sup>183</sup> First Nations communities in British Columbia most of whom have not given up, ceded or surrendered their Aboriginal title and rights claims to their traditional territory within British Columbia.<sup>184</sup> *Section 35* of the *Constitution* is the catalyst for First Nations to revitalize their self-government process. Given the myriad of differences within First Nations communities in BC it is going to take some First Nations' governance reform to work towards being able to implement their inherent rights under *Section 35*. Since First Nation communities are now in a position to be developing their own governance models, this section will examine the different approaches to First Nations governance that are currently available within the constitutional and legislative frameworks of Canada. The First Nations governance models currently available include: continuing with the *Indian Act* alone; *Indian Act* with *First Nations Land Management*<sup>185</sup> and/or Taxation either under S. 83 of the *Indian Act* or the *First Nations Fiscal Management Act*<sup>186</sup>; *Indian Act* with Self-Government Agreements; pre-Confederation Treaties (Treaty 8 and Douglas Treaties) and negotiating a modern day treaty using the BC Treaty Process.

<sup>183</sup> About British Columbia First Nations found at: <https://www.aadnc-aandc.gc.ca/eng/1100100021009/1314809450456>

<sup>184</sup> First Nations in BC See Appendix B for a map – prepared by AANDC

<sup>185</sup> *FNLMA*, *Supra*, note 174

<sup>186</sup> *FNFMA*, *Supra*, note 175

## Frameworks Overview:

The *Constitution*<sup>187</sup> under *Section 91(24)*<sup>188</sup> gives Federal parliament the power to make laws in relation to Indians and Lands Reserved for the Indians. And, pursuant to *Section 91(24)* of the *Constitution* the Federal Government has the ability and the sole responsibility to make laws governing Indians and Lands Reserved for Indians. Thus, the *Indian Act* exists and gives sole responsibility to the Federal Government to oversee the lives of *Status Indians*<sup>189</sup> or First Nations in Canada that live both on and off-reserve. However, there has been a slight change in the division of powers when it comes to laws of general application and inter-jurisdictional immunity. The Court in *Tsilhqot'in* held that:

The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction. The problem in cases such as this is not competing provincial and federal power, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province. Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. Interjurisdictional immunity may thwart such productive cooperation.<sup>190</sup>

This is the Court's way of ensuring that Aboriginal rights and title are protected while at the same time balancing the constitutional parameters of s. 92 of the *Constitution* and providing the necessary space to regulate the province.<sup>191</sup> The notion of cooperative federalism is at the genesis of the Court's guidance.<sup>192</sup>

<sup>187</sup> *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 [hereinafter, the "*Constitution 1867*"]

<sup>188</sup> Section 91(24) contains two heads of power: (1) Indians and (2) Lands Reserved for Indians. [hereinafter, "*S. 91(24)*"]

<sup>189</sup> Section 2(1) of the *Indian Act*, R.S. 1985 C1-5 defines Status Indians.

<sup>190</sup> *Tsilhqot'in*, *Supra*, note 121 at paragraph 141

<sup>191</sup> *Tsilhqot'in*, *Supra*, note 121

<sup>192</sup> For more on cooperative federalism please see *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 (*PHS*)

## **Indian Act alone with no delegated jurisdictions**

Since confederation, the *Indian Act*<sup>193</sup> is the only form of governance a First Nation community has been able to exercise, which arguably is not an exercise of autonomy or self-governance at all. The *Indian Act* is top-down paternalistic legislation that is not accountable to each respective First Nations' citizen but rather is only accountable to the bureaucrats in Ottawa. Also, under the *Indian Act* model of governance there is no ability to implement a Nation's own inherent governance because a First Nation can only perform what the *Indian Act* allows under statute. "In general, the Indian Act would appear to foster a punitive, restrictive, regulatory organizational culture."<sup>194</sup> This form of governance impedes economic development because of the rigorous process of seeking Ministerial approval for all progressive activity and improvement that occurs on *Section 91(24) Reserve Lands*<sup>195</sup>.

## **Indian Act with First Nations Land Management Act (FNLMA)**

The *FNLMA* is a federal law and signing the Framework Agreement is the first step for a First Nation to assume control over its reserve lands, resources and the environment.<sup>196</sup> "Enacted federally in 1999, the *FNMLA* provides an option for First Nations to replace the land management provisions of the *Indian Act* with community-level jurisdiction over allotment of property rights to Band members and leasing agreements with off-reserve parties."<sup>197</sup> *FNLMA* only applies to *Reserve Lands*, or lands held pursuant to *Section 91(24)* of the *Indian Act*, and it does not apply to fee simple lands or to treaty settlement lands. Essentially, *FNLMA* removes the Federal Government as an intermediary between: Entrepreneur, First Nation, and Investor, and through this process the community will eventually be implementing a land code that is drafted

<sup>193</sup> *Indian Act, Supra*, note173

<sup>194</sup> Abele, Frances. Like an Ill-Fitting Boot: Government, Governance and Management Systems in the Contemporary Indian Act. Research Paper for the National Centre for First Nations Governance. June 2007.

<sup>195</sup> Reserve Land as identified in the *Indian Act*, reserve land is "a tract of land, the legal title to which is vested in Her Majesty, which has been set apart by Her Majesty for the use and benefit of a band". found at: <https://www.aadnc-aandc.gc.ca/eng/1100100034737/1100100034738>

<sup>196</sup> Lands Advisory Board found at: <http://www.labrc.com/framework-agreement/lands-advisory-board/>

<sup>197</sup> Baxter, Jamie and Micheal Trebilcock. "Formalizing" Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform. *Indigenous Law Journal*/Volume 7/Issue 2/2009 found at: <https://tspace.library.utoronto.ca/bitstream/1807/18355/1/ILJ7.2-BaxterandTrebilcock.pdf> at pg. 83

by the community for the community.<sup>198</sup> Under the community developed *FNMLA* Land Code, the *Indian Act* provisions relating to land management no longer apply to those First Nations who have ratified Land Codes. This means First Nations under the *FNMLA* will have the authority to create their own system for making *Reserve Land* allotments to individual First Nation members.<sup>199</sup> Also, the *FNMLA* places the First Nation in the driver's seat when looking at economic development on their *Reserve Lands* because they have worked to replace the land management provisions of the *Indian Act*.

Having a Land Code is one method for first Nations to incrementally take on jurisdictions for their community and to start slowly rebuilding their nation state, by building upon the First Nations' traditional governance and translating their traditions into contemporary laws. John Burrows asserts that:

One should be careful not to equate change in indigenous cultures with the extinction of indigenous cultures. Something does not automatically become non-indigenous just because indigenous people adapt and adopt contemporary objects in their ideas and experiences.<sup>200</sup>

Moreover, First Nations will also gain the authority to formalize policies that will address matrimonial real property interests or rights. The *FNMLA* states that First Nations are responsible for enacting rules and procedures to address the issues of property rights in the cases of a breakdown of a marriage. Currently, there is a legislative gap in addressing matrimonial property rights on reserve and this is because the *Indian act* is silent on this issue.<sup>201</sup> And, First Nations under the *FNMLA* have 12 months from the date their Land Code takes effect to enact the rules and procedures dealing with matrimonial rights or interests on reserve land into their Land Code or a First Nation law.<sup>202</sup> This is a significant feature of a Land Code because those First Nations who are under *Indian Act* and do not have matrimonial property laws will be subject to the federal

<sup>198</sup> *Ibid*

<sup>199</sup> First Nations Land Management Regime found at: <https://www.aadnc-aandc.gc.ca/eng/1327090675492/1327090738973>

<sup>200</sup> Borrows, John. "Indigenous Legal Traditions in Canada" Report for the Law Commission of Canada (2006) found at: [http://publications.gc.ca/collections/collection\\_2008/lcc-cdc/JL2-66-2006E.pdf](http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-66-2006E.pdf)

<sup>201</sup> Grant John, Wendy. Report of the Ministerial Representative Matrimonial Real Property Issues on Reserves. March 9, 2007.

<sup>202</sup> First Nations Land Management Act and Matrimonial Interests and Rights. AANDC. found at: <https://www.aadnc-aandc.gc.ca/eng/1317228777116/1317228814521>

matrimonial property laws.<sup>203</sup> This just further illustrates and exemplifies the lack of First Nation independence when being governed by just the *Indian Act* alone.

Evidently, the *FNLMA* provides the community with a sense that managing their own land is a significant step towards self-governing. But more importantly, First Nations are also experiencing improved economic development circumstances because they are able to attract business onto their reserve. Some of the factors that are influencing the new economic environment on the reserve are: certainty of local land laws being statutorily in place; control being exercised locally which provides direct access to First Nations representatives; and, decisions are not being delayed by having the Federal government bureaucracy involved.<sup>204</sup> The First Nation's Land Code and the supporting instruments provide third parties with a clear understanding of the conditions that currently exist on that reserve, which creates a climate of certainty for business investment. Probably the most important factor contributing to business activity on reserve lands are the efficiencies gained in relation to land management processes such as improved processing conditions. It is evident that in business, no one is happy when a project is sitting idle pending a decision. The *FNLMA* shortens the time it takes for an application to be processed and for decisions to be made, which undoubtedly provides a benefit to both the First Nations and businesses alike.

Another sectoral arrangement available to First Nations in order to manage certain governance authorities is a taxation arrangement,<sup>205</sup> which permits a First Nation to develop revenues through taxation. Taxation can be developed using *Section 83* of the *Indian Act* or using *First Nations Financial Management Act (FNFMA)* to achieve taxation jurisdiction for a First Nation community. This is one incremental mechanism available to First Nations to become self-governing because taxation enhances a First Nations government's ability to deliver Nation specific services and programs to their citizens. Even when the First Nation is assuming taxation authorities and *FNFMA* land decision-making this does not fully eradicate the *Indian Act* from

<sup>203</sup> *Family Homes on Reserves and Matrimonial Interests or Rights Act* (Act). June 19, 2013. found at: <http://laws-lois.justice.gc.ca/PDF/F-1.2.pdf>

<sup>204</sup> *Supra*, note 189

<sup>205</sup> Section 83 of the *Indian Act* gives the First Nation authority to draw down jurisdiction same as the *FNFMA*. For comprehensive information on taxation powers please visit the First Nations Tax Commission at <http://www.fntc.ca/>



First Nations governance, because these aforementioned decision-making jurisdictions only apply to Indian reserve lands and do not extend to any part of the First Nations' traditional territory.

### **Indian Act with Self Government [eg. Westbank, Sechelt models]**

As a matter of law the Federal government is responsible for the First Nations in Canada and ultimately the First Nations in British Columbia. “And, pursuant to *Section 91(24)* of the *Constitution* the Federal Government has the ability and the sole responsibility to make laws governing Indians and Lands. This means that First Nations will be working on a bilateral agreement<sup>206</sup> to negotiate self-government agreements with the Federal government under the *Indian Act*. The Federal government will always have a unique fiduciary relationship rooted in history with the First Nations' people of Canada.<sup>207</sup>

However, this relationship must evolve since First Nations also have an inherent right to be self-governing and to be self-sustaining. And, one mechanism, to enable the evolution of this relationship is through self-government arrangements with Canada.<sup>208</sup> To enter into self-government agreements the First Nations must follow the Federal government's process for completing self-government agreements and follow these six steps: Submission of Proposal; Acceptance; Framework Agreement, Agreement in Principle; Final Agreement and Ratification; and, Implementation.<sup>209</sup> Evidently, the Federal government acknowledges that self-government arrangements need to be able to take many forms to meet the needs of the diverse historical, cultural, political and economic circumstances of the Aboriginal communities involved. The Federal government has a process in order to meet the needs of any First Nation that wants a self-government agreement because the Federal government is waiting for “submission of proposal”<sup>210</sup> for self-government agreements from First Nations communities. The First Nation's

<sup>206</sup> BCAFN Tool kit found at: <http://www.bcafn.ca/toolkit/>

<sup>207</sup> *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and A Royal Proclamation October 7, 1763 found at: <http://www.ushistory.org/declaration/related/proc63.htm>

<sup>208</sup> Self Government Agreements can be found at: <http://www.aadnc-aandc.gc.ca/eng/1100100032275/1100100032276>

<sup>209</sup> Self Government Process can be found at: [https://www.aadnc-aandc-aandc.gc.ca/eng/1100100032275/1100100032276](https://www.aadnc-aandc.gc.ca/eng/1100100032275/1100100032276)

<sup>210</sup> *Ibid*

proposal should outline their community's needs and reflect what they want in their final agreement for their community's ratification.

For First Nations' self-government agreements to be effective, they need to address, among other things, the structure of the new government and its relationship with other governments, new fiscal arrangements, the relationship of laws between jurisdictions, program and service delivery, and the self-government agreement's implementation plan. The implementation of First Nations' self-government agreements "should enhance the participation of Aboriginal peoples in the Canadian federation, and ensure that Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society."<sup>211</sup> Good government in Aboriginal communities through modern treaties and self-government agreements helps to increase investor confidence, supports economic partnerships and provides benefits for all of the First Nation's membership.

In order to move forward and become economically successful First Nations in British Columbia should be looking at implementing their inherent right to self-government or at least taking significant steps towards self-government. An important feature of their governance model is to have a cultural fit. This means that their governance model will reflect the customs and traditions of their community, and "rebuild our Nations through the exercise of our right to self-determination through strong, stable and culturally relevant systems of government"<sup>212</sup> Developing and having a constitution in place that the First Nation community understands and believes in can be an essential component of a successful governance model. A constitution provides a strong footing for other governance frameworks to be developed. Constitutions are the highest governing foundation for a First Nation community and are a direct reflection of their cultural values, traditions and governance system.

Besides the cultural fit of a governance model, a governance model should consider five components at the centre of good governance. These are "the people, the land, laws and

<sup>211</sup> National Centre for First Nations Governance. Governance Best Practices Report. Submitted to the New Relationship Trust. June 2009, found at: [http://fngovernance.org/publication\\_docs/NCFNG\\_Best\\_Practice\\_Report.pdf](http://fngovernance.org/publication_docs/NCFNG_Best_Practice_Report.pdf) at page iii.

<sup>212</sup> *Ibid*

jurisdiction, institutions and resources.”<sup>213</sup> Obviously, the community will have to determine which items from the list are the highest priority, but people seem to be important when they are the subjects of the rules of government. And, in the case of dealing with people, transparency is an important principle as this will give the community faith and understanding in their governing process as a whole.

During the final stage of implementation of the self-government agreement for the First Nation it should be clear that self-government arrangements do not need to be implemented exclusively through treaties. There are other mechanisms that will play a role in the implementation process. One example is the Memoranda of Understanding, which are not legally enforceable but could be used to set out the political commitments needed for self-government arrangements. For some aspects of the agreement legally enforceable contracts can be used for setting out detailed, technical or time-limited agreements respecting the implementation of self-government arrangements. Finally, legislation can be used in the following ways: to ratify and give effect to self-government agreements, to implement particular provisions of a self-government agreement; and to act as a stand-alone mechanism when the parties concerned wish to implement First Nation’s self-government arrangements, but they do not apply to treaty related self-government arrangements. Once the bilateral negotiations are complete and an agreement is reached the final phase is self-government legislation. To date there are three First Nations that have negotiated agreements: *Yukon First Nations Self-Government Act*<sup>214</sup>, the *Westbank Self-Government Agreement*<sup>215</sup> and the *Sechelt Indian Band Self-Government Act*.<sup>216</sup>

The Westbank First Nation located near Kelowna in central British Columbia has seen many economic benefits with their Self-Government Agreement. The *Westbank First Nation’s Self-Government Act* received Royal Assent in Ottawa and became law on May 6, 2004. “As of 2011, WFN had contributed \$80 million annual fiscal revenue to Canada and B.C. through the generation of sales tax, personal income tax, and corporate tax on Westbank First Nation lands;

<sup>213</sup> *Supra*, note 201 at page vii

<sup>214</sup> *Yukon Self Government Act*, (S.C. 1994, c. 35)

<sup>215</sup> *An Act to give effect to the Westbank First Nation Self Government Agreement* (S.C. 2004, c. 17) found at: <http://laws-lois.justice.gc.ca/eng/acts/W-6.2/page-1.html>

<sup>216</sup> *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27) found at: <http://laws-lois.justice.gc.ca/eng/acts/S-6.6/FullText.html>.

and \$500 million annually to the local economy.”<sup>217</sup> This illustrates how a Self-Government Agreement can benefit both the First Nation and the local community’s economy. And, this further proves that when a First Nation has good governance in place, has been given autonomy via their self- government agreement, “the whole region prospers.”<sup>218</sup>

## **Pre-Confederation & Historic Treaties in BC: [eg. Treaty 8, Douglas Treaties]**

There is an example of one type of pre-Confederation Treaty<sup>219</sup> in BC and that is the Douglas Treaties.<sup>220</sup> There is also only one Historic or post-Confederation treaty<sup>221</sup> in BC and that is Treaty 8.<sup>222</sup> “The Douglas Treaties, were completed in the 1850s, covered parts of Vancouver Island and in 1899, Treaty 8 was extended to include part of northeastern British Columbia.”<sup>223</sup> These treaties put the government on notice that their duty to consult is on the high spectrum if there is going to be infringement on their existing Aboriginal treaty rights.<sup>224</sup> Unlike modern treaties when a First Nation has negotiated a pre-Confederation Treaty and a Historic Treaty, the *Indian Act* is the governing legislation for the Indian Band or First Nation. And, under the *Indian Act* model of governance there is no ability to implement a Nation’s own inherent governance because a First Nation can only perform what the *Indian Act* allows under statute. This means that the Douglas Treaty First Nations and Treaty 8 First Nations would benefit from the previous discussions on: *FNLMA* and/or Taxation (eg. S.83/ *FNFMA*); and even developing Self-

<sup>217</sup> West Bank First Nation Press Release. "Economic & Fiscal Benefits of WFN," Fiscal Realities Economists, Kamloops, November 2011 found at: <http://www.wfn.ca/newsreleases.htm>

<sup>218</sup> Pierre, Sophie. BC Treaty Commission Press Release. “Treaty Commission sees a Lack of Urgency in negotiations”. Found at: <http://www.marketwired.com/press-release/treaty-commission-sees-lack-of-urgency-in-negotiations-1572231.htm>

<sup>219</sup> Douglas Treaty Map please see [http://www.hulquminum.bc.ca/pubs/Douglas\\_treaties\\_map.pdf](http://www.hulquminum.bc.ca/pubs/Douglas_treaties_map.pdf)

<sup>220</sup> Douglas Treaties text can be found at: <http://www.aadnc-aandc.gc.ca/eng/1100100029052/1100100029053> and for more information on Pre-Confederation Treaties and Historic treaties please see Madill, Dennis. British Columbia Indian Treaties in Historical Perspective, Research Branch Corporate Policy for the Department of Indian Affairs. 1981 found at: [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/treC-B\\_1100100028953\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/treC-B_1100100028953_eng.pdf)

<sup>221</sup> Treaty 8 Map please see NWT Aboriginal Relations & Intergovernmental Affairs found at: <http://www.daair.gov.nt.ca/live/pages/wpPages/Maps.aspx>

<sup>222</sup> Treaty 8 can be found at: <http://www.aadnc-aandc.gc.ca/eng/1100100028805/1100100028807>

<sup>223</sup> Douglas Treaties can be found at: <http://www.aadnc-aandc.gc.ca/eng/1100100029049/1100100029050>

<sup>224</sup> *Mikisew*, *Supra* note 111

Government Agreements as mechanisms to reconcile these historic and pre-confederation treaties with contemporary realities.

## **Modern BC Treaty Negotiation Process:**

### **The Nisga'a Treaty**

“May 11, 2000, the Effective Date of the treaty, was a historic and triumphant day for the Nisga'a people. It marked the end of a 113-year journey-and the first steps in a new direction.”<sup>225</sup> The Nisga'a Treaty is the first modern treaty in British Columbia and the negotiations started prior to the existence of the BC Treaty Process.<sup>226</sup> The completion of the negotiation process and the ratification of the treaty by each respective government (First Nations ratify by way of a community process, BC and Canada go through a parliamentary process ratifying the treaty) brought about resolution of the long standing Nisga'a land claim, catapulting the Nisga'a to independence through a constitutionally protected treaty, which is<sup>227</sup> undoubtedly, the highest form of reconciliation in Canada.

However, there was a lot of criticism from First Nations and British Columbians alike and there was even a legal challenge by Gordon Campbell<sup>228</sup> regarding the Nisga'a Final Agreement. Some of the criticisms regarding their Treaty were related to setting the benchmark for other BC First Nations because: they received only a small portion of their traditional territory; they were expected to fail and be broke within a few years because they couldn't possibly have the governance structures in place to properly govern; and they were sell outs. But few critics took into consideration the fact that the Nisga'a wanted control and jurisdiction of their land and their lives; the treaty is something their early leadership sought since 1890<sup>229</sup> And,

<sup>225</sup> Understanding Treaty, Nisga'a Nation found at: <http://www.nisgaanation.ca/understanding-treaty>

<sup>226</sup> Negotiations started in 1973 through a bilateral Comprehensive Claims Process with Canada only and BC joining the negotiations in 1990 found at: <https://www.aadnc-aandc.gc.ca/eng/1100100031298/1100100031299>

<sup>227</sup> Benefits of Nisga'a Treaty found at: <http://www.nisgaanation.ca/about-accomplishments-and-benefits-nisgaa-treaty>

<sup>228</sup> *Campbell v. Nisga'a* 2000 BCSC 1123 is found at: <http://www.courts.gov.bc.ca/jdb-txt/sc/00/11/s00-1123.htm>

<sup>229</sup> *Supra*, note 217

quite the contrary has occurred silencing the critics; for instance, the Nisga'a Lisims government has been involved in enhancing their programs and services to Nisga'a citizens; the Nisga'a have increased internet connectivity in the region through industry partnerships; as well as pursuing other economic opportunities to enhance the lives of Nisga'a culture and overall well-being.<sup>230</sup>

Nisga'a includes several chapters outlining their governmental responsibilities.<sup>231</sup> One value that is of significance to the Nisga'a Lisims government is environmental stewardship and management. Because “[u]nder no circumstances will the Nation accept a trade-off between environmental protection and economic benefits.”<sup>232</sup> Also, stated by the Nisga'a Lisims government is:

The Nass Area covers almost 27,000 square kilometers. About 8% of this area is Nisga'a Lands which roughly correspond to what people think of as the Nass Valley from Nass Camp to the coast. The Nation owns and has control over development on Nisga'a Lands. The Nation also has comprehensive rights relating to consultation and environmental assessment over proposed developments in the rest of the Nass Area.<sup>233</sup>

Thus, when the crown and industry are pursuing economic development initiatives on Nisga'a Treaty Settlement Land or where Nisga'a have jurisdiction pursuant to their treaty there is a high duty to consult and accommodate the Nisga'a. This is because their treaty is constitutionally protected and as confirmed by the Supreme Court of Canada there would be a high level and deep consultation would be required as per *Haida*<sup>234</sup> when dealing with the instances of a treaty, consent for development is required. That is why in recent news the Nisga'a Lisims Government is entering into several agreements with regards to LNG. As stated in a news article:

The Nisga'a Nation will receive approximately \$6 million from the Province at various stages in the project: \$1 million upon signing the agreement, \$2.5 million when pipeline construction begins, and \$2.5 million when gas starts to flow.

The Nisga'a Nation will also receive a yet-to-be-determined share of \$10 million a year in ongoing benefits that will be available to First Nations along the PRGT pipeline. The

<sup>230</sup> Benefits of Nisga'a Treaty found at: <http://www.nisgaanation.ca/about-accomplishments-and-benefits-nisgaa-treaty>

<sup>231</sup> For more information regarding the treaty please see: <http://www.nkn.ca/files/u28/nis-eng.pdf>

<sup>232</sup> Naas area strategy found at: <http://www.nisgaalisims.ca/nass-area-strategy>

<sup>233</sup> *Ibid*

<sup>234</sup> *Haida, Supra*, note 113

Province expects to be signing similar agreements with other First Nations along proposed natural gas pipeline routes in the near future.<sup>235</sup>

Clearly, the Nisga'a Lisims Government are able to benefit from their treaty which supports the notion that negotiated treaties will help create a strong economic base for First Nations communities and their neighbors as well as provide the certainty BC needs for the ongoing resource developments.

## **BC Treaty Process**

Although, the *Indian Act* still plays a significant role in the day-to-day lives of the First Nations' people negotiating a modern day treaty can be one way to break free from under the *Indian Act*. The made in BC Treaty Process<sup>236</sup> was established in 1992 to help resolve the numerous outstanding land claims in British Columbia.<sup>237</sup> The BC Treaty Process is a tripartite process, meaning the Federal Government, Provincial Government and First Nations are negotiating a modern day land claim under their framework agreement.<sup>238</sup> This unique process is meant to speed up the comprehensive land claims process and deal with the unresolved First Nations' land claims in BC by negotiating a modern treaty.

Since this process is voluntary and political it means not all First Nations in BC participate.<sup>239</sup> According to the BC Treaty Commission "there are 65 Nations, representing 105 Indian Act Bands out of a total of 199 Indian Act Bands in BC, which are participating in or have

<sup>235</sup> Nisga'a sign LNG Deal found at: <http://www.lngworldnews.com/bc-nisgaa-nation-sign-lng-benefit-agreement/> Additional text that is important from the news release is as follows: "The two governments are creating a strong framework for Nisga'a participation in the LNG sector and to ensure B.C. is in a strong position to compete in the new global market place. The Nisga'a and B.C. governments have both introduced legislation to enable the Nisga'a Lisims Government to levy and collect property tax from non-Nisga'a citizens and companies with industrial installations, such as LNG pipelines on Nisga'a Lands. The Ministry of Environment has also introduced the Protected Areas of British Columbia Amendment Act. The act would remove 63.5 hectares from Nisga'a Memorial Lava Bed Park for PRGT development and take effect once all regulatory approvals are received and the Nisga'a Final Agreement is amended. The route selected avoids specific cultural sites and has the support of the Nisga'a Lisims Government."

<sup>236</sup> For a map of Treaty Negotiations in British Columbia please see Appendix C

<sup>237</sup> BC Claims Task Force Report can be found at:

[http://www.bctreaty.net/files/pdf\\_documents/bc\\_claims\\_task\\_force\\_report.pdf](http://www.bctreaty.net/files/pdf_documents/bc_claims_task_force_report.pdf)

<sup>238</sup> BC Treaty Commission process found at [www.bctreaty.ca](http://www.bctreaty.ca)

<sup>239</sup> *Ibid*

completed treaties through the BC Treaty negotiation process.”<sup>240</sup> There are six stages to the treaty process and these are: filing a statement of intent to negotiate; readiness to negotiate; negotiation of a framework agreement; agreement in principle; negotiating a final agreement; and, implementation of the treaty.<sup>241</sup> To date there have been two agreements concluded under the BCTC Process: Tsawwassen<sup>242</sup> and Maa-nulth<sup>243</sup>. Tsawwassen is the first urban treaty, whereas, Maa-nulth is the first multi-community treaty<sup>244</sup> with its member nations spanning the west coast of Vancouver Island.<sup>245</sup>

Once a treaty concludes under the BCTC’s process it will then be protected under *Section 35* of the *Constitution*. An example is the “The Tsawwassen Government will operate under the Tsawwassen Constitution and will enact laws over several fundamental matters.”<sup>246</sup> The Tsawwassen Nation is now in control by determining their path forward and implementing their treaty provisions to match their vision driven by their community members. The Tsawwassen Nation is in a great urban location for economic development and the media has highlighted the nation's economic development with their building of a large scale mall. And, of course there are future plans for further economic activity at the Delta Port.

By the way, a "2009 report by PricewaterhouseCoopers, concluded that completing treaties with First Nations will deliver more than \$10 billion in benefits to British Columbia's economy over the next 15 years."<sup>247</sup> For those First Nations who have modern treaties, they are

<sup>240</sup> BC Treaty documents found at: <http://www.bctreaty.net/documents/FINALNewsRelease-TrueInvestmentinTreatyNegotiationscopy.pdf>

<sup>241</sup> *Supra*, note 228

<sup>242</sup> Tsawwassen Final Agreement found at: [http://www.tsawwassenfirstnation.com/pdfs/TFN-About/Treaty/1\\_Tsawwassen\\_First\\_Nation\\_Final\\_Agreement.PDF](http://www.tsawwassenfirstnation.com/pdfs/TFN-About/Treaty/1_Tsawwassen_First_Nation_Final_Agreement.PDF)

<sup>243</sup> Maa-nulth Final Agreement found at: [http://www.bctreaty.net/nations/agreements/Maanulth\\_final\\_intial\\_Dec06.pdf](http://www.bctreaty.net/nations/agreements/Maanulth_final_intial_Dec06.pdf)

<sup>244</sup> The five Maa-nulth member nations include: Ucluelet, Huu-ay-aht, Toquaht, Uchucklesaht, and, Ka:yu:kth/Che:k'tles7et'h.

<sup>245</sup> Treaties will provide First Nations in BC with the economic and social tools to promote self-reliant communities, and provide them with the capacity to identify and implement their own solutions to difficult economic and social problems. As well, the province's overall economic and social well-being will benefit from strong, self-reliant First Nation communities.

<sup>246</sup> Centre for First Nations Governance: Tsawwassen First Nation. Principle: Expansion of Jurisdiction. [http://fngovernance.org/toolkit/best\\_practice/tsawwassen\\_first\\_nation](http://fngovernance.org/toolkit/best_practice/tsawwassen_first_nation)

<sup>247</sup> Price WaterHouse Coopers Report found at [www.bctreaty.ca](http://www.bctreaty.ca)



able to take control of their own futures by having their policies; their laws; and ultimately their governance reflect what is important to their members.<sup>248</sup> It is also worthy to note that:

Treaty Making is supported by industry, which sees modern treaties as the best and preferred way to establish a legal framework to clarify the attributes and geographical extent of Aboriginal rights, thereby contributing to a more stable, competitive, and predictable environment for economic and resource development.<sup>249</sup>

The above-mentioned supports the notion that negotiated treaties will provide the certainty BC needs for satisfying industry and will help create an economic base for the First Nations' communities.

Additionally, the recent Maa-nulth treaty on Vancouver Island is the underlying factor leading to an agreement with Steelhead LNG. "A self-governing aboriginal group on Vancouver Island has signed a deal with a fledgling liquefied natural gas company in hopes of developing a massive project to export LNG to Asia." Although, Vancouver Island is far from the natural gas fields in northeastern BC, "[t]here are now two terminals proposed for Vancouver Island – the other is the Discovery LNG project slated for Campbell River". This demonstrates the potential wealth and prosperity that the proposed LNG industry in BC can provide. The Steelhead LNG chief executive officer Nigel Kuzemko...said "[w]e certainly see some clarity because of the signed treaty and the ability to be on treaty lands. We're tremendously excited to do this working partnership at such an early stage of the project." Early could be an understatement because most of the BC LNG supply chain is still in the planning and development phase as well as "[n]ew pipelines would need to be built for transporting natural gas across the Georgia Strait to Vancouver Island".

As briefly explored, the *Indian Act* is an overly bureaucratic and outdated policy dictated by those in Ottawa. Unless the Nation has been able to get out from the *Indian Act*, then the *Indian Act* continues to have an impact on the day-to-day lives of First Nation communities and

<sup>248</sup> Treaties will provide First Nations in BC with the economic and social tools to promote self-reliant communities, and with the capacity to identify and implement their own solutions to difficult economic and social problems. As well, the province's overall economic and social well-being will also benefit from strong, self-reliant First Nation communities.

<sup>249</sup> Eyford, Douglas. A New Direction: Advancing Aboriginal and Treaty Rights. A Report to the Minister of Aboriginal Affairs and Northern Development Canada. February 20, 2015. At page 37. [hereinafter, "Eyford Comprehensive Claims"] found at: [http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/eyford\\_newDirection-report\\_april2015\\_1427810490332\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/eyford_newDirection-report_april2015_1427810490332_eng.pdf)

its members. It is up to a First Nation to determine which path of governance meets their community's unique needs and pursue jurisdiction accordingly. Because,

[s]uccessful economies stand on the shoulders of legitimate, culturally grounded institutions of self-government. Indigenous societies are diverse; each nation must equip itself with a governing structure, economic system, policies, and procedures that fit its own contemporary culture.<sup>250</sup>

Once this has been attained then a First Nation community can continue to build its nation and move forward on their chosen path.

However, each community needs to determine what path is right for them and when the timing is right for them to precede down their chosen path. Sometimes, it is internal factors influencing the community's choice to take control over their reserve lands through implementing a land code; sometimes economic development initiatives will be the catalyst in determining the First Nation's choice to enter into self-government arrangements; and sometimes litigation will be catalyst for First Nations entering into the modern day treaty process. Whatever the reason, First Nation communities require support and this support is going to be the legislative frameworks for governance and jurisdiction, financial ability and having the human capacity to implement.

This chapter reviews some of legislative frameworks for governance and jurisdiction available to BC First Nation communities in order to move their First Nation in the direction their community sees fit. The governance models available to First Nations in BC provide varying levels of independence and economic improvements for the community. The governance model that provide the lowest level of independence and economic improvements is continuing with the *Indian Act* alone which does nothing to improve the lives of First Nations because under the *Indian Act* model of governance a First Nation can only perform what the *Indian Act* allows under statute. But, following the *Indian Act* with First Nations Land Management (*FNLMA*) places the First Nation in the driver's seat when looking at economic development on their *Reserve Lands*. This gives a First Nation some independence and economic improvements for their community members living on reserve. Also, Following the *Indian Act* with taxation by using *Section 83* of the *Indian Act* or using *First Nations Financial Management Act (FNFMA)* to achieve taxation

<sup>250</sup> *Eyford Energy, Supra*, note 2 at page 28

jurisdiction for a First Nation community is one incremental mechanism currently available and moves the First Nation towards becoming self-governing.

On the other hand, the two governance models available to First Nations in BC that provide the best levels of independence and economic improvements are self-government agreements and modern treaties. These in turn build the First Nations' governance and jurisdictional powers enabling a First Nation to build their community's independence and prepare a First Nation to engage in multi-stakeholder conversations that will advance their communities' economic growth. Having investor confidence is essential when the LNG proponents are engaging First Nations in BC with pipeline deliberations or any of the LNG supply chain consultations. The more autonomy a First Nation in BC has, the healthier their socio-political climates are for engaging any one of the future LNG proponents that may be coming to their traditional territory. And autonomy only increases a First Nations' self-determination, improves their decision making, and increases their resourcefulness which will have a positive impact on their economic development initiatives partnering with the LNG proponents.

Unfortunately, even First Nations with healthy socio-political climates for engaging any of the future LNG proponents may run into issues where the engagement processes do not lead to mutually beneficial outcomes. The LNG proponents' desired results and First Nations' interests can lead to opposing perspectives that the engagement processes were never designed to address. The next chapter will review the consensus approach to resolving multi-stakeholder issues with a process that can address the differences between the parties.

## Chapter 4.

### The Consensus Approach: Process & Strategy

This section will focus on the consensus approach as a means to reconciling the LNG proponents' energy interests with other third parties' interests and BC First Nations' interests. Generally speaking “[t]he relationships between the extractive industries and host communities have unique challenges and opportunities: Exploration is a high risk and competitive endeavor, which makes the timing of community engagement and co-planning a challenge”<sup>251</sup> The consultation process is about building trust through a systematic engagement and proactive integration of feedback from the various stakeholders impacted by the proponent's activities. The engagement processes may very well be creating company challenges in the following ways:

The time required to help communities and others understand and reflect upon how they may be affected by the proposed project can challenge company timeframes. For the company, the high upfront costs of extractive operations impose tremendous financial pressure for speed, especially until the operation begins to return profits. Community interests, on the other hand, are in favor of taking the requisite time to reflect, to build trust and to make careful choices. Once construction begins, however, there is little flexibility.<sup>252</sup>

The aforesaid clearly illustrates how industry proponents believe time is of the essence or speed is necessary, whereas, the community's approach is centered on reflecting, building trust and making a careful choice regardless of any time constraints.

These divergent viewpoints can create irreconcilable differences between the parties resulting in a situation where continuing to participate in the standard consultation process is no longer an option. But the LNG proponents can find themselves to be in a position where they cannot abandon a project because it is an integral portion of a LNG pipeline which means they need a process to resolve the conflict. The need for the LNG proponents continuing to pursue a specific course of action can result in using the consensus approach to resolving multi-stakeholder issues. This section will begin by reviewing some of the parties that can take part in the consensus approach to resolving multi-stakeholder issues which include: the provincial

<sup>251</sup> *Managing Risk, Supra*, note 68

<sup>252</sup> *Managing Risk, Supra*, note 68

government, First Nations and Industry. The next steps will review the “when”, the “how” and the “why” to use the consensus approach to resolve complex issues with many stakeholders or rights’ holders involved with BC’s LNG resource developments.

## **The Who:**

This section will begin with a review of some of the parties that will be involved in the consensus approach to resolving multi-stakeholder issues which will focus on: the BC Government, the BC First Nations and the LNG industry proponents. And part of the consensus approach to resolving multi-stakeholder issues is to be inclusive and give all potential impacted parties a voice. Which means the consensus approach can sometimes include any of the following: municipal governments, sporting associations, land owners, business owners and any other individuals or organizations being impacted by the LNG development in a specific area. But this segment focuses its review on the BC Government, the BC First Nations and the LNG industry proponents in particular because these parties will consistently play a role in BC’s LNG development.

## **Provincial Government**

The BC Government is a hierarchical decision-making organization and as such the initial consultations may be attended by subordinate representatives. The subordinates or low-level bureaucrats do not have any decision making authority and typically are in the fact-gathering role. Gathering facts is an essential part of carrying out the duty to consult because the “government is legally required to consult with First Nations and seek to address their concerns before impacting claimed or proven aboriginal rights (including title) or treaty rights.”<sup>253</sup> Having gathered facts on specific consultations the government can make a more informed decision including if the appropriate level of consultation has been carried out and if there is an accommodation component required to meet their legal duties.<sup>254</sup>

<sup>253</sup> *BC Consultation Guide, Supra*, note 140

<sup>254</sup> Paraphrased from my class preparation notes for BUS 661 Managing Complexity Within and Beyond the Organization, Sept. 2013, based on the Edumine : Practical Tools for Sustainable Relationships in Mining found at:<http://www.edumine.com/xutility/html/menu.asp?category=xcourse&course=Xout>

## First Nations

While First Nations look to have a hierarchical, top-down decision-making structure there are some cases involving both: traditional (hereditary chiefs) as well as elected leadership (*Indian Act* chiefs) present during the initial consultation phase. There are a myriad of differences in the values as they relate to the various BC First Nations' peoples and cultures. But, a common theme among First Nations is being the environmental stewards of the land and being tasked with the responsibility to care for the land for future generations.

As well, First Nations may be accompanied by non-members selected for their expertise on specific subjects at negotiations. These agents are only qualified to respond to questions that center around their expertise and cannot speak beyond their subject matter, such as making the decision to enter into an agreement with a proponent or the Crown. Also First Nations no longer regard themselves as "stakeholders" because *Section 35* and the current Aboriginal case law regard them as "rights' holders". So, this is terminology one wants to avoid using when engaging First Nations in any conversation around resource development. And as rights' holders First Nations will require the time it takes for a consensual decision-making process to receive the approval of its members through ratification or by following the processes of their internal decision making.<sup>255</sup>

## Industry

The hierarchical decision-making structure of corporations is more likely to be under a single authority which will include a Board. The corporation may also appoint representatives with sufficient authority to make decisions. The corporation is often the moving party in a multi-party dispute because they are proposing a particular project or action. But, "any opposition can lead to a siege mentality and the sense that those opposed are inherently unreasonable".<sup>256</sup> This makes it difficult for the organization's representative to propose and receive favorable consideration of any concessions and changes in their position within their own organization.

<sup>255</sup> Paraphrased from my class preparation notes for BUS 661 Managing Complexity Within and Beyond the Organization, Sept. 2013, based on the Edumine : Practical Tools for Sustainable Relationships in Mining found at: <http://www.edumine.com/xutility/html/menu.asp?category=xcourse&course=Xout>

<sup>256</sup> *Ibid*

This is because corporations develop detailed internal positions on issues and proposals which make any modifications difficult. Also “[c]ommunication as practiced by energy companies, both internally and externally is still too often an exercise in information push meant to control the conversation and get people onside.”<sup>257</sup> The standard corporate attitude continues to be “time is money” which works for their internal deliberations but, results in a low tolerance for the time requirements of the other outside organizations.<sup>258</sup>

## **The When:**

The “when” I assert is simple. As soon as a proponent has an idea for a project it wants to build, then the engagement with First Nations as partners should be a priority. Even case law holds that engagement and consultation should begin at the “strategic planning stages”<sup>259</sup> so even prior to the crown making a final decision on their proposed project. And, I preface the aforementioned not only because First Nations have constitutionally guaranteed rights under *Section 35*<sup>260</sup> but because it is the right thing to do; being good neighbors is one common sense principle to employ when engaging with First Nations. It is also advantageous to utilize this approach to build relationships that go beyond the business realm as this can create goodwill which will assist the LNG proponents with maintaining their Social License to Operate.

## **The How:**

The “how” of resolving complex issues with many stakeholders or rights’ holders involves developing a framework that will meet their needs and interests that are specific to BC LNG resource developments. “Energy use and development have become topical political, environmental and economic issues in Canada, particularly the extraction and transport of oil and natural gas.”<sup>261</sup> Being able to resolve these issues with many stakeholders or “creating processes

<sup>257</sup> *Reinventing CSR Supra*, note 51

<sup>258</sup> *Ibid*

<sup>259</sup> *Haida, Supra*, note 112 at paragraph 76

<sup>260</sup> *Section 35, Supra*, note 105

<sup>261</sup> *Eyford Energy, Supra*, note 2 at page 12

for problems<sup>262</sup> is achieved by developing the consensus approach to resolving the complications of topics with many stakeholders. There are four steps to the consensus process.<sup>263</sup> Phase 1: Assessment of potential interest in participation. Phase 2: Convene the process and draft the ground rules. Phase 3: Managing the process/crafting the agreement. And, Phase 4: Implementing the agreement and monitoring the results.

Under phase 1, there is the partnerships and relationship building. It must be made clear to all of the potential parties that the consensus approach is a voluntary process. The consensus approach temporarily levels the playing field by suspending power imbalances for as long as the process continues. This means that all participants are equal and have to take an active role in understanding the other parties' interests to forge new relationships. Being able to understand the values that the other side brings to the discussion will help in creating an overall understanding within the process. For industry "listening to the other party's concern is less risky than ignoring them."<sup>264</sup> This can take place with effective communication strategies and being cognizant of other peoples' communication strategies to reduce conflicts. This will ensure that the participants are building new relationships and these relationships will be maintained throughout the entire consensus process. And, within the first phase there is getting together to "talk about talking" which will help in developing the consensus approach because "nothing but an evening can be lost by talking about whether to go on talking."<sup>265</sup>

Phase 2: Convene the process and draft the ground rules. Once the parties have agreed to the consensus building approach to resolve their issues the process begins with framing how the discussions will happen throughout the consensus approach by laying out ground rules which will ensure that discussions remain productive. "Many attempts to resolve conflicts fail not because of lack of will to agree or a lack of skills but because the participants have failed to define and agree on the process".<sup>266</sup> While convening their process is the best time to go over the roles and

<sup>262</sup> Business 661 class notes from the Simon Fraser University, Beedie School of Business 2013 Fall Semester. (My Class notes Professor Glenn Sigurdson quote)

<sup>263</sup> BUS 661 Module 3: Understanding and Creating Context: Establishing a Framework. EMBA ABL BUS 661, 2013 Courtesy of the CSE Group at pg. 6 – 9

<sup>264</sup> *Ibid*

<sup>265</sup> Business 661 class notes from the Simon Fraser University, Beedie School of Business 2013 Fall Semester. (My Class notes from Glenn Sigurdson presentation).

<sup>266</sup> *Ibid*



responsibilities so that there is structure to the meetings and dialogues. There should be a clear definition of what the issues are and the goals & objectives of the consensual process, because this will ensure that the meetings will stay on point and everyone knows what they are trying to accomplish.

Next is Phase 3: Managing the process and crafting the agreement. When crafting an agreement one should be able to identify the essential interests of the parties. Interests are what is important to each party and what motivates them. Interests are what underlie the positions that parties take within the negotiation process and a good strategy is to become aware of their interests so you can offer a solution. Also, look at making the dispute bigger to allow for accommodating the interests of every party that is involved in the process. And, recognize that there may be a need for some caucus discussions or joint proposals and submissions. Once they believe they are coming to a solution that all can agree to they should define and confirm the consensus agreement in writing.

Finally, there is Phase 4: Implementing the agreement and monitoring the results. This is where anticipating everything that can go wrong is very important. Things to be considered are the costs of implementation, participation in the implementation and if necessary, a process for reviewing and revisions of the agreement. Addressing these types of things will help ensure the agreement moves smoothly through the implementation phase.

## **The Why:**

The why is because at the end of a successful consensus process, each party can sustain their values and the belief that opponents' values have less merit. What is required is not a conversion of values but a tolerance for other values and respect for the people who hold them. The goal is to try to develop outcomes that enable the parties to live together in spite of their differences, not to eliminate these differences. Values define who we are and BC First Nations have a wide range of values within their own communities as well as illustrating the differences between all of the other First Nations. This will become evident when the “Spectra Energy and the BG Group engages the approximately 20 potentially-impacted Aboriginal groups before they

start building their gas pipeline from northeastern British Columbia to the Port of Prince Rupert”.<sup>267</sup>

The previous discussion illustrates how divergent viewpoints can create irreconcilable differences between the BC First Nations and the LNG industry proponents resulting in a situation where continuing to participate in the standard consultation process is no longer an option. This outcome can result from a simple difference on the perspective of time. Where the LNG proponents believe that time is of the essence, whereas, the BC First Nations believe making the right decision is more important regardless of the time constraints. In getting beyond how the dispute began the LNG proponents can find themselves in a position where they need to resolve their issue by using the consensus approach to resolving multi-stakeholder issues. This approach allows for many stakeholders to participate in developing a “process for problems” that will use a consensus approach to resolve their issues. This section reviews the potential participants in the consensus approach to resolving multi-stakeholder issues which includes: the provincial government, First Nations and Industry. Obviously, there will be times when there will be many stakeholders involved with this process but, the review focuses on the three parties that will have a consistent role to play in BC’s LNG development. The analysis then examines the “when”, the “how”(the process will work) and “why” to use the consensus approach to resolve complex issues with many stakeholders or rights’ holders involved with BC’s LNG resource developments. The goal of the consensus process is about building bridges to resolve the issues between the various stakeholders and is not about converting the participants’ values or beliefs.

<sup>267</sup> *Eyford Energy*, *Supra* note 2 at page 47 Appendix B found at: <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/www/pdf/publications/ForPart-Online-e.pdf>

## **Chapter 5. Conclusions**

This paper examines the BC LNG developments that need to occur for Canada to maintain its energy resource exports. As part of the review it becomes evident that international LNG resource companies will be coming to BC to develop this resource. This paper's focus is to assist the industry in developing an engagement strategy to foster working relations with BC First Nations. The previous sections of this paper provides the LNG resource companies with general guidelines to follow enabling their development of an effective engagement strategy with BC First Nations. An underlying value integral to their success is that the LNG proponents need to have early and open discussions with the various rights holders and stakeholders.

Chapter one reviews CSR initiatives and highlights the need for the LNG proponents to gain their Social License to Operate because this policy allows corporations to adapt to the changes that stakeholders are creating in the social and political fields in which they will operate. And, as illustrated by engaging with the Haisla Nation early in the process, Kitimat LNG has secured a partner in (a strategic relationship) and advocate for the project, and established the company's social license to operate in the Haisla's territory. The Kitimat LNG's success is directly related to having prompt and candid discussions about their project with the local First Nation whose traditional territory will be the future site of their development.

Evidently, the courts agree with an early engagement process for the LNG proponents as they carry out the consultation and accommodation doctrine requirements when dealing with BC First Nations' interests in the land. Having competing interests in the land require the LNG proponents to not only engage early but they also need to listen to the First Nations' responses on how their Aboriginal title and rights will be potentially impacted by the proposed LNG developments. This can require the LNG proponents to make changes to their original plans in order to mitigate any of the First Nations' concerns, which further demonstrate the need for early engagements. Another option for gaining First Nations' consent is the LNG proponents can use any of the existing economic partnerships based on pre-existing Aboriginal title and rights that are currently available in BC. However, the LNG proponents should not overlook the fact that early engagement with BC First Nations based on the consultation and accommodation doctrine requirements can also help to develop working relationships as the two parties will be having

candid discussions to ensure that both parties have a complete understanding of the project's requirements.

Although, industry believes BC First Nations' treaties provide "the best and preferred way to establish a legal framework to clarify the attributes and geographical extent of Aboriginal rights, contributing to a more stable, competitive, and predictable environment for economic and resource development."<sup>268</sup> The reality is that there are few treaties in BC, which means that the LNG proponents will have to work with First Nations that are using any of the five governance models available to them. With the LNG proponents using the principal value that is gaining success by having early and open discussions about their projects with the various First Nations in BC they will learn which governance model they are currently using. However, given the long duration associated with the LNG projects the proponents need to understand that the First Nations' governance models can change because they have the inherent right to be self-governing.<sup>269</sup> This will ensure that any agreements between the parties are taking the First Nations' governance issues into account by providing room for their growth.

Finally, the underlying value of early and open discussions about the LNG proponents' projects also holds merit with when they need to resolve outstanding issues by using the consensus approach to resolving multi-stakeholder issues. Even though different perspectives are contributing factors to needing the consensus approach the LNG proponents should understand that resolving multi-stakeholder issues will take time. And, the proponents will benefit from their timely and frank discussions because this approach will provide some extra time for developing a process for resolving their problems. To be effective the process to resolving multi-stakeholder issues will have to address the various stakeholders' interests.

<sup>268</sup> *Eyford Comprehensive Claims*, *Supra*, note 238 at page 37.

<sup>269</sup> Included in the the inherent right to be self-governing is the possibility of other models of First Nations' governance being added to the five models that are currently available within the constitutional and legislative frameworks of Canada.

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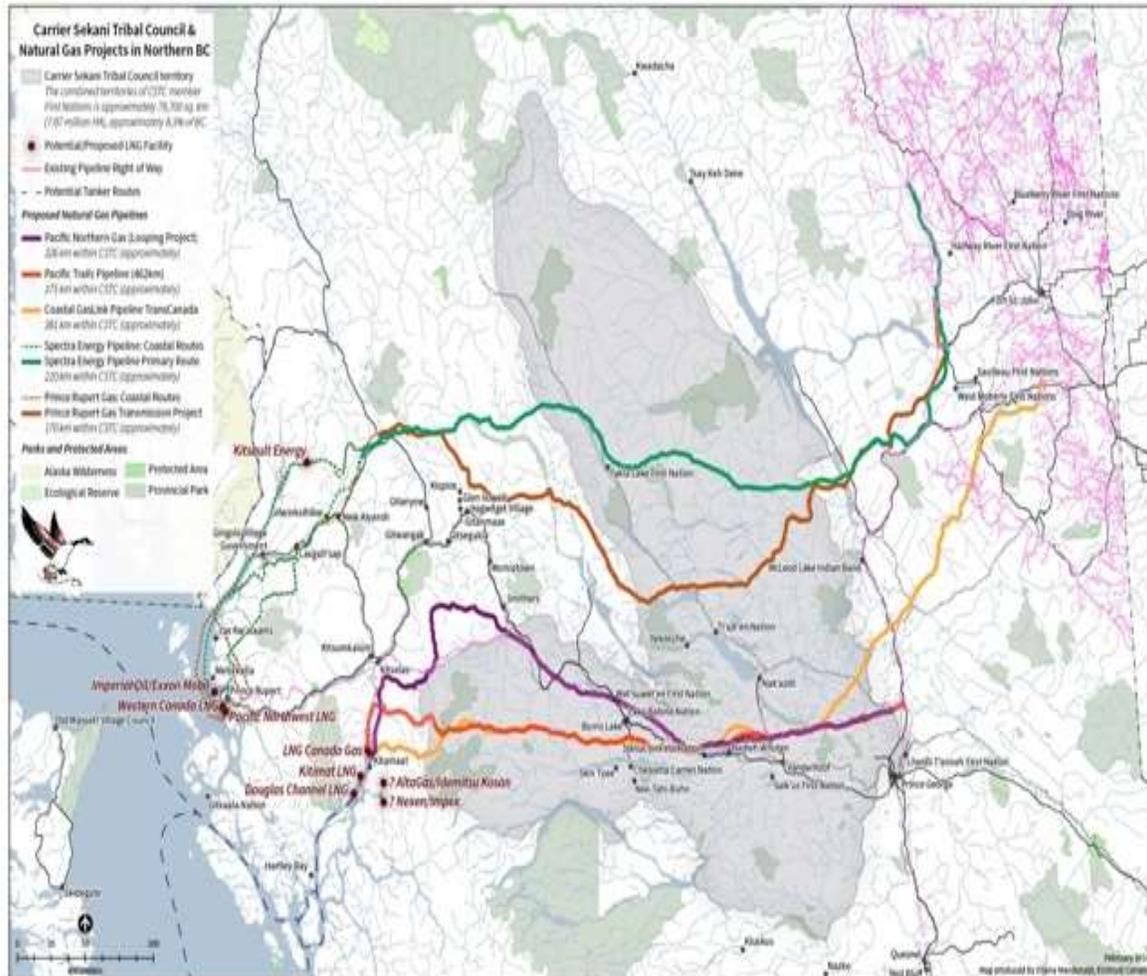
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## **APPENDICES**

## Appendix A-Natural Gas Projects in Northern BC



(Source Carrier Sekani Tribal Council use with permission/map made by Ecotrust)

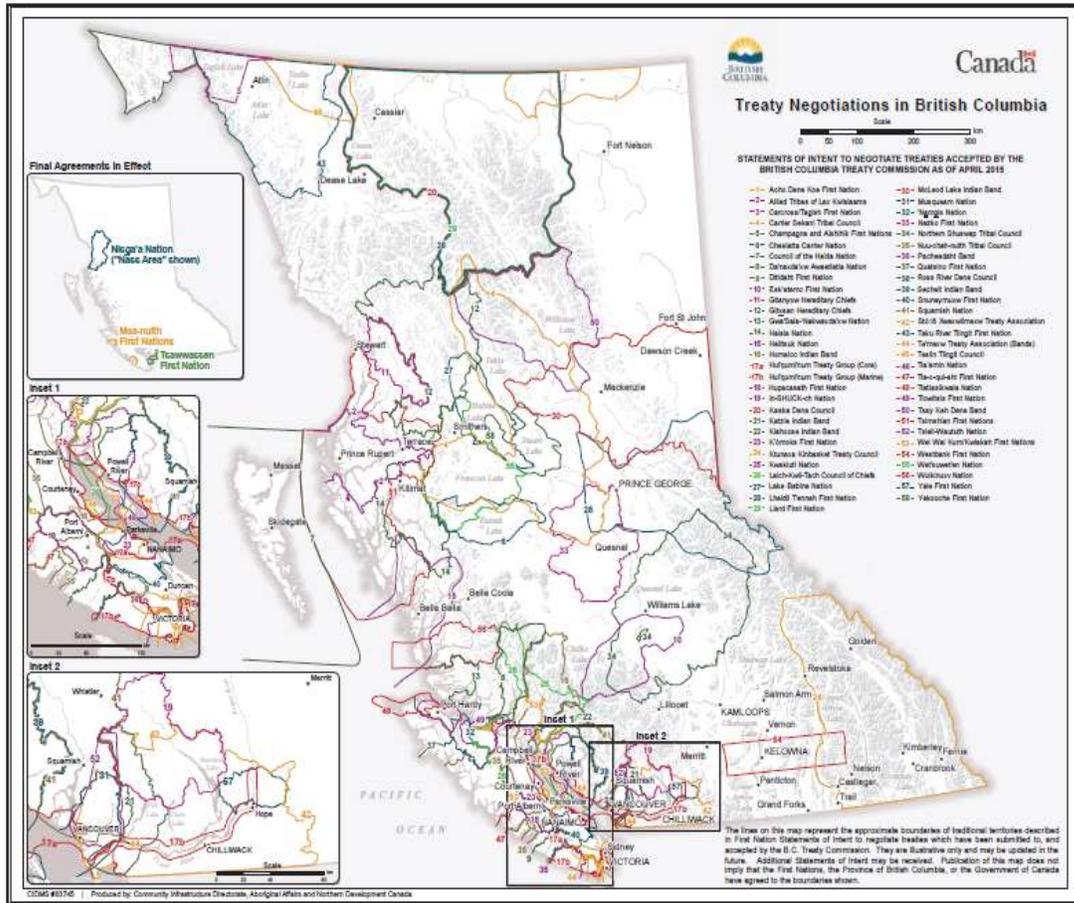


# Appendix B-First Nation in BC



(Source AANDC used with permission)

# Appendix C-Treaty Negotiations in BC



(Source AANDC used with permission)