

**First Nations, Infrastructure and Indigenous  
Participation With Major Resource Projects:**

**A report prepared for**

**The Assembly of Manitoba Chiefs**

**by**

**Dr. Ken Coates**

**30 September 2015**

## **Statement of Qualifications:**

I, Kenneth Stephen Coates, state my qualifications to provide this expert's report as follows:

- I hold a PhD (Canadian History), from the University of British Columbia. My dissertation focused on the history of Native-newcomers relations in the Yukon.
- I have worked as a university professor for more than thirty years with my research and teaching emphasizing Indigenous history, Indigenous participation in resource development and Indigenous rights.
- I am currently the Canada Research Chair in Regional Innovation and Director, International Centre for Governance and Development at the University of Saskatchewan.
- I have published in academic and general audience publications on Indigenous issues for many years, with much of my work focusing on Indigenous participation in the resource economy.
- I am the Co-Director of the Aboriginal Peoples and Natural Resources project and a Senior Fellow with the Macdonald-Laurier Institute (a non-partisan think tank based in Ottawa).
- I have consulted with the Government of Canada, provincial and territorial governments and international organizations on matters relating to Indigenous people and natural resources.

- I have served as an expert witness for governments and Indigenous organizations on matters relating to Indigenous history and Indigenous rights.
- I am an academic and researcher trained in the Western intellectual tradition, and am familiar with historical, political and legal materials related to Indigenous engagement in natural resource projects in Canada and internationally.
- I have been retained to provide historical and contemporary context on the dialogue and relationships between First Nations, the Crown and corporations with respect to natural resource extraction, environmental protection, and the recognition by non-Indigenous parties of First Nations legal and political rights.
- As a professional working in the field, I am familiar with the public and formal positions advanced by First Nations people in their relationships with the Crown and the private sector. I do not purport to speak on behalf of First Nations or the Metis Nation or claim to fully understand their positions on resource and infrastructure developments. Scholars working in this field understand in full that First Nations cultural, political leaders and communities are well informed on these issues and have unique and powerful insights into First Nations values, norms, and priorities.
- The analysis advanced herein has not been approved by the Assembly of Manitoba Chiefs and do not represent the position of the Assembly of Manitoba Chiefs.
- In preparing this submission, and following the practice of the Assembly of Manitoba Chiefs, the use of the term “Aboriginal” will be limited to specific references to the *Constitutional Act (1982)*. The use of the word “Indigenous”

covers First Nations, Inuit and Metis People. The term “First Nations” refers to individuals and communities declaring themselves to be First Nations and recognized as such by the Crown and through Government of Canada legislation. The Assembly of Manitoba Chiefs refers to their people as being Treaty First Nations and Non-Treaty First Nations.

## EXPERT'S DECLARATION

I, Kenneth Stephen Coates, DECLARE THAT:

- I understand that my duty in providing written reports and giving evidence is to help the National Energy Board, and that this duty overrides any obligation to the parties by whom I am engaged or the persons who have paid or are liable to pay me. I confirm that I have complied and will continue to comply with my duty.
- I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.
- I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
  - 1.1 to provide opinion evidence that is fair, objective and non-partisan;
  - 1.2 to provide opinion evidence that is related only to matters that are within my area of expertise; and
  - 1.3 to provide such additional assistance as the National Energy Board may reasonably require to determine an issue.
- I know of no conflict of interest of any kind.
- I will advise the party by whom I am instructed if, between the date of my report and the hearing, there is any change in circumstances which affect my answers to the previous point.
- I have identified the sources of all information I have used.
- I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.
- I have endeavoured to include in my report those matters, of which I have knowledge or

of which I have been made aware, that might adversely affect the validity of my opinion.

I have clearly stated any qualifications to my opinion.

- I have not, without forming an independent view, included or excluded anything that has been suggested to me by others, including my instructing lawyers.
- I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report requires any correction or qualification.
- I understand that:
  - my report may form the evidence to be given under oath or affirmation;
  - questions may be put to me in writing for the purposes of clarifying my report and that my answers shall be treated as part of my report and covered by my statement of truth;
  - I may be required to attend at a hearing to be cross-examined on my report by a cross-examiner assisted by an expert.

## **STATEMENT OF TRUTH**

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

## Table of Contents

|   |    |
|---|----|
| Statement of Qualifications   | i  |
| Expert’s Declaration  | iv |
| Statement of Truth  | vi |
| About the Author  | 4  |
| 1.0 Introduction  | 6  |
| 1.1 Indigenous Views of the Past                                    | 6  |
| 1.2 Indigenous View of the Law                                      | 7  |
| 1.3 First Nations Oral Traditions                                   | 7  |
| 2.0 The Importance of Treaties                                      | 8  |
| 3.0 Resource Revenue Sharing  | 9  |
| 4.0 The Enbridge Line 3 Pipeline                                    | 11 |
| 5.0 First Nations’ Approaches to Resource-Related Projects          | 13 |
| 5.1 The Sacredness of the Land                                      | 16 |
| 5.2 Long-Term Perspective   | 16 |
| 5.3 Divisive Decisions  | 17 |
| 5.4 Active Participation  | 18 |
| 5.5 Environmental Concerns  | 19 |
| 5.6 First Nations’ Historical Experiences with Development Projects | 20 |
| 5.6.1 Canada and the Development of the Prairies                    | 21 |
| – Treaties and Promises   |    |
| 5.6.2 Railways: The West’s First Infrastructure Project             | 25 |

|       |   |    |
|-------|---|----|
| 5.6.3 | Hydro Electric Projects   | 27 |
| 5.6.4 | Modern Infrastructure Projects  | 29 |
| 6.0   | The Changing Context for Resource Development on<br>Ancestral Territories           | 31 |
| 6.1   | The Mackenzie Valley Pipeline Inquiry   | 33 |
| 6.2   | Lysyk Report on the Alaska Highway Pipeline Proposal                                | 35 |
| 6.3   | The Enbridge Pipeline to Norman Wells   | 36 |
| 6.4   | Legal Challenges and Indigenous Empowerment   | 38 |
| 6.5   | Concerns about Contemporary Projects  | 41 |
| 6.6   | Enbridge and Manitoba First Nations   | 42 |
| 6.7   | Modern Treaties and Indigenous Engagement in Resource<br>Development                | 43 |
| 6.8   | Fort Good Hope Dene Community   | 45 |
| 6.9   | Nisga'a of Northern British Columbia  | 46 |
| 7.0   | Equity and Infrastructure Development   | 48 |
| 7.1   | Lac Seul Generating Station   | 48 |
| 7.2   | Moose Cree First Nation   | 49 |
| 7.3   | The Nisichawayasihk Cree Nation   | 50 |
| 7.4   | The Keeyask Project   | 52 |
| 7.5   | Sts'ailes First Nation  | 54 |
| 7.6   | The Pic River First Nation and the Nawiinginokiima<br>Forest Management Corporation | 55 |
| 8.0   | Indigenous Engagement with Pipeline Development                                     | 56 |

|       |  |    |
|-------|--|----|
| 8.1   | TransCanada Corps Energy East Pipeline                             | 57 |
| 8.2   | Northern Gateway, Enbridge and Bitumen                             | 58 |
| 8.3   | The Mackenzie Gas Project  | 63 |
| 8.4   | LNG Pipelines and the Province of British Columbia                 | 65 |
| 8.4.1 | Haisla First Nation  | 66 |
| 8.4.2 | Lake Babine First Nation   | 69 |
| 8.4.3 | Kinder Morgan: Increasing Pipeline Capacity                        | 69 |
| 9.0   | Examples from Other Jurisdictions                                  | 70 |
| 9.1   | Navajo Nation  | 73 |
| 10.0  | Indigenous Engagement with Natural Resource Projects               | 73 |
| 11.0  | Best Practice and Opportunities for Cooperation with First Nations | 74 |

**About the Author:** Dr. Ken Coates is Canada Research Chair in Regional Innovation, Johnson-Shoyama Graduate School of Public Policy, and Director, International Centre for Northern Governance and Development, University of Saskatchewan. He holds a Bachelor of Arts (History), from the University of British Columbia, a Masters of Arts (History) from the University of Manitoba and a PhD (Canadian History) from the University of British Columbia. Dr. Coates has taught at universities across Canada and in New Zealand, has received numerous research grants and awards for his scholarly work. He was appointed as a Fellow of the Royal Society of Canada (Social Sciences), in September 2015. He has published over 25 books and numerous scholarly articles and book chapters.

Dr. Coates has worked extensively on Aboriginal issues, serving as an advisor to First Nations, the Government of Canada and various provincial and federal governments. He has served as an expert witness in several Aboriginal rights and claims cases. He is currently a Senior Fellow with the Macdonald-Laurier Institute, a non-partisan think-tank based in Ottawa, and is a Co-Director of the Institute's research program in Aboriginal Peoples and Natural Resources in Canada.

Dr. Ken Coates was retained by the Assembly of Manitoba Chiefs to provide an overview of some broken promises associated with treaties and natural resource projects; an explanation of resulting devastating impacts upon First Nations; development of modern treaties in recent Supreme Court of Canada case law; overview of belated recognition by industry and Government of the need to provide First Nations with a role in environmental decision making, project development and monitoring; examples of ongoing efforts at relationship building including pipeline and hydro electric projects; major challenges experienced by pipeline industry; identification of good practice

examples and a commentary on replacement line issues.

## **1.0 Introduction**

1. As an introduction to the analysis that follows, it is useful to provide several statements about the relationship between the Canadian legal system, the Western academic tradition, and the processes involved in having professional experts address issues of central importance to First Nations.

### **1.1 Indigenous Views of the Past**

2. On matters relating to First Nations history and contemporary priorities, I have been told and have read that First Nations people wish to explain their history in their terms and within the standards and norms of First Nations historical and cultural traditions. In particular, they wish to have their historical and contemporary experiences understood in light of their own laws and their historical understanding.<sup>1</sup>

3. Historians trained in the Western academic tradition contribute to the general understanding of First Nations history and the history of Indigenous-newcomer encounters, but many do so with respect and appreciation for the ability of First Nations people to explain and document their history in First Nations terms.

---

<sup>1</sup> This position has been well articulated by First Nations leaders and Indigenous academics. D'Arcy Linklater, Harry Bone and the Treaty and Dakota Elders of Manitoba, with contributions by the Assembly of Manitoba Chiefs Council of Elders, *Kaa'esi Wahksotumanhk ski – Our Relations with the Land: Treaty Elders' Teachings, Volume II* (Winnipeg: AMC, 2014). Treaty 7 Tribal Council, Walter Hildebrandt, Sarah Carter and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen's University Press, 1996).

Harold Cardinal and Walter Hildebrand, eds, *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples Will One Day be Clearly Recognized* (Calgary: University of Calgary Press, 2000).

## **1.2 Indigenous Views of the Law**

4. On matters that come before the Canadian courts or Canadian regulatory panels, frequent mention is made of the “legal” context of a particular issue. The unspoken but critical element here is that the “legal” standing typically refers to existing Canadian laws, as defined by the Parliament of Canada, the *Constitution Act* (1982) and the decisions of the Supreme Court of Canada. The use of these words, which assume the stability and assert the primacy of Canadian law, often limits the awareness of the changing nature of Canadian laws, as interpreted by the courts. “The law” is an evolving concept, shaped in this field substantially by Indigenous challenges to Canadian legislation, regulations and government practices. More importantly, it does not properly account for the Creator’s law and centuries-old and still honoured First Nations legal traditions that founded on a collective commitment to the Creator’s laws, natural laws, First Nations protocols, and fundamental human principles and standards. In this context, it is commonplace to find that a practice or process is deemed “legal” within the narrow confines of the Canadian legal system but that is inappropriate, unjust and discriminatory when viewed through the lens of robust and deeply held First Nations legal traditions. The international legal and intellectual community is slowly moving toward the recognition of the legitimacy, contemporary relevance and authority of First Nations laws.

## **1.3 First Nations Oral Traditions**

5. A full and comprehensive evaluation of First Nations’ positions on historical and contemporary issues, including resource and infrastructure development, requires access

to First Nations oral traditions. This is particularly the case with regards to such seminal events as the signing of the numbered treaties in Western Canada and subsequent formal relationships with the Crown. While insights can be gleaned from published versions of these oral traditions, it is vital to recognize that the traditions remain alive today and that First Nations elders play an honoured role within their societies as repositories and stewards of First Nations historical, cultural and legal knowledge.<sup>2</sup>

6. The analysis that follows draws on the literature relating to the experiences of First Nations from across Canada, primarily to show that First Nations, governments and corporations have attempted, with some success, to find mutually beneficial arrangements that permit resource and infrastructure developments to proceed, provided that there are appropriate environmental safeguards. It is vital, in evaluating these different approaches, that the different political realities facing First Nations governments and individuals in their relationships with the Crown be understood.

## **2.0 The Importance of Treaties**

7. Most (but not all) of the First Nations in Manitoba, for example, operate under historic treaties, signed with the Crown commencing in 1870 and implemented, and interpreted since that time. These treaties with the Crown are of fundamental importance to Manitoba First Nations (and other signatories to the so-called “numbered treaties”) and form the foundation of their relationship with the Crown and their understanding of their

---

<sup>2</sup> D’Arcy Linklater, Harry Bone and the Treaty and Dakota Elders of Manitoba, with contributions by the Assembly of Manitoba Chiefs Council of Elders, *Kaa’esi Wahksotumanhk ski – Our Relations with the Land: Treaty Elders’ Teachings*, Volume II (Winnipeg: AMC, 2014).

place within Canada.<sup>3</sup> A second group of First Nations and Inuit people, living primarily in the territorial North and in areas of the provincial North not previously covered by an historic treaty, have entered into what are commonly called “modern treaties” with the Crown. These are complex and lengthy legal documents that define the First Nations land allocations, resource and development rights, self-government arrangements and many other aspects of First Nations governance and First Nations-Crown relations. A third of First Nations, including, for example, the Dakota in Manitoba, most of the First Nations in British Columbia and some First Nations in the Yukon and Northwest Territories, are not covered by an historical or a modern treaty. The relationships of these First Nations with the Crown are defined, in substantial measure, by the First Nations’ perspectives on the role of the Government of Canada, the *Indian Act* and other legislation. Signatories to the treaties cannot walk away from their responsibilities as articulated in the agreements; those who do not have treaties do not have the same relationship with the Crown as those that do. Existing treaties, or the absence of a First Nation-Crown accord where there have been no treaties, define the parameters for relations with the Crown but do not remove the obligation of the Crown, as defined in the *Constitution Act*, to respect Aboriginal and treaty rights across the country.

### **3.0 Resource Revenue Sharing**

8. The issue of resource revenue sharing with First Nations, which has attracted a great deal of national attention in recent years, underscores the First Nations’

---

<sup>3</sup> The Canadian treaty process is not complete. There is considerable unfinished business in terms of signing, implementing and interpreting First Nations treaties and revising the First Nations-government relationship..

assumptions that sharing the resource wealth of Canada is an important element in the Crown's relationship with First Nations, albeit less significant respecting and appreciating the sacredness and long-term protection of the land. Revenue sharing has been enacted, through modern treaties and other practices in many parts of the country. Coupled with appropriate environmental safeguards, it has been critical to securing First Nations' engagement on resource and infrastructure projects. Resource revenue sharing can be understood as honouring the spirit and intent of the treaties and the First Nations expectations of just treatment within Canada. The expectation that the wealth of the land will be shared with First Nations has been articulated by First Nations leaders from the beginning of the treaty process and is now deeply, but not uniformly, imbedded in Canadian practice. There is no doubt that expectations of the sharing of resource wealth is important to First Nation approaches to the commencement of resource-related projects, but less significant in the longer term. For many First Nations, this principle of wealth sharing is imbedded in the treaties, re-enforced in Section 35 of the *Constitution Act* (1982) and is integral to First Nations relations with the Crown and resource companies. (It needs to be said, highlighting a point that will be raised in detail later that this sharing did not occur historically, contributing to the multi-generational poverty and marginalization of First Nations people in Canada.) Put simply, some First Nations hold consistently to the belief that resource projects can be undertaken, but only with assurances of appropriate environmental protection and assurances that benefits will accrue to the First Nations.

#### **4.0 The Enbridge Line 3 Pipeline**

9. The proposed replacement of the Enbridge pipeline through Southern Manitoba is understandably of great interest to First Nations along the pipeline route, throughout the province and across Canada. What appears, on the surface, to be a simple pipeline replacement is, in the eyes of Indigenous people and communities, an opportunity to speak out about and to be engaged with a project that was initially undertaken with little or no consultation or engagement with the First Nations whose ancestral lands the pipeline crosses. The idea that this is a “replacement” project and thus not subject to the general standards of consultation and accommodation is not tenable in this situation and others, in that First Nations did not have a respectful and appropriate opportunity to state their case when the project was initially undertaken.

10. The National Energy Board (NEB), in agreeing to hear from First Nations people and governments, will encounter a rich and diverse explanation of the historical impact of research projects, a clear understanding of contemporary Aboriginal and treaty rights regarding consultation and the use of traditional territories, and diverse approaches to questions of resource development and commercial engagement on First Nations territories. This report provides a brief historical and legal background to First Nations engagement with resource and infrastructure projects and considers best practices in resource and infrastructure construction on and through Indigenous lands.

11. The announcement of the Line 3 replacement, expansion and repurposing project, which will see a shift from traditional oil to a mix of oil products and a major expansion in Enbridge's pipeline capacity, attracted the attention of people living along the pipeline corridor and in adjacent regions. Political realities have shifted over the decades, making it essential that the company and project proponents reach out to First Nations communities. Enbridge has done so to a certain extent. As one report observed:

Over 90 face-to-face meetings have been held regarding both the Line 3 Segment Replacement Program and the Line 3 Replacement Program. Project information is distributed during meetings and community drop-ins. Including Project information packages, Enbridge has distributed over 145 mail outs containing both Line 3 Segment Replacement Program and Line 3 Replacement Program Project-related information and Project contact information. Over 250 phone calls, emails and text messages have been placed regarding both the Line 3 Segment Replacement Program and the Line 3 Replacement Program.<sup>4</sup>

12. According to the company, officials have contacted First Nations who hold reserve lands within 1 kilometre of the Line 3 route<sup>5</sup> and have acknowledged that they have identified eight other Indigenous groups "For Engagement." As Enbridge approaches the National Energy Board for approval, it has taken some initial but less than comprehensive steps that recognize, implicitly and explicitly, that First Nations along Line 3 have a significant interest in the project.

13. The company's enumeration of a specific number of efforts at outreach does not, by itself, demonstrate appropriate outreach. Engagement with First Nations in areas covered by a development project requires extensive contact and a willingness to

---

<sup>4</sup> Enbridge, Line 3 Replacement Project Description (July 2014), p. 45.  
[http://www.enbridge.com/~//media/www/Site%20Documents/Delivering%20Energy/Projects/Line%203/Line\\_3\\_Replacement\\_Program\\_Project\\_Description.pdf?la=en](http://www.enbridge.com/~//media/www/Site%20Documents/Delivering%20Energy/Projects/Line%203/Line_3_Replacement_Program_Project_Description.pdf?la=en)

<sup>5</sup> *Ibid*, 35.

listen to and respect First Nations knowledge. The most effective consultations in Canada begin not with discussions of financial terms, employment arrangements and other technical details, but rather with efforts by project proponents to understand First Nations history, cultures and perspectives on the use of their traditional territories. A review of the historical and contemporary relationship between First Nations cultural, legal and political traditions, resource and infrastructure projects and evolving Canadian legal and political environments makes it clear that First Nations must play a more central role and that industry must recognize the crucial role of First Nations.. First Nations clearly expect a level of consultation that is much closer to that envisaged by First Nations from the time of the signing of the 19<sup>th</sup> century treaties, in the evaluation of project plans related to their traditional lands.

## **5.0 First Nations' Approaches to Resource-Related Projects**

14. As a starting point, it is useful to provide an overview of contemporary First Nations' engagement with resource and infrastructure projects. First Nations, Metis and Inuit people have become active participants in this important economic sector. While media attention focuses on protests and legal challenges, a growing number of Indigenous communities have agreed to participate with the resource projects. They do so, in large measure, because employment and economic considerations leave them with little alternative. Agreement comes from economic necessity rather than enthusiasm for development.

15. Indigenous people have long been active participants in the resource economy,

maintaining patterns of trade that long predated the arrival of Europeans. The commercial opening of the west during fur trade was founded on mutually beneficial arrangements with First Nations and the Metis. Current partnerships build on that base. With the advent of the agricultural frontier and the development of commercial mining, timber and hydroelectric operations, First Nations were pushed to the margins, their interests almost completely ignored by governments and resource companies. Over the last few decades, largely because of Supreme Court decisions that recognized First Nations rights, Indigenous people and communities have become more active participants in the Canadian resource economy.<sup>6</sup> Beyond the technical requirements created by Supreme Court decisions, the greater societal recognition of the cultural attacks on First Nations – as long asserted by First Nations and has described as cultural genocide by both the Truth and Reconciliation Commission and the current Chief Justice of the Supreme Court of Canada, Justice Beverley McLachlin – has re-enforced the fundamentally important role of First Nations people.

16. There are many signs of this important transition, which for reasons that will be explained later, has occurred over the past 30 years. There are over 250 Aboriginal Economic Development Corporations in Canada, a growing number with investable assets in the hundreds of millions of dollars. Indigenous groups have begun to purchase equity shares in significant resource projects, seeking to garner a greater portion of the economic return for their communities. Indigenous entrepreneurship has likewise expanded rapidly, through joint ventures with resource companies, preferred procurement

---

<sup>6</sup> Ken Coates and Brian Lee Crowley, “New Beginnings: How Canada’s Natural Resource Wealth Could Re-shape Relations with Aboriginal People,” (MacDonald-Laurier Institute, Ottawa, May 2013), 2.

contracts with developers, investments of funds received from claims, specific claims, gaming, Treaty Land Entitlement settlements and other sources. There has been a major surge in commercial activities, and the growth of entrepreneurial activity by Indigenous individuals.<sup>7</sup>

17. While there are First Nations that are not supportive of specific resource projects near their communities and/or on their traditional territories,<sup>8</sup> the more common approach has seen to be open to negotiations and, if conditions warrant, agreements with developers and governments.<sup>9</sup>

18. First Nations typically go into these agreements with trepidation, seeing agreements as a means of producing income to poor and marginalized communities. The issue is one of economic survival, undertaken at a time, when traditional First Nations' use of the land has been undermined by widespread development, the socio-cultural disruption of the communities and the effects of being left out of major decisions that affect First Nations. In general – and recognizing that each First Nation, Metis or Inuit

---

<sup>7</sup> Wanda Wuttunee, *Living Rhythms: Lessons in Aboriginal Economic Resilience and Vision*, Toronto: McGill - Queen's University Press: 2004, 102. Indian and Northern Affairs Canada, "Canada Celebrates Historic TLE Settlement Agreement with Sturgeon Lake First Nation and Province of Saskatchewan," in About INAC – Media Room: 2007 News Releases, <http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2007/2-2897-eng.asp>, June 19, 2007.

<sup>8</sup> Nick Logan, "Anti-shale gas protesters vow not to give up after Rexton, N.B. clash," Global News, <http://globalnews.ca/news/911929/anti-shale-gas-protesters-vow-not-to-give-up-after-rexton-nb-clash/>.

<sup>9</sup> See negotiations for the Inuit Impact and Benefits Agreement as part of the Baffinland's Mary River project: IIBA wraps up for Baffinland's Mary River iron ore mine, *CBC News*, <http://www.cbc.ca/news/canada/north/iiba-wraps-up-for-baffinland-s-mary-river-iron-ore-mine-1.1368059> and the Tahltan's creation of the Tahltan Resource Development Policy to guide their policy development: British Columbia Aboriginal Business and Investment Council, *Tahltan Nation*, <http://www.bcabc.ca/content/tahltan-nation>. First Nations and Natural Resource Development Advancing Positive, Impactful Change, *A Report of the Working Group on Natural Resource Development*, February 2015, available online at: <http://www.afn.ca/uploads/files/Working-Group-on-Natural-Resource-Development-Report.pdf>.

community responds to natural resource and infrastructure projects based on the nature of the proposed activities, their socio-economic realities, and the structure and potential economic, social and cultural impact of the project. Indigenous engagement can be summarized as follows:

### **5.1 The Sacredness of the Land**

19. The starting point for most First Nations is a foundational commitment to the sacredness of the land and the responsibility of current community leaders to their children and grandchildren. As Elder D’Arcy Linklater observed, “There is a lack of openness and recognition from developers when it comes to claims of sacredness. I do not think any First Nations person or community in Canada has been respected for claiming our sacredness. I think we should ask the Chiefs to push that, to develop our consultation laws on the way we want to be consulted. We know the heart and soul of our land and our people. So it should be up to us, the way we want to be consulted with respect to development.” “When we speak, it is on behalf of our children and the unborn. The unborn are looking at us now – we are transforming our oral wisdom into writing for them. We have a sacred responsibility to them. Culture is not just trapping and fishing it is about spirituality.”<sup>10</sup>

### **5.2 Long-Term Perspective**

20. Indigenous communities assess the potential value and impact of any specific

---

<sup>10</sup> D’Arcy Linklater et al. “Ka’esi Wahkotumahk Aski- Our Relations With the Land: Treaty Elders’ Teachings Volume II” (2014). Importantly, this acknowledgement of multi-generational responsibility is built in explicitly to First Nations responsibility for land stewardship in the 2014 Tsilhqot’in decision of the Supreme Court of Canada.”

project in a long-term perspective. First, they consider any proposed development in the context of the long-term impact of earlier resource and infrastructure projects. Secondly, they review proposals before them with a view to the multi-generation benefits and implications for their communities and members. As Elder D'Arcy Linklater observed on that point: “We are here doing this for our children. As I was told by my father, “When you go out for your meetings do not forget that you are there to speak on behalf of your children, your grandchildren that have yet to arrive and for those that are still in the spirit world so they can come into this world in a good way. They are the ones that are going to take your place.” This is what my father has told me and to respect each other and not interfere when somebody is talking.”<sup>11</sup> Thirdly, and reflecting their role as stewards of their traditional territories, they review proposals with a particular concern for the impact on the land, wildlife and the environment at large. Their view of a specific resource project is not, therefore, limited to the standard business or development cycles.

Indigenous communities are not automatically or uniformly opposed to resource development; indeed, most settlements face significant economic and employment challenges and are looking to create additional opportunities for their members.

### **5.3 Divisive Decisions**

21. The decisions about resources are often intense and divisive as communities struggle to find a balance the promise of jobs and the prospect for greater prosperity against the disruption of regional eco-systems and threats to traditional lifeways. Victor

---

<sup>11</sup> Linklater, page 7.

Spence of Tataskweyak Cree Nation (one of the “Keeyask Cree Nations” or KCNs) said “Keeyask will be the fifth generating station on the Nelson River. We can no longer live off the lands and waters in the way we used to. With this project we have a realistic hope that Keeyask can help us strengthen our identity and to improve the social and economic hardship that we struggle with daily, while being constructed and operated in an environmentally sustainable way, with appropriate mitigation and monitoring measures to ensure ongoing respect of the environment”.<sup>12</sup>

22. Other First Nations have echoed these sentiments. Ted Bland (now Chief of York Factory First Nation also KCN) said “When people had an opportunity to speak about the impacts that they have felt, it was emotional for a lot of people. And not everybody agreed to move forward, but a majority of people acknowledge that there was (sic) impacts, acknowledge that this is not something that we can hold onto in our hearts.”<sup>13</sup> George Neepin (Fox Lake Cree Nation) offered similar sentiments: “So it was not with eagerness or absence of thought that we chose to become partners in a major hydroelectric project. Rather our pride in our history, culture and values makes us cautious and apprehensive as we approach this new phase in our history.”<sup>14</sup>

#### **5.4 Active Participation**

23. Indigenous communities insist on real and significant participation and have a strong sense of financial and other commercial agreements in other jurisdictions. The

---

<sup>12</sup> Spence, Keeyask Transcript, November 6 2013 at 2413.

<sup>13</sup> Bland, Keeyask Transcript, November 6 2013 at p 2270-1.

<sup>14</sup> Neepin, Keeyask Transcript, November 6 2013 at p 2360.

engagement may include some or all of the following: early and sustained discussions on the nature and extent of the project, concrete benefits to their communities (in the form of cash, business opportunities and employment and training), and active involvement with environmental assessment, monitoring and remediation. It can be argued that many First Nations are looking for partnerships and engagement rather than a payment of fixed sum of money.

## **5.5 Environmental Concerns**

24. Indigenous communities understand, based on lengthy experience, that resource developments have environmental impacts and carry significant environmental risks. They always understood that there can also be significant economic and other benefits to their people, a position that the Supreme Court of Canada has only enforced in recent decades. First Nations judge each resource project, therefore, by balancing the environmental costs and dangers against the anticipated financial and employment returns. In many cases — Indigenous communities and governments appear to have determined that the benefits outweigh the risks.<sup>15</sup> The complexities of the agreements are affected by divisions within First Nations populations and the specific nature of the projects. As a result, the existence of an IBA makes it difficult to define the acceptance of an IBA as representing acquiesce.<sup>16</sup>

---

<sup>15</sup> There are close to 400 impact and benefit agreements (IBA) currently in place across Canada with mining companies alone.

<sup>16</sup> There are communities, such as the Tahltan in Northwest British Columbia, that have accepted substantial developments on their lands. The community was divided over the decision to proceed with these projects in collaboration with industry, with several of the elders occupying the band offices in protest.

25. In other instances, particularly when the projects in question impinge on or threaten sacred or culturally specific traditional territories, First Nations have made a concerted (and sometime successful) effort to stop specific projects. In such situations, the First Nations are prepared to use a variety of civil, political and legal mechanisms to utilize and defend their Aboriginal and Treaty rights. It is important to note here that all Canadians have the right, if not the obligation, to exercise their rights under Canadian law (and First Nations no doubt would prefer to exercise in full their rights under First Nations law). Exercising these rights and seeking a full explanation and test of these rights is not inappropriate or obstructionist, but rather is legitimate use of First Nations Aboriginal and treaty rights.

#### **5.6 First Nations' Historical Experiences with Development Projects**

26. Indigenous peoples are profoundly shaped by their culture, custom and history. They have strong oral traditions, a collective responsibility for maintaining understanding about the past, and bitter memories connected to the impact of such government programs as reserve creation, restrictions on personal movement, limits on democratic rights, residential schools. There are strong memories of the many other intrusions of the *Indian Act*, a collective process that analysts, the 2015 interim report of the Truth and Reconciliation Commission and even the Chief Justice of the Supreme Court of Canadian, Justice Beverly McLaughlin have referred to as “cultural genocide,” First Nations people view contemporary opportunities through an historical lens. To a much greater degree than the Canadian public at large, First Nations contemplate their options based on the experiences of their ancestors and with a view to the impact on future

generation. This applies to their evaluation of resource and infrastructure projects.

### **5.6.1 Canada and the Development of the Prairies -- Treaties and Promises**

27. The signing of the numbered treaties between First Nations and the Crown, represented by officials delegated by the Government of Canada, was the defining 19<sup>th</sup> century event for First Nations in Manitoba. The treaties built off the Royal Proclamation of 1763, a British measure that recognized the nationhood of First Nations, their ownership of and responsibility for the land. First Nations took seriously their commitments to the Crown and saw these accords as being binding, mutually beneficial agreements between their people and the British Crown. The treaties were of fundamental importance to the First Nations, carrying sacred authority, for they represented an opportunity to articulate their desire to live and work in peace with the newcomers and to find an appropriate means of co-existing while continuing as proud and distinct societies. In their initial meetings with the representatives of the Crown, commencing a process that continues to the present, First Nations leaders and Elders underscored their responsibility to speak for their traditional lands and the wildlife with whom they had lived on those lands and to share the land and resources for mutual benefit. The First Nations accepted and honoured their role as stewards of their environment, a position that shows up routinely in discussions surrounding contemporary resource projects and their strong belief that First Nations did not relinquish either their rights or responsibilities to the land through the historic treaties.

28. The treaties came at a time of substantial crisis and transition in the prairie west. Imported European diseases had ravaged the Indigenous population, causing severe population loss and interrupting a long and favourable engagement with the fur trade. The destruction of the bison herds due to the construction of railways across the American west and mass slaughters of the once massive herds, attended by several decades of armed struggles between American Indians, settlers and the U.S. Calvary, brought even more dramatic change. With central Canadians and Americans moving into the region, and with settlers laying claim to the rich farmlands of the Red River and areas west, First Nations faced the difficult choice between contesting the intrusions into their territories or seeking some form of lasting accommodation with the newcomers. The Canadian purchase of Rupert's Land from the Hudson's Bay Company, a deal consummated in 1870 without engagement with the First Nations, created new pressures on the people of the prairie west.

29. In the first instance, the First Nations of what is now Manitoba temporarily blocked the movement of settlers onto their lands and demanded treaties with the Crown. The First Nations did not indicate a desire to permanently stop western settlement; rather, they wanted to protect the land and their rights to their lands, gain the resources needed to respond to the new economic order, and prepare for a peaceful and respectful migration of newcomers onto the prairies. When the representatives of the Crown arrived to negotiate Treaty 1 and Treaty 2 in 1870, they came with a fixed idea – and a prepared text -- of the conditions of the proposed accords. The First Nations agreed that treaties

were necessary, but they pressed the government for additional terms, clearly demonstrating that they had a specific agenda and detailed expectations of what they wanted from the Crown in return for the shared use of their traditional lands. They also sought education, medicines, farm equipment and the like – the means to allow them to adapt to the new economic realities. The Crown, through the Government of Canada, agreed, to what became known as the “outside promises.”

30. The First Nations’ first sustained experiences with the Government of Canada and with the subsequent implementation of the treaties proved far from positive. The Government of Canada imposed reserves and moved First Nations people onto them. They initially stalled on the recognition of the outside promises. More generally, and with what scholars have referred to as the “iron hand,” Canadian authorities attempted to force Indigenous conformity to government dictates.<sup>17</sup> What the First Nations assumed to be a collaborative partnership in the West, based on recognition of First Nations treaty rights and shared stewardship of the land and its wealth, turned out instead to be a difficult transition to life under government control.

31. The intensity and destructive impact of the transition for the plains First Nations is often underestimated. As late as the 1860s, the First Nations and Metis continued to hunt the bison, albeit with declining success, and had few constraints on their movements and actions. They fished, travelled, attended cultural events, ceremonies and otherwise followed traditional practices and patterns. There were no restrictions on cultural

---

<sup>17</sup> This subject is covered extensively in Daschuk , *Clearing the Plains*. See also Truth and Reconciliation Commission, *Interim Report* (Ottawa; TRC, 2015).

practices and few effective government controls (and those in place were exercised by the Hudson's Bay Company, a chartered British company). First Nations participated actively in the regional fur trade economy.

32. Two decades later, conditions had changed dramatically due to government action coupled with population and environmental pressures. The non-Indigenous population of Manitoba, still a "postage stamp" province,<sup>18</sup> jumped from slightly more than 25,000 in 1871 to over 62,000 ten years later and more than 150,000 in 1891. Settlers had spread out from Red River/Winnipeg and now occupied a growing amount of prairie farmland. Many reserves had been established and the Government of Canada, through the Department of Indian Affairs, was actively moving First Nations onto these smaller territories and enacting other restrictions on their movement and access to their traditional resources, land and economic opportunity. The bison herds had virtually disappeared from the prairie west, undermining traditional First Nations and Metis harvesting. Hunger and food shortages had become commonplace. The negative cultural, economic and social impacts that resulted from the loss of land, the limitations on economic opportunity and decimation of the bison, continued in subsequent generations.

33. Many First Nations made a concerted effort to adjust to the new agricultural economy, experiencing more success than anticipated despite difficulties securing the promised food, agricultural equipment and training. Indian Affairs introduced residential

---

<sup>18</sup> The initial boundaries of Manitoba encompassed a province that was only 130 miles, measured East to West, and 110 miles South to North. A series of boundary extensions moved the borders to the East, West and North.

schools in the 1880s, promising to meet the educational needs of First Nations by removing the children from their parents, launching a process of intentional cultural destruction that had major multi-generational consequences for First Nations students, families and communities.<sup>19</sup>

34. The passage of time would demonstrate the full impact of this early post-treaty transitional phase. What stands out with reference to contemporary development issues are the simple facts of dramatic and even traumatic transition in the region and the unreliability of government commitments to the First Nations people of the west. First Nations, having learned tragic lessons from armed resistance of American Indians in the United States, gambled on better results from negotiated treaties and peaceful co-existence. This approach worked to the extent that conflict was minimal and government; it did not, as hoped, put First Nations on an equitable footing with non-Indigenous peoples and did not provide for economic and cultural independence.<sup>20</sup>

### **5.6.2 Railways: The West's First Infrastructure Project**

35. Canadians understand the historical significance of the construction of the Canadian Pacific Railway in the aftermath of the Canadian purchase of Rupert's Land. What is rarely discussed is the First Nations' perspective on the building of the railway.

---

<sup>19</sup> Ibid.; TRC, *Interim Report of the Truth and Reconciliation Commission*.

<sup>20</sup> For a summary of the Treaty process, see J.R. Miller, *Compact, Contract and Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009). See also Gerald Friesen, *The Canadian Prairies: A History* (Toronto: University of Toronto Press, 1984). See also James Daschuk, *Clearing the Plains: Disease, Politics of Starvation and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013).

The treaties had, in the eyes of the Government of Canada resolved questions of Indigenous control over their traditional territories; First Nations had a different understanding of this process, believing that the treaties recognized their sovereignty and assured them of an ongoing role in the governance of their traditional territories. The race to complete transcontinental railways across the United States had alerted all, including Indigenous people, to the stakes, speed and disruptive capabilities of the railways.

36. Little was done across the West to prepare Indigenous peoples for the impact of construction and subsequent operation of the railways. What was, to most Canadians and an admiring world, a remarkable feat of engineering and creative (and occasionally corrupt) commercial finance, was to First Nations a disruptive force on previously unknown magnitude. Thousands of settlers followed the railway line westward. New communities sprung up along the route, attracting many thousands more who sought to prosper by serving the farming economy.

37. First Nations were not given an opportunity to speak out about the specifics of the railway projects. They had no say in the selection of the route or the potential avoidance of culturally important or key harvesting sites. It was assumed that First Nations would contribute significantly to the construction labour force – but few Indigenous people participated economically in the construction. The railway paid no royalties, no license fees, and no rent for the use of lands. Instead, First Nations, their economy devastated by the destruction of the buffalo herds and their population depleted by the combination of

resource depletion and imported diseases, received thousands of people on their territories. They experienced the destruction of harvesting habitant and saw vast expanses of the prairie west converted into farmland. First Nations witnessed the commercialization of their territories in manner that few had ever anticipated.

38. This, the first major infrastructure project in Western Canadian history, happened to the First Nations and not with the First Nations. Both at the time and in retrospect, the railway construction did not serve the interests of the First Nations. The Canadian legal and political structures of the time did not require or permit Indigenous participation. As would happen frequently in subsequent years, Indigenous people were left with the negative consequences of major projects while receiving few if any benefits from the construction and operational activities.<sup>21</sup> The establishment of the permit system, which controlled First Nations movements off reserve, put a further barrier to First Nations participation in the emerging economy.<sup>22</sup>

### **5.6.3 Hydro Electric Projects**

39. In the decades that followed the construction of the Canadian Pacific Railway and subsequent railways, resource development expanded across the west. Commercial fishing opened on Lake Winnipeg and in other areas. Forestry operations commenced, as did mining activity. The development process did not shift from the railway experience, with no previous discussions with First Nations and only limited Indigenous participation

---

<sup>21</sup> This is covered in Daschuk, *Clearing the Plains*, and Friesen, *The Canadian Prairies*.

<sup>22</sup> This topic is covered in J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 2000).

in the resource activities beyond unskilled labour positions.

40. In Manitoba, the most significant transition came with the development of the province's vast northern hydroelectric potential in the 1950s and 1960s. In short order, Manitoba Hydro and private contractors developed a series of major hydroelectric stations across the North. Following the rules of that age, which did not compel engagement with Indigenous people and communities, the developers moved forward without Indigenous consent, participation or assured benefits. What most non-Canadians saw as the quintessential sign of industrial progress – the exploitation of northern resource potential and the production of cheap energy - one of the key elements of the industrial age - was viewed very differently by Indigenous people.

41. The northern hydro projects disrupted whole communities. Unplanned and uncompensated destruction of traditional harvesting grounds caused widespread hardship. The relocation of villages to government-planned settlements ushered in an era of social despair and cultural loss. Conflicts with non-Indigenous construction crews increased racial tensions across the region. The fabric of northern Manitoba First Nations lives had been ripped asunder.

42. Compensation eventually came for some First Nations, in the form of the Northern Flood Agreements, but only after extensive perseverance by Indigenous communities and governments through protests and legal challenges. The resulting accords delivered millions of dollars to Indigenous communities, many of which had

already suffered social dislocation and serious economic collapse. The compensation did not come soon enough, or with sufficient scale, to set right the dislocations that had occurred in the previous generations.

43. Over the decades since Manitoba joined Confederation, a great deal of resource wealth has been extracted from the area. First Nations benefit little from these developments and had no substantial input into the manner, timing and nature of the resource activities. The major lesson learned from the experience, particularly noticeable in the case of the northern hydro development projects, was that governments and developers gave little thought to Indigenous communities or to the impact of the developments on Indigenous peoples, life-ways and economies. Provincial prosperity had, for generations, come at the expense of First Nations people, with little thought given to the participation of Indigenous communities in the economic development of the region.

#### **5.6.4 Modern Infrastructure Projects**

44. The railway proved to be but the first of the many infrastructure initiatives that would reshape Manitoba and the prairie west over subsequent decades. The advent of the automobile launched the slow development of a highway and road network across the region. A commitment to region-wide opportunity sparked an aggressive 20<sup>th</sup> century campaign to bring telephone and electrical services to the rural West. The discovery and development of oil and natural gas in Alberta and other parts of the West resulted, over several decades, in the construction of thousands of kilometers of pipelines across the

region. Add to this daunting list major public and private investments in telecommunications, airfields, and the like and it becomes clear that infrastructure development has been a hallmark of 20<sup>th</sup> and now 21<sup>st</sup> century economic development in Manitoba and the rest of the west.<sup>23</sup>

45. These projects, each hailed as a central element in the modernization, competitiveness and general improvement of economic and social well-being, occurred without significant engagement with Indigenous people.

46. Within a few generations, the traditional territories of First Nations had been criss-crossed by railways, roads, pipelines, transmission towers, and fibre optic cabling. Only in the past decade have First Nations begun to be consulted systematically about these developments and only recently have there been any significant efforts to secure First Nations consent, to provide payment or compensation, or to engage Indigenous peoples in a significant and sustained way in the construction, maintenance and environmental care of these projects.

47. Governments have been very quiet on the question of Indigenous engagement,

---

<sup>23</sup> James Waldrum, *As Long as the Rivers Run: Hydroelectric Development and Native Communities* (Winnipeg: University of Manitoba Press, 1993); Frank Tough, *As the Natural Resources Fail: Native Peoples and the Economic History of Northern Manitoba, 1870 – 1930* (Vancouver: UBC Press, 1995); Morris Zaslow, *The Opening of the Canadian North, 1870 to 1914* (Toronto: McClelland and Stewart, 1971); Morris Zaslow, *The Northward Expansion of Canada, 1914-1967* (Toronto: McClelland and Stewart, 1988); Ken Coates and W.R. Morrison, *The Forgotten North. A History of Canada's Provincial Norths* (Toronto: James Lorimer, 1992).

until forced by the courts to seek First Nations opinions.<sup>24</sup> Much the same has been true of the private sector, although a number of companies understood the significance of First Nations participation sooner than governments as they sought a “social license” to proceed with their projects.<sup>25</sup> The processes –surrounding resource and infrastructure projects did not have much of a role for Indigenous peoples throughout much of the post-World War II period. Governments saw the use of natural resource wealth as integral to economic wellbeing and modernization and pushed an aggressive pro-development agenda. Without a recognized Canadian legal foundation for their active participation, Indigenous involvement was minimal in most cases. Business followed a comparable approach, working within the established legal and political framework and proceeding with a primary focus on commercial interests. This is the pattern of resource development that First Nations reflect upon when they contemplate contemporary requests for support for new projects. Throughout this period, there was no defined role for First Nations, no clear or included benefits, and no structured processes for including Indigenous people in the resource sector.<sup>26</sup>

## **6.0 The Changing Context for Resource Development on Ancestral Territories**

48. Much has changed in the time between the development of Manitoba’s northern

---

<sup>24</sup> Further, the government’s arrangements and regulations, by placing primary emphasis on corporations and government agencies, limited First Nations participation and thereby restricted the possibility of First Nations benefitting from the projects.

<sup>25</sup> The concept of social license suggests that permission to proceed with a resource projects requires some form of general societal consensus or broad societal support that the project can proceed. Social license extends beyond formal or governmental approval. A project may have secured all of the required permits but, under this concept, lack social license because of concerns from residents about the suitability of the initiative

<sup>26</sup> For a general overview of the patterns of Indigenous engagement with natural resource development in recent years, see Brian Lee Crowley and Ken Coates, *New Beginnings: How Canada’s Natural Resource Wealth Could Re-Shape Relations with Aboriginal People* (Ottawa; Macdonald-Laurier Institute, 2013).

hydroelectric dams and the present time. Indigenous people have been vocal in their commentary about the lack of engagement and participation during the Canadian resource boom of the 1950s and 1960s. Governments and companies, with no recognized legal requirement to consult with First Nations people, proceeded on the central assumption that resource development was a sign of societal progress, modernization and economic advancement. To the degree that Indigenous people factored into national planning, it was taken as axiomatic that general resource and industrial expansion would elevate Indigenous communities toward national economic norms. That assumption, which has been at the core of national economic policy for generations, did not work out at all. Indigenous communities rarely prospered from the resource activity – there was some short-term work and some First Nations communities became more engaged with certain projects – and the arrival of workers, the opening up of traditional territories, and the transformation of the regional economy caused substantial disruptions in northern conditions.<sup>27</sup>

49. Indigenous protests mounted, escalating when plans emerged in the 1970s for a major natural gas pipeline down the Mackenzie River valley and a competing proposed pipeline along the Alaska Highway. The Liberal government established two separate commissions, one led by Thomas Berger (Mackenzie River) and the other by Kenneth Lysyk (Alaska Highway), to investigate the viability of the respective routes and, more importantly, to gauge regional support for the projects.

---

<sup>27</sup> See, for example, Ken Coates, *Best Left as Indians: Native -White Relations in the Yukon Territory* (Montreal: McGill-Queen's University Press, 1993) and Robert Page, *Northern Development: The Canadian Dilemma* (Toronto: McClelland and Stewart, 1986).

50. The Berger Inquiry, in particular, tapped into deep Indigenous resentment about the proposed pipeline development. Indigenous residents along the pipeline routes articulated strong and consistent visions about regional participation in resource activity and expressed grave concerns about the socio-economic and cultural impact of major resource and infrastructure projects. The pipeline debates launched an expansion of environmental assessments and, even more importantly, the search for new means of engaging Indigenous people and communities in the project approval process.

### **6.1 The Mackenzie Valley Pipeline Inquiry**

51. The Mackenzie Valley Pipeline Inquiry (generally known as the Berger Commission),<sup>28</sup> initiated by Jean Chrétien, Minister of Indian Affairs and Northern Development, represented a new approach to Indigenous issues and concerns. Formal hearings for the Mackenzie Valley Gas Pipeline Inquiry were conducted during 1974-75. Berger and his commissioners collected testimony from 300 experts on the North, including scientists, economists, oil company experts. Furthermore, the inquiry listened to the concerns and opinions of the residents of 35 communities. Indigenous and environmental organizations received funding to engage expert witnesses to appear at meetings of the Commission. The Commission encouraged Elders to share their views

---

<sup>28</sup> Thomas Berger, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry* (Ottawa: MVPI, 1977).

about northern development, often in their language and with evocative commentaries about the importance of the land, animals and indigenous ways of life.<sup>29</sup> The Commission essentially made a national Canadian event out of the pipeline investigations. The Commission was a central element in a time period that “thrust the North into the Canadian consciousness.”<sup>30</sup> Testimonies by Indigenous peoples and communities made clear the local opposition to extensive development on their lands and articulated the Indigenous peoples’ desire for land claims negotiations and for greater control over their territories.<sup>31</sup>

52. The Commission concluded that oil and gas development in the Mackenzie Delta and Beaufort Sea region would proceed in the longer term. The final report was positive about the feasibility of building an energy corridor along the Mackenzie Valley to Alberta but the Report recommended that a pipeline not be constructed immediately in the Mackenzie Valley. The report recommended the postponement of any pipeline construction until First Nations land claims could be settled and until Indigenous peoples supported the project. That recommendation, plus the changing economics of the project, led Ottawa to postpone the project. The inquiry was concerned about Indigenous employment and was not assured that the pipeline would provide meaningful and continuing employment for northern Indigenous people.<sup>32</sup>

---

<sup>29</sup> The story of the inquiry is told in Page, *Northern Development: The Canadian Dilemma*.

<sup>30</sup> Gurston Dacks, *A Choice of Futures: politics in the Canadian North* (Toronto: Methuen, 1981).

<sup>31</sup> J. Lotz, *Northern Pipelines and Southern Assumptions*, (Calgary: Arctic Institute of North America, 1977) at 202.

<sup>32</sup> M. Nuttall, *Canada’s and Europe’s Northern Dimensions*, (Oulu: Oulu University Press, 2009) at 73, available online at <http://www.cci.ualberta.ca/en/Conferences%20and%20Events/CanadasandEuropesNorthernDimensions/~media/cci/Documents/PagesfromCanadasandEuropesNorthernDimensionsEnergy.pdf> . See also Page, *Northern Development*.

53. In the minds of many Canadians, the Berger Inquiry changed the way Canadians viewed resource projects, primarily by focusing on the protection of the northern environment and the future of northern peoples. The report also highlighted the importance of giving Indigenous peoples time to negotiate land claims agreements with the Crown.<sup>33</sup>

## **6.2 Lysyk Report on the Alaska Highway Pipeline Proposal**

54. The Lysyk Inquiry into the Alaska Highway Pipeline project studied the socioeconomic impacts of the proposal, holding hearings across the Yukon over less than two months.<sup>34</sup> Mr. Lysyk's report made several specific recommendations to minimize any potentially negative impacts from construction. The report emphasized the issues surrounding the Yukon Native Brotherhood's land claim (launched officially in 1973), arguing that the "opportunity [lay] in capitalizing on the motivation that the pipeline provides to assign a high priority to the achievement of a settlement." The Lysyk report highlighted the risk that the "construction of the pipeline may begin before the Indian people can mobilize the financial and other resources provided by the settlement" in order to realize the advantage afforded by pipeline construction."<sup>35</sup>

55. The conciliatory report noted the importance of the James Bay Agreement in northern Quebec in signalling a new relationship between Indigenous peoples and the

---

<sup>33</sup> The Mackenzie Valley Pipeline Inquiry (also known as the Berger Inquiry) also provides a good, if not politically and legally dated, example of engagement with Indigenous peoples.

<sup>34</sup> Ken Lysyk at al, Alaska Highway Pipeline Inquiry (Yukon: AHPI, 1977)

<sup>35</sup> *The Alaska Highway Pipeline Inquiry*.

Crown and suggested that the arrangement provided a context for a similar arrangement in the Yukon. The report sought to identify common ground where non-Indigenous and Indigenous groups might work together to avoid negative outcomes at the community level.<sup>36</sup> By recommending the establishment of a heritage fund of \$200 million, the members of the inquiry clearly believed steps could be taken to mitigate the environment and socio-economic damage that might attend highway construction.

56. The Lysyk Inquiry report was optimistic. It argued that northern people could be participants in, and not victims of, infrastructure development. The commissioners suggest that construction of the proposed pipeline be deferred, and that a planning and regulatory agency, a body separate from both government and developers, be established. The need for “the Indian people to have time to organize themselves to use their resources effectively before construction of the pipeline commences” was central to this report’s recommendations.<sup>37</sup> One of the challenges noted by the Inquiry was to “minimize prejudice to land selection, while avoiding an unnecessarily rigid land-freeze in the Yukon.” The commission suggested that this challenge would be solved by taking a flexible approach to land selection for the proposed pipeline.

### **6.3 The Enbridge Pipeline to Norman Wells**

57. Shortly after the Mackenzie Valley Pipeline Inquiry in the 1970s, Enbridge received government authorization to build a 50,000-barrel-a-day oil pipeline from NWT

---

<sup>36</sup> Ibid.

<sup>37</sup> The word “Indian” in this context appears to refer to Aboriginal people, including First Nations and Metis.

to connect with the southern grid. Unlike the experience with the original Mackenzie Valley pipeline proposal, this time there has been an expansion of First Nations participation. Enbridge and other firms involved with the project developed Indigenous training and employment programs and provided contracts for local Indigenous owned suppliers. The Norman Wells pipeline was the first major northern energy megaproject in the NWT, providing a solid indication of the economic development potential of the sector for northern communities.<sup>38</sup>

58. The pipeline was constructed to Zama, Alberta, connecting a productive northern field to southern markets. The federal government mandated the use of northern companies and the hiring of northern workers. Ottawa made it clear that the success of the project would be judged, in significant measure, by the degree to which the Indigenous residents of Norman Wells and the region benefited economically. The federal government likewise supported additional social programs that were designed to minimize negative social impacts resulting from the construction.

59. The Norman Wells has been described as a useful model for pipeline development as it emphasized the importance of Indigenous involvement in infrastructure development. Earlier projects had not endeavoured to engage with Indigenous persons in any meaningful way, let alone consider such innovative initiatives as encouraging Indigenous equity in infrastructure projects. As one Dene leader noted from the Norman

---

<sup>38</sup> For the background on the Norman Wells development, see D. H. Breen, "Anglo-American rivalry and the evolution of Canadian petroleum policy to 1930," *The Canadian Historical Review*, (1981), vol. 62, pp. 283-303, 1981.

Wells project: “I saw a lot of what was going on in the Norman Wells project at that time, which has helped me to be a leader, to ensure that in future development projects, the interests of the people are at the table.”<sup>39</sup>

#### **6.4 Legal Challenges and Indigenous Empowerment**

60. Beginning with legal challenges over Indigenous land and resource rights in the 1970s, continuing through the patriation of the Canadian constitution, the negotiation of modern treaties and the start of a series of Indigenous legal challenges to Canadian law the last decades of the 20<sup>th</sup> century saw a major transformations in Canadian development processes. Land claims negotiations resulted in agreements in James Bay/Northern Quebec, in the Beaufort Sea region of Northwest Territories and, in the 1990s and 2000s, across much of the remainder of the NWT, in Nunavut, the Yukon and Labrador.<sup>40</sup>

61. Most of the provincial and territorial Norths, covered by 19<sup>th</sup> and early 20<sup>th</sup> century treaties (the numbered treaties), were not involved in these negotiations, with the government insisting that the earlier accords covered all resource exigencies. First Nations disagreed strongly, declaring that the spirit of the treaties and the limited nature of the original agreements provided ample room for additional negotiations.<sup>41</sup>

Furthermore, they argued, the spirit of the treaties called for a sharing of opportunities

---

<sup>39</sup> M. Nuttall, “Aboriginal Participation, Consultation, and Canada's Mackenzie Gas Project,” *Energy and Environment* vol. 9 (2008).

<sup>40</sup> Ken Coates, ed., *Aboriginal Land Claims in Canada: A Regional Approach* (Toronto: Copp Clark Pitman, 1992).

<sup>41</sup> Coates and Morrison, *The Forgotten North*. See also Rene Fumoleau *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11* (Calgary: University of Calgary Press, 2004 ).

and benefits, which committed the Crown to work cooperatively with the First Nations. Moreover, recent jurisprudence has confirmed the need for reconciliation under section 35 of the *Constitution Act* (1982) through which modern treaties can act as a “legal basis to foster a positive long-term relationship between Indigenous and non-Indigenous communities.” Modern treaties represent “nation-to-nation and government-to-government relationships”, and are defined by the goal of reconciliation between Crown and Indigenous peoples through the sharing of the lands, resources and natural wealth in a manner that is “equitable and just.”<sup>42</sup>

62. A series of legal decisions, particularly Supreme Court judgements including *Haida Nation* (2004),<sup>43</sup>, *Taku* (2004),<sup>44</sup> and *Tsilhqot’in* (William 2014),<sup>45</sup> transformed the role of First Nations people in the resource and infrastructure sectors. Indigenous people had demanded greater involvement in the development process and the Supreme Court agreed. The judgements recognized “duty to consult and accommodate” requirements, which put the onus on governments to ensure that Indigenous peoples had been properly informed about project plans, that adverse effects have been reasonably avoided or mitigated, and that Indigenous peoples had received appropriate compensation for any negative or disruptive impacts on their communities.<sup>46</sup>

---

<sup>42</sup> *Beckman v Little Salmon/Carmacks First Nation*, [2010] SCJ No 53, [2010] 3 SCR 103.

<sup>43</sup> *Haida Nation v British Columbia* (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 550.

<sup>44</sup> *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550.

<sup>45</sup> *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44. See also Ken Coates and Dwight Newman, *The End is Not Nigh; Reasons Over Alarmism in Analyzing the Tsilhqot’in Decision* (Ottawa: Macdonald-Laurier Institute, 2014).

<sup>46</sup> See D.G. Newman, “*Revisiting the Duty to Consult*” (Saskatoon: Purich Publishing, 2014); D.G. Newman, *Is the Sky the Limit, Following the trajectory of Aboriginal legal rights in resource development*, (Ottawa: Macdonald-Laurier Institute Publication, June 2015).

63. Empowered by the early decisions, Indigenous people pressed for additional recognition of their rights, winning many of the cases they brought before the courts.<sup>47</sup> Indigenous people won more court cases than they lost, building a substantial body of legal precedent that supported their position on the necessity of greater engagement in development processes. In the process, and with companies adapting to the new realities faster than most governments, a new order settled in around the Canadian resource sector. While the Indigenous people did not have a legally recognized veto – although many believe that they had such authority, particularly after the *Tsilhqot'in* decision – they nonetheless should exercise considerable influence over the resource processes in Canada.<sup>48</sup> The result has been in, slightly more than a decade, hundreds of agreements between resource companies and Indigenous communities. For some, the returns to the Indigenous peoples were substantial. While most of the agreements involved several millions of dollars, the larger projects attracted settlements of \$100 million or more.<sup>49</sup>

64. In addition, a number of the resource companies provided assurances, not all realized, of Indigenous employment, skills and training programs, special procurement

---

<sup>47</sup> See Bill Gallagher, *Resource Rulers: Fortune & Folly on Canada's Road to Resources* (Toronto: Lightning Source, 2010).

<sup>48</sup> See K Coates & D Newman, *The End is Not High: Reason over alarmism in analysing the Tsilhqot'in decision*, (Ottawa: The Macdonald-Laurier Institute Publications, September 2014), 21.

<sup>49</sup> For information about Cameco and Areva's Collaboration Agreements with Saskatchewan First Nations, see: Sean Willy, Collaboration Agreements: Building a 2nd Generation Agreement (Saskatchewan Mining Association AGM, 2013); Collaboration Agreement Between The Northern Village Of Pinehouse and Kineepik Metis Local Inc. and Cameco Corporation and Areva Resources Canada Inc., (12 December 2012), For an example in B.C., the Scwempemc First Nation reached an agreement with the B.C. government that allows for 37.5% of government revenue from the Mineral Tax Act to be shared with the First Nation: Stk'emlupsmec of the Scwempemc Nation Economic and Community Development Agreement, [www.newrelationship.gov.bc.ca](http://www.newrelationship.gov.bc.ca)

projects for Indigenous-owned and managed Indigenous companies, and community benefit commitments. Indigenous peoples have gained a significant role in the resource sector, with additional benefits for active participation in the approval, construction, operations, environmental oversight and remediation of major development initiatives. Resource companies, it must be noted, have struggled to meet their Indigenous employment commitments, in part due to long-term challenges with training and work experience in remote communities, themselves vestiges of the long term failures of government and church-managed First Nations education, and the multigenerational effects of ineffective government policy.

### **6.5 Concerns about Contemporary Projects**

65. Across Canada, Indigenous people and communities have assumed a much more critical role in the development of resource and infrastructure projects. In the case of initiatives ranging from the East Coast Pipeline<sup>50</sup> to an iron ore project on Inuit territory on Baffin Island.<sup>51</sup> Indigenous peoples have insisted, on substantial and meaningful participation in project evaluation and approval. Consultation processes are expected to be clear, thorough and meaningful. In certain cases, Indigenous people have been involved in environmental assessments, monitoring and remediation. Most Indigenous communities seek, and expect, respect for their rights and culture and traditions. Furthermore, they demand appropriate benefits, in the form of work, training,

---

<sup>50</sup> Shawn McCarthy, "Energy companies struggle with Aboriginal needs on pipelines," *The Globe and Mail*, 8 December 2013.

<sup>51</sup> "IIBA wraps up for Baffinland's Mary River iron ore mine," *CBC News*, <http://www.cbc.ca/news/canada/north/iiba-wraps-up-for-baffinland-s-mary-river-iron-ore-mine-1.1368059>.

commercial contracts and community projects, in return for their participation and support.<sup>52</sup>

66. As recently as the 1980s and 1990s, Indigenous people struggled to receive basic returns from resource and infrastructure projects occurring on their traditional territories. Buttressed by a series of favourable Supreme Court of Canada decisions, the legal and political landscape changed significantly. The transitions did not turn Indigenous communities into uncritical supporters of all major projects. Serious concerns remained and securing Indigenous support and participation required extensive consultations, negotiations and collaboration. New collaborative tools emerged, including company offers of opportunities for equity participation in the projects, and expanded involvement with environmental oversight.

Improving the nature of relationships is not a guarantee of project approval, especially in instances where significant cultural or environmental impacts are anticipated. In some instances, significant offers of compensation did not sway the Indigenous communities, particularly if the projects involved sacred or culturally significant lands or territories of particularly ecological or traditional importance. The Lax Kw'alaams First Nations' rejection of a promise of over \$1 billion in return for their support for a liquefied natural gas terminal on Lelu Island near Prince Rupert, British Columbia, is only the most high profile example of such a response to proposed project as well as an indication of the

---

<sup>52</sup> See Bram Noble, "Comfort monitoring? Environmental assessment follow-up under community–industry negotiated environmental agreements," *Environmental Assessment Review*, vol. 31 (2011), 17.

primacy of environmental protection for First Nations.<sup>53</sup>

## 6.6 Enbridge and Manitoba First Nations

67. In March 2014, Enbridge announced plans to replace its crude oil pipeline, Line 3 (Edmonton, Alberta to Superior, Wisconsin), a project estimated to cost \$7.5-billion, the largest ever by the firm. Enbridge has proposed building a pipeline to replace one that is nearing the end of its technical lifecycle, close to doubling the capacity of the line and changing the use from light oil to light and heavy oil, drawn from both conventional and unconventional sources.<sup>54</sup> The Line 3 project is being undertaken in the context of the Supreme Court decisions and the new political realities governing Indigenous engagement with resource and infrastructure projects.

68. There have, for example, been developments in the area of hydroelectric projects, where Indigenous people have gained equity interest in significant projects. The Government of British Columbia has offered financial incentives for Indigenous governments and groups to encourage their active engagement with natural gas pipeline construction, including a proposal to the First Nations Group Limited Partnership to secure a stake in the Pacific Trail Pipelines project and the Nisga'a Nation's agreements with the Prince Rupert Gas Transmission Ltd. Agreement relating to an Liquefied Natural

---

<sup>53</sup> Christopher Donville & Rebecca Penty, *B.C. First Nation rejects \$1.15 billion Petronas-led LNG deal: 'This is not a money issue'*, *Bloomberg News*, available online at: <http://business.financialpost.com/news/energy/b-c-first-nation-rejects-1-15-billion-petronas-led-lng-deal-this-is-not-a-money-issue>.

<sup>54</sup> See: Enbridge Pipelines Inc., Line 3 Replacement Program Project Description, July 2014, available online: [http://www.enbridge.com/~/\\_media/www/Site%20Documents/Delivering%20Energy/Projects/Line%203/Line 3 Replacement Program Project Description.pdf?la=en](http://www.enbridge.com/~/_media/www/Site%20Documents/Delivering%20Energy/Projects/Line%203/Line%203%20Replacement%20Program%20Project%20Description.pdf?la=en).

Gas pipeline.<sup>55</sup> In all cases, Indigenous people have had a significant role in the decision-making processes.

## **6.7 Modern Treaties and Indigenous Engagement in Resource Development**

69. Modern treaties create a more equitable framework for First Nations and governments through a series of provisions that address land and resource matters. Agreements encourage the negotiation of agreements between companies and First Nations, provide dispute resolution systems in the event that negotiations do not lead to agreements and create a higher level of legal certainty for governments, commercial proponents and First Nations community members.<sup>56</sup> Perhaps most significantly, they also provide a substantial role for Indigenous engagement on environmental questions and therefore greater local involvement in the protection of the environment. Several examples of major developments occurring in the context of modern treaties illustrate the manner in which these accords have transformed resource and infrastructure projects.

70. In the impact and benefit agreements, partnerships and collaborations outlined below, which include both new projects and redevelopment of existing operations and facilities, several key elements appear with some regularity, but not uniformly. These elements include:

- Financial compensation to the community;

---

<sup>55</sup> Aboriginal Business & Investment Council, Haisla First Nation, available online at: <http://www.bcabic.ca/content/haisla-first-nation>.

<sup>56</sup> While not necessarily appropriately applicable to the experiences of Manitoba First Nations see for example *Nisga'a Final Agreement, Chapter 19: Dispute Resolution; Yukon Umbrella Final Agreement, Chapter 26; Inuvialuit Final Agreement, Section 18.15*. See also: *Guide for the Management of Dispute Resolution Mechanisms in Modern Treaties* (Ottawa: Aboriginal Affairs and Northern Development Canada).

- Participation in environmental monitoring, evaluation and remediation;
- Employment commitments and skills training;
- Preferential business opportunities in the operations, service and supply fields;
- Resource revenue or taxation sharing;
- Equity shares;
- Lease and other payments.
- Support for Indigenous cultures, including traditional harvesting.

71. The review of several agreements emphasizes the general direction of resource-based arrangements and does not offer an opinion on the specific merits of any particular deal and implementation process.

### **6.8 Fort Good Hope Dene Community**

72. The community of Fort Good Hope is a Dene (community on the Mackenzie River. During the Mackenzie Valley Pipeline debate in the 1970s, Fort Good Hope had been at the centre of opposition to development. Although there was support for the project from Metis in the NWT and from a few Dene leaders, Dene opposition was quite strong. In the 1990s, the community faced a revival of the the original Mackenzie Valley Pipeline, called the Mackenzie Gas Project.

73. The Fort Good Hope Dene were one of five Indigenous communities that accepted a regional agreement called the Sahtu Treaty. The modern claims settlement agreement, signed in 1993, gave them substantial financial resources and set up a variety

of joint management boards that ensured First Nations of a role in decision-making. Local corporations managed land and capital; in Fort Good Hope, the Sahtu body was called Yamogha Incorporated. When the new Mackenzie Valley project was proposed, a consortium of local Indigenous development corporations, including Yamogha, formed an Aboriginal Pipeline Group (APG, discussed in more detail below), which intended to take an ownership position in the project.

74. At a Dene Nation Assembly in 2005, Dene youth representatives, opposing development, were rebuked by older leaders who suggested that times had changed and that it was important to “move ahead.”<sup>57</sup> It is hardly surprising that there are internal differences and even inter-generational debates about the best way to respond to resource pressures, as such divergent positions are commonplace in First Nations and non-First Nations communities when resource projects are proposed. These leaders indicated strong support for the pipeline. The issue for them was not ‘whether or not,’ but rather ‘how much can we get out of this.’

75. Despite the optimism of project proponents, the Dene community rejected the Impact and Benefit Agreement proposed by Yamogha Incorporated and Imperial Oil in 2006. In the subsequent debate, it became clear that the shared power structure did not conform to community expectations. Instead of preparing the community to negotiate effectively with developers, the Sahtu Treaty had created a divided power to Fort Good Hope. The community sought additional self-government authority, which would permit

---

<sup>57</sup> P. Kulchyski and W. Bernauer, “Modern Treaties, Extraction, and Imperialism in Canada’s Indigenous North: Two Case Studies,” *Studies in Political Economy*, vol. 93 (2014).

them to coordinate decision-making in the community, and effectively bring the business corporation fully under local political control.

## **6.9 Nisga'a of Northern British Columbia**

76. The Nisga'a Final Agreement,<sup>58</sup> signed in 2000, is one of the best known in Canada.<sup>59</sup> The Final Agreement recognized the Nisga'a Nation's ownership of approximately 2,000 sq. km of Nisga'a lands and provide a context for joint economic natural resource initiatives. It was also the first B.C. treaty to provide constitutional recognition in respect of an Indigenous people's Section 35 right to self-government. The Nisga'a entered into a benefits agreement related to the Prince Rupert Gas Transmission (PRGT) pipeline in October 2014. Through this deal, the Nisga'a Nation allowed for 85 km of the planned TransCanada Pipeline to run through Nisga'a lands.<sup>60</sup> The benefits agreement provided for significant direct financial benefits to the Nisga'a Nation. There as also money provided for capacity building and training. In addition to milestone payments and annual right of way payments, the agreement called for the Nisga'a to benefit from future success of the venture. The Nisga'a Nation also concluded a property tax agreement with the Province of B.C., meaning that the benefit agreement allowed the Nisga'a to receive PRGT property tax payments.<sup>61</sup> In addition, the benefit agreement

---

<sup>58</sup> Nisga'a Final Agreement, (27 April 1999).

<sup>59</sup> See A Rose, *Spirit Dance at Meziadin: Chief Joseph Gosnell and the Nisga'a Treaty*. (Madeira Park, B.C.: Harbour Publishing, 2000); W.T. Molloy, *The World is Our Witness: The Historic Journey of the Nisga'a into Canada* (Fifth House Publishers, 2006).

<sup>60</sup> Overview of Benefits Agreement for Prince Rupert Transmission Project, <http://www.nisgaanation.ca/sites/default/files/Overview%20of%20Benefits%20Agreement%20for%20PRGT%20Pipeline.pdf>.

<sup>61</sup> Government of British Columbia, Nisga'a Nation positioned for LNG opportunity, Press Release (27 November 2014), available online at: [http://www2.news.gov.bc.ca/news\\_releases\\_2013-2017/2014ARR0037-001783.htm](http://www2.news.gov.bc.ca/news_releases_2013-2017/2014ARR0037-001783.htm).

committed PGRT to provide the Nisga'a Nation with contracting opportunities for right of way clearing, camp services, security, and medical services on Nisga'a lands. The agreement also includes a role for the Nisga'a Nation's forestry operations in PRGT reforestation efforts.

77. The Nisga'a Nation has the opportunity to capitalize on future developments with the project, including the possibility of locating an LNG facility at the site on or near Nisga'a lands. The Nisga'a and PGRT also agreed to work together to establish a future natural gas distribution scheme to serve homes within the Nass Valley.<sup>62</sup>

## **7.0 Equity and Infrastructure Development**

78. Indigenous groups wishing to participate in major projects have increasingly considered taking an equity position or financial stake in the projects, a measure that some observers believe will result in increased independence and self-reliance in the First Nations communities. To similar effect, some First Nation leaders have called for a restoration of the resource equity sharing that underlay the First Nation relationship with newcomers prior to the numbered treaties.

### **7.1 Lac Seul Generating Station**

79. In February of 2009, the Lac Seul First Nation and Ontario Power Generation (OPG) agreed to share in the operation of the Lac Seul Generating Station. The partnership emerged from a 2006 settlement that dealt with hydroelectric power plants

---

<sup>62</sup> Sandra Gogal, et al, *Aboriginal Impact and Benefit Agreements: Practical Considerations*, 43 *Albert Law Review*, 129 (July 2005).

constructed on Lac Seul First Nations lands. The English River unit can produce approximately 52 million kilowatts of hydroelectricity per year (enough for 5,000 homes). This partnership established the foundation for the Lower Mattagami (Moose Cree) project described noted below. Besides providing renewable energy to thousands of Ontario homes, the generating station is a sustainable financial asset for the Lac Seul First Nation, who have a 25 percent share in the project.<sup>63</sup> According to the Chief of the Lac Seul First Nation, Clifford Bull, “this partnership has provided [the] community with a source of revenue that has enabled us to create economic opportunities, joint ventures, and training programs that have enhanced Lac Seul First Nation’s ability to move forward down the road to self-sufficiency and self-determination.”<sup>64</sup>

## **7.2 Moose Cree First Nation**

80. Some of the agreements with Indigenous communities focus on major re-development projects, or the upgrading and/or expansion of existing facilities. The Lower Mattagami project is a \$2.6 billion redevelopment project of a series of old generating stations north of Kapuskasing, Ontario.<sup>65</sup> It is one of the largest hydro projects in the north and is a crucial economic collaborator for Moose Cree First Nation. The project was designed to add 438 megawatts to the stations’ output, or enough electricity to power about 400,000 homes. As part of the deal, Moose Cree First Nation

---

<sup>63</sup> The arrangement is described in <http://www.aboriginalaffairsinfo.ca/business/aboriginal-communities-playing-a-leading-role-in-ontario>.

<sup>64</sup> <http://www.opg.com/news-and-media/news-releases/Pages/OPG-and-Lac-Seul-First-Nation-Celebrate-5-Years-of-Partnership.aspx>, 19 February 2014.

<sup>65</sup> “Moose Cree First Nation ratifies Amisk-oo-Skow Comprehensive Agreement,” *Nation Talk*, (20 May 2009).

secured a 25 per cent equity stake. The First Nation will share in the revenue from the power generation, equalling approximately 25 per cent of the incremental revenue from the expansion project.<sup>66</sup> Moose Cree businesses also did contracting work valued at close to than \$300 million during construction.<sup>67</sup>

81. Part of the Moose Cree capital comes from settlements of claims dating back to the construction of the first dams. The earlier project flooded traditional territories and displaced residents, producing many unresolved claims. Money from the settlement of these and other claims are being rolled into the new partnership. The Moose Cree can use income from the project to purchase additional equity stake. Chief Norm Hardisty Jr. of the Moose Cree First Nation spoke of his nation's experience partnering with industry to secure equity in major resource projects, saying, "This is what a treaty is all about. Being able to work together. Being able to share the lands and resources that are in our territory." In discussing the project, John Murphy, executive vice president of Ontario Power Generation PG, declared that OPG "fundamentally changed its approach" in dealing with Indigenous people. He continued, "We recognized in order to capture some of these hydro-electric opportunities such as this, we need a new model in interfacing with First Nations." He said. "This project is an important example of a First Nation equity arrangement. The deal will see money coming into the First Nation for years to come."

---

<sup>66</sup> OPG and Moose Cree start new hydro development, [http://www.thestar.com/business/2010/06/09/opg\\_and\\_moose\\_cree\\_start\\_new\\_hydro\\_development.html](http://www.thestar.com/business/2010/06/09/opg_and_moose_cree_start_new_hydro_development.html).

<sup>67</sup> OPG, Moose Cree First Nation mark milestone at new hydro project, CBC News, <http://www.cbc.ca/news/canada/sudbury/opg-moose-cree-first-nation-mark-milestone-at-new-hydro-project-1.2920105>

### **7.3 The Nisichawayasihk Cree Nation**

82. The Nisichawayasihk Cree Nation (NCN) signed an agreement with Manitoba Hydro in 2006. This agreement enabled NCN, which was involved in the construction of the project, to invest in the proposed Wuskwatim generating station. When the First Nations became a partner in the project, the community was assured of a share of the future revenues.

83. This arrangement encountered significant issues. The First Nation received an equity stake in the infrastructure project, which was hoped to bring NCN a solid financial return. But the recession, higher capital costs, lower than expected revenues from the export market and competition from shale gas in the export market challenged the financial viability of the project. A Manitoba Hydro report estimated that NCN's one-third share of Wuskwatim losses will be substantial, perhaps totalling \$134 million over 10 years.<sup>68</sup>

84. Since 2012, Hydro and NCN have been negotiating PDA Supplement No. 2, which seeks to restructure the partnership, building on Supplement No. 1 from 2010. According to a NCN newsletter, the supplement includes Hydro's offer of a \$2.5-million annuity that will continue to 2033. These payments may extend for 20 years, providing up to \$50 million. Manitoba Hydro noted that this annuity was intended to honour the

---

<sup>68</sup> "Manitoba Hydro sweetens pot on Wuskwatim for NCN," <http://www.winnipegfreepress.com/opinion/analysis/manitoba-hydro-sweetens-pot-on-wuskwatim-for-ncn-265014831.html>.

utility's commitment that NCN would benefit from the project. The money will come not from Wuskwatim but from Hydro's general revenues, with the costs borne provincewide.<sup>69</sup> Manitoba Hydro will recover the annuity payment costs from a percentage of NCN's annual Wuskwatim revenue..

85. Despite these issues, payments to the community were projected in 2014 to be about \$7 million annually from 2016 to 2048, and between \$10 million and \$30 million per year thereafter. The Wuskwatim process had other important key benefits. The NCN played a crucial role in designing the project, particularly convincing partners to reduce the level of the dam and thereby limit flooding.<sup>70</sup>

#### **7.4 The Keeyask Project**

86. With these and similar initiatives, like the Keeyask hydro-electric generation plant,<sup>71</sup> First Nations have been able to secure agreements that incorporated and respected traditional Indigenous knowledge, utilized western scientific knowledge and adjusted the projects to mitigate environmental dislocation while improving economic opportunities.

87. The Keeyask Project involves Manitoba Hydro and four Manitoba First Nations, working together as the Keeyask Hydropower Limited Partnership (KHLP). The [Joint Keeyask Development Agreement \(JKDA\)](#) outlines the terms of the collaboration,

---

<sup>69</sup> *Ibid.*

<sup>70</sup> See: Clean Environment Commission, Wuskwatim Generation and Transmission Projects (22 September 2004), available online at: [http://www.cecmnitoaba.ca/resource/reports/Commissioned-Reports-2004-2005-Wuskwatim\\_Generation\\_Transmission\\_Projects\\_Full\\_Report.pdf](http://www.cecmnitoaba.ca/resource/reports/Commissioned-Reports-2004-2005-Wuskwatim_Generation_Transmission_Projects_Full_Report.pdf).

<sup>71</sup> See: Manitoba Clean Environment Commission (spring 2014); Manitoba Public Utilities Board Needs For And Alternatives To (NFAT) Review of Manitoba Hydro's Preferred Development Plan – Final Report (June 2014).

focusing on a variety of economic, social and environmental issues. The project involves Tataskweyak and War Lake (acting as the Cree Nation Partners), York Factory, and Fox Lake. Under the terms of the accord, Manitoba Hydro will own at least three-quarters of the project and handle much of the administration and management. The four participating First Nations have the right to own the remainder of the facility.<sup>72</sup> To participate, each First Nation has to make a series of payments which could be converted from preferred to common shares.<sup>73</sup> (It appears that the First Nations will retain the lower risk preferred shares.) The JKDA was officially signed in 2009. A Working Group on Operational Jobs manages Indigenous employment targets.<sup>74</sup> On the contracting side, Manitoba Hydro has agreed that over \$200 million in contracts will be designated as Identified Work Packages. The utility will allocate 60% of selected work package contracts to CN, 20% to York Factory and 20% to Fox Lake, with the allocations based on the population of each participating First Nation.

88. The project is particularly noteworthy for its emphasis on First Nations-inspired environmental protection. The two significant licences, granted in 2014, that regulate the project were described by then Manitoba Conservation and Water Stewardship Minister Gord Mackintosh as being the "strictest licence of its kind." Federal Environment Minister Leona Aglukkaq issued an environmental assessment decision that declared that project "is not likely to cause significant adverse environmental effects"<sup>75</sup> A commentator

---

<sup>72</sup> Joint Keeyask Development Agreement, s. 2.2.4, available at [https://www.hydro.mb.ca/projects/keeyask/pdf/JKDA\\_090529.pdf](https://www.hydro.mb.ca/projects/keeyask/pdf/JKDA_090529.pdf), Manitoba Hydro, First Nations Partnership, [https://www.hydro.mb.ca/projects/keeyask/first\\_nations.shtml](https://www.hydro.mb.ca/projects/keeyask/first_nations.shtml).

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> John Barker, Keeyask Generation Project receives provincial Class 3 Environment Act licence approval and federal green light, Thompson Citizen, <http://www.thompsoncitizen.net/news/nickel-belt/keeyask->

described the project as having been through “the most thorough financial and economic evaluation of an industrial development in Manitoba history.”<sup>76</sup> After years of negotiations and preparation, work started on the Keeyask KHL project on July 16, 2014. When fully operational, the Keeyask Generating Station will produce an average of 4.4 billion kilowatt hours of renewable energy each year.<sup>77</sup>

### **7.5 Sts’ailes First Nation**

89. As with the Lac Seul Generating Station, the Sts’ailes First Nation partnership in infrastructure development emerged from regional partnerships. In this case, the B.C. government made a \$500,000 investment as part of the First Nations Clean Energy Business Fund. According to the B.C. government, “Revenue-sharing from FNCEBF projects is based on sharing tax revenues with local First Nations. By re-investing in First Nations’ economic activities, B.C. is working to close the social and economic gaps between First Nations and other British Columbians, and build strong, sustainable economies at the community level. In neither case is sharing revenue a new cost to industry.”<sup>78</sup>

90. The funding supports investment from Sts’ailes to Bremner Trio Hydro Corporation (BTHC, the developer of the facility) for the construction of two 25MW

---

[generation-project-receives-provincial-class-3-environment-act-licence-approval-and-federal-green-light-1.1371472#sthash.0qpqxAjD.dpuf..](http://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-clean-energy-business-fund-revenue-sharing-agreements)

<sup>76</sup> Ibid.

<sup>77</sup> John Barker, “Construction begins on Keeyask Generating Station,” Thompson Citizen, <http://www.thompsoncitizen.net/news/nickel-belt/construction-begins-on-keeyask-generating-station-1.1368508>.

<sup>78</sup> The details on the fund can be found here: <http://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-clean-energy-business-fund-revenue-sharing-agreements>.

hydro projects. Partners in the project consist of BTHC, Kingston Construction, Corpfinance International and Sts'ailes First Nation, with the latter a minority owner of the project. Sts'ailes revenue sources may include royalty revenues, equity ownership, one-time "trigger payments" once operations begin, as well as preferential contracting work.<sup>79</sup>

91. The Sts'ailes, which has more than 1,000 members, have also participated through equity holders in the Sakwi Creek hydro project, which provides backup electrical power to the reserve during power outages. It also receives royalties from two Innergex operations in the Harrison Lake area, (the 18-megawatt Tipella Creek and 22-megawatt Stokke Creek), with two more Innergex projects in the works (the 21-megawatt Tretheway Creek and 51-megawatt Big Silver Creek).<sup>80</sup>

## **7.6 The Pic River First Nation and the Nawiinginokiima Forest Management Corporation**

92. The Nawiinginokiima Forest Management Corporation (NFMC) offers another illustration of how Indigenous governments can take an economic interest in infrastructure development. One element is the management and maintenance of the Caramat Road that services the development . NFMC intends to contract out this work to the Pic River First Nation (which is pursuing separately a hydroelectric dam project in the

---

<sup>79</sup> Larry Pynn, First Nations series: Sts'ailes seek economic benefits in land of the Sasquatch, *The Vancouver Sun*, available online at: <http://www.vancouversun.com/mobile/business/news/First+Nations+series+ailes+stake+their+economic+claim+land/11106908/story.html>.

<sup>80</sup> First Nation Series: Sts'ailes seek economic benefits in land of the Sasquatch, Vancouver Sun, <http://www.vancouversun.com/business/First+Nations+series+ailes+stake+their+economic+claim+land/11106908/story.html#ixzz3fzq2DSdT>

area).<sup>81</sup> The 93-kilometre gravel road, though historically important had been closed in 2010 following a major washout. NFMC chairman Daryl Skworchinski said the road will be utilized both for industry and public use.<sup>82</sup>

## **8.0 Indigenous Engagement with Pipeline Development**

93. The Government of British Columbia recently established several natural gas pipeline benefit agreements with select First Nations in the province. According to the agreements, the primary projects are the Prince Rupert Gas Transmission Project and the Coastal Gaslink Pipeline Project (a TransCanada initiative).<sup>83</sup> B.C. Minister of Aboriginal Relations and Reconciliation John Rustad noted that the government had “been holding discussions with more than 30 First Nations for infrastructure specific to natural gas pipelines and anticipate that other First Nations will realize the opportunity.”<sup>84</sup>

94. The agreements, such as those signed by the Gitxaala First Nation, Kitselas First Nation and Yekooche First Nation offer initial, one-time payments upon signing, 50 percent of the remaining payment when construction of a pipeline project begins and remainder once the pipeline project is in operation. The one-time benefit payments are released once the First Nations’ signal to the Province they want the agreements to come into effect. The amount of compensation and total benefits depends on the particular First Nation and the specific projects.

---

<sup>81</sup> Ian Ross, "North shore road reopened under new management." *Northern Ontario Business* Sept. 2014: 36. *General OneFile*. Web. 11 May 2015.

<sup>82</sup> Ian Ross, "North Shore road reopened under new management", <http://www.northernontariobusiness.com/Industry-News/transportation/2014/09/North-Shore-road-reopened-under-new-management.aspx>.

<sup>83</sup> For a list, see: Natural Gas Pipeline Benefits Agreements: <http://www2.gov.bc.ca/gov/content/industry/>.

<sup>84</sup> <http://cfnrfm.ca/three-first-nations-sign-lng-pipeline-benefit-agreements/>

95. Consider the case of the Kitselas First Nation, which receives the following benefits as part of the Coastal Gaslink Pipeline:

- Cash payments of \$1.38 million total (approx.)
  - \$230,000 one-time payment upon signing or effective date
  - \$575,000 when pipeline construction begins
  - \$575,000 when the pipeline goes into operation
- Share of \$10 million annually after the pipeline project is in operation.<sup>85</sup>

96. Many pipeline projects are much higher profile than the ones discussed previously. These include TransCanada's Energy East project, Enbridge's Northern Gateway, and the Mackenzie Valley pipeline.

### **8.1 TransCanada Corps Energy East Pipeline**

97. The Energy East project, with an estimated cost of \$12 billion project is not currently subject to a specific equity stake for any of the First Nations on the pipeline's route, although the Company suggests that other beneficial arrangements are possible. According to one pipeline executive, the sheer scale of the Energy East pipeline (4,500 km from Alberta to New Brunswick), and the major differences in degree of impact among the Indigenous communities along the route make the equity option too complicated for the project, which is aimed at moving oil-sands-derived crude to Eastern

---

<sup>85</sup> Melissa Shaw, Three First Nations Sign LNG Pipeline Benefit Agreements, *CFNR Network*, available online at: <http://cfnrfm.ca/three-first-nations-sign-lng-pipeline-benefit-agreements/>.

Canada and eventually on to export markets. TransCanada suggests that there are other ways to achieve similar economic benefit without the complications of equity arrangements. They are considering sustainable First Nations employment and a measure of Indigenous control over the pipeline project.<sup>86</sup>

98. The Energy East project has faced a number of challenges. A report from the Manitoba Energy Justice Coalition suggests that the project poses a major potential risk to crucial waterways in the province.<sup>87</sup> The pipeline, for example, would partly run underneath an aqueduct carrying Winnipeg's drinking water from Shoal Lake near the Ontario boundary. The report's author concluded that the repurposed natural gas line to be used for the project is vulnerable to breakage. TransCanada challenged the assertion suggesting that the company already does a thorough inspection of the existing line with technology that can detect very small cases of erosion.<sup>88</sup>

## **8.2 Northern Gateway, Enbridge and Bitumen**

99. Another well-known project is the Northern Gateway pipeline that proposes to move bitumen from northern Alberta to a transshipment port on the Pacific Northwest Coast. Northern Gateway has generated extensive debate and sizable environmental and First Nations opposition, in large measure because of its substantial economic potential and the environmental issues associated with the production and shipment of bitumen. A

---

<sup>86</sup> TransCanada, Energy East Pipeline Project, available online at: <http://www.transcanada.com/energy-east-pipeline.html>.

<sup>87</sup> DM LeNeveu, Potential Impacts of the Energy East Pipeline on The City of Winnipeg, Manitoba Energy Justice Coalition.

<sup>88</sup> Chinta Puxley, Report: Energy East pipeline would threaten Manitoba's drinking water, *Macleans*, available online at: <http://www.macleans.ca/news/canada/report-energy-east-pipeline-would-threaten-manitobas-drinking-water/>.

number of analysts suggest the project's timeline is a prime example of the challenges faced by the government, industry, and Indigenous governments on major pipeline projects. However, there are differing perspectives on the nature of the controversies. Some point to the regulatory process and others to the lack of constructive dialogue on environmental risk.

100. Doug Eyford argued, in the review he conducted for the Government of Canada, that the Northern Gateway Pipeline project demonstrates how regulatory processes can become overly adversarial, between the Crown and industry on one hand and between Indigenous communities, governments and businesses on the other. Just one example is the environmental assessment process, which First Nations groups suggest does not adequately consider the breadth of potential impacts to their section 35 rights.<sup>89</sup>

101. By way of contrast, and drawing on the evidence from two government reports, Robert Hage explained that there has not been a constructive dialogue with First Nations on energy projects and that there has been no shared understanding across Canada of the systems in place to prevent and respond to oil spills.<sup>90</sup> Hage ultimately identified the need to overcome past oversights and to build public awareness while engaging in collaborative regional planning. Such collaborative planning could include establishing a true, independent citizens' advisory council with Indigenous membership, guaranteeing Indigenous involvement in all aspects of pipeline development and in particular oil spill

---

<sup>89</sup> D.R. Eyford, *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development*, (Ottawa: Natural Resources Canada, 2013).

<sup>90</sup> Robert Hage, Risk, Prevention, and Opportunity: Northern Gateway and the Marine Environment, March 2015, <http://www.macdonaldlaurier.ca/files/pdf/MLIHageNorthernGatewayPaper03-15-webready.pdf>.

prevention, working with the First Nations Financial Management Board to obtain Indigenous equity for projects such as Northern Gateway, and reviewing the costs and benefits of upgrading crude oil prior to overseas shipment.<sup>91</sup>

102. Financial considerations have also proven to be a significant barrier. The project has been seen by many as a prime opportunity to involve First Nations governments through equity participation.<sup>92</sup> In fact, equity opportunities have been suggested. Enbridge offered a 10% equity stake in the proposed \$5.5 billion project, over the next 30 years, to participating Indigenous governments. In addition, a trust has been proposed that could grow to \$100 million in 15 years.<sup>93</sup> Enbridge further claimed that 15% of the project's labour will be supplied by various Indigenous communities.<sup>94</sup>

103. The challenge on Enbridge's side involves the economic and environmental risks. There is a concern that the proposed shipping area along the B.C. north coast is not conducive to large ship traffic. To First Nations in the area, the risk of an bitumen spill to their traditional practices is simply too great. With development of the project seemingly at a standstill, it is apparent that First Nations opposition remains a significant challenge that is unlikely to be addressed, by money alone (if at all).

---

<sup>91</sup> Ibid.

<sup>92</sup> Brian Lee Crowley and Ken Coates, [The way to break the Northern Gateway logjam: aboriginal equity](#), *The Globe and Mail*, 3 January 2013.

<sup>93</sup> Claudia Cattaneo, Five B.C. First Nations reject Enbridge equity offer, *Financial Post*, available online at: <http://business.financialpost.com/news/energy/five-b-c-first-nations-reject-enbridge-equity-offer>.

<sup>94</sup> Enbridge: Northern Gateway Pipelines, Aboriginal Benefits Fact Sheet, available online at: [http://www.gatewayfacts.ca/~media/GatewayFacts/documents/FactSheet\\_AboriginalBenefits.pdf?la=en](http://www.gatewayfacts.ca/~media/GatewayFacts/documents/FactSheet_AboriginalBenefits.pdf?la=en).

104. While offering an equity stake is significant, it is not the only option available. Other suggestions that have been presented include the development of additional revenue streams and a template for further infrastructure development along with responsive environmental monitoring to limit potential risks and create further employment and revenue opportunities for First Nations.<sup>95</sup> In this instance, underlying First Nations' opposition to the shipment of bitumen across their territories and, especially, along the Pacific Northwest Coast remains strong.

105. The proposed equity arrangement goes beyond the standard impact and benefit agreement arrangements, in that it involves direct participation in ownership, a significant difference from the widely used impact benefit agreement (IBA), which is typically used to set out various arrangements between a proponent and a First Nation government. Some First Nations worried that Enbridge had expanded its equity agreement to include First Nations governments that would not directly be impacted by a pipeline rupture or oil tanker mishap or Métis groups that do not own land and do not have treaties.<sup>96</sup> The concern then appears that some groups would approve the project and gain from it, despite not being vulnerably affected by the potential risks. By having so many agree to the arrangement, it was argued that Enbridge had attempted to stifle the voice of First Nations by claiming those who have not signed the equity agreement were in the minority.

---

<sup>95</sup> Brian Lee Crowley and Ken S. Coates, *The Way Out: New thinking about Aboriginal engagement and energy infrastructure to the West Coast*, (Ottawa: Macdonald-Laurier Institute, May 2013).

<sup>96</sup> Shari Narine Sweet, "Wording of Enbridge equity agreement draws criticism", <http://www.ammsa.com/publications/alberta-sweetgrass/wording-enbridge-equity-agreement-draws-criticism#sthash.aja9Do9q.dpuf>.

106. As of December 2014, with concerns about the company escalating, Enbridge Inc. was offering significantly greater Indigenous participation and equity in the Northern Gateway oil pipeline, with the company eventually stepping back into more of an operator role. At the same time, discussions began regarding the movement of the project's control from Enbridge to a more independent entity, such as a limited partnership, governed by a board representing Enbridge, oil company shippers and Indigenous equity partners. In the face of First Nations rising participation in other projects, including the 33% stake in the now-shelved Mackenzie Valley pipeline, Enbridge responded by offering a greater ownership stake in the hope of belatedly securing greater Indigenous support for the project.<sup>97</sup>

107. As one analyst noted, negotiations at one point involved moving the project's control from Enbridge to a more independent entity, such as a limited partnership. The board would then consist of persons representing Enbridge, oil company shippers and Indigenous equity partners.<sup>98</sup> Another commentator highlighted the economic of Northern Gateway and the desire of the federal and provincial governments to engage Indigenous governments and people in helping to minimize environmental risks, an intervention designed to gain First Nations support for the project.

---

<sup>97</sup> Claudia Cattaneo, "Enbridge plans Northern Gateway shakeup, giving greater control to aboriginal partners", *Financial Post*, <http://business.financialpost.com/news/energy/enbridge-plans-northern-gateway-shakeup-giving-greater-control-to-aboriginal-partners>.

<sup>98</sup> Ibid.

108. Problems with other aspects of company operations affected the Canadian debate. The 2010 Enbridge oil pipeline spill in Michigan's Kalamazoo River revealed many issues, shifting the discussion about environmental protection. The 2010 spill required extensive and long-term clean-up, continuing years after the initial problem. In fact, in 2014 the Kalamazoo River was reported to still be affected by the oil spill.<sup>99</sup> This, in turn, has resulted in the recommendation by the US Environmental Protection Agency that bitumen pipelines be evaluated differently than the regular pipelines and that additional environmental protections be added, a perspective emphasized by the highly political Keystone Pipeline controversy between Canada and the United States.<sup>100</sup> A 2015 spill at a Nexen pipeline in Alberta created considerable reaction in Canada, including among First Nations concerned about pipeline development and operations in general.

### **8.3 The Mackenzie Gas Project**

109. The Mackenzie Valley Pipeline has a long history. In the 1970s, Indigenous opposition delayed the project. More recently, promising discussions providing the foundation for a larger Indigenous role in the project, including employment, environment monitoring and remediation and direct equity, but even this was not sufficient for the project to proceed. Following the failure in the 1970s, a completely different pipeline project involving Indigenous Aboriginal lands attracted the promise of a substantial increase in First Nations participation. When the Mackenzie Valley Pipeline

---

<sup>99</sup> Enbridge's Kalamazoo cleanup dredges up 3-year-old oil spill," CBC News, 6 September 2013. <http://www.cbc.ca/news/politics/enbridge-s-kalamazoo-cleanup-dredges-up-3-year-old-oil-spill-1.1327268>

<sup>100</sup> Elizabeth Shogren, "EPA: Tar Sands Pipelines Should Be Held To Different Standards National Public Radio," 24 April 2013. <http://www.npr.org/2013/04/24/178844620/tar-sands-pipelines-should-get-special-treatment-epa-says>.

came back into consideration in the early 21<sup>st</sup> century, a changed attitude was apparent. As one observer noted, “This time, northern aboriginal people are at the planning table. In a sense, we are now wearing two hats. One hat we wear identifies our traditional role as guardians and stewards of the land. The other hat represents our emerging role as business opportunity developers.”<sup>101</sup>

110. In order to facilitate Indigenous participation, the Aboriginal Pipeline Group (APG) was established by Indigenous governments from the Northwest Territories.<sup>102</sup> The APG created the Mackenzie Valley Aboriginal Pipeline Limited Partnership to represent Indigenous business interests. The APG signed a Memorandum of Understanding (MOU) with several major oil and gas companies as a partner on behalf of those governments. Through this consortium, APG secured a potential 33.3% interest in the pipeline while the oil companies hold more substantial interests in the oil fields and other infrastructures.<sup>103</sup> Long delays hampered the project, although for different reasons than in the 1970s According to APG, the pipeline was “badly needed” for employment.<sup>104</sup>

---

<sup>101</sup> Brian Lee Crowley, “Canada’s Resource Tide is In,” *Resource Works*, 12 June 2014. [http://www.resourceworks.com/canada\\_s-resource-tide-is-in-will-it-miss-the-boat](http://www.resourceworks.com/canada_s-resource-tide-is-in-will-it-miss-the-boat).

<sup>102</sup> See: Mackenzie Valley Aboriginal Pipeline LP, Advantage North, presentation at the Yukon Convention Centre, available online at: <http://www.vanhorne.info/files/vanhorne/Reid.pdf>.; Aboriginal Pipeline Group website, <http://www.mvapg.com/>.

<sup>103</sup> R.L.. Broiles, Imperial Oil Limited presentation to the Peters & Co. Limited, Energy Conference [http://www.imperialoil.ca/canada-english/files/news/n\\_s\\_speech060127.pdf](http://www.imperialoil.ca/canada-english/files/news/n_s_speech060127.pdf).

<sup>104</sup> <http://www.davidmckie.com/aboriginal-group-frustrated-by-mackenzie-valley-pipeline-delays-document-reveals/>.

111. The Mackenzie Valley pipeline was granted federal cabinet approval in 2011, following the National Energy Board granting a Certificate of Public Convenience and Necessity.<sup>105</sup>

However, the agreements with Indigenous partners were not sufficient to overcome a number of challenges, including delays in environmental assessments and approval.

112. Whereas the initial project was stalled by a lack of understanding between industry and Indigenous governments, the recent pipeline proposals stalled through a combination of timing, process and market factors. Given that APG is not an oil company, there has been some discussion of several Indigenous governments starting an oil company similar to APG in order to enhance their position. As the APG President noted further, “We’ve got to somehow build a stronger, trusting relationship between industry, aboriginals and the government. The only way to do that is we need to become partners in the industry.”<sup>106</sup>

#### **8.4 LNG Pipelines and the Province of British Columbia**

113. The development of Liquefied Natural Gas has emerged as the cornerstone of British Columbia’s economic planning and aspirations. The province has large quantities

---

<sup>105</sup> <https://www.neb-one.gc.ca/bts/nws/nr/archive/2011/nr07-eng.html>.

<sup>106</sup> *Ibid.* The Mackenzie Valley Pipeline also had a notable regulatory process. For instance, the Environmental Impact Statement was developed over three years. The assessment went through several important aspects of the project from impacts on the environment and wild life to the socio-economic impact focus of community wellness. What was also unique about the process is that it marked the first instance that an Environmental Impact Review was required to meet the combined statutory requirements of: The *Mackenzie Valley Resource Management Act* (MVRMA), the *Canadian Environmental Assessment Act* (CEAA) and the *Western Arctic (Inuvialuit) Claims Settlement Act*. The Mackenzie Valley pipeline was granted federal cabinet approval in 2011, following the National Energy Board granting a Certificate of Public Convenience and Necessity.

of natural gas in the North -East, potentially eager customers in Asia, and opportunities to build pipelines through B.C. to link supply with demand. The Government of B.C. has made the development of this resource a high priority and has encouraged First Nations engagement. The Provincial Government, for example, announced the signing of 28 agreements with First Nations that will see the sharing of resource revenues.<sup>107</sup> At this point, the details of many of the agreements are being kept confidential, although information about as eight agreements have been publicly released.

#### **8.4.1 Haisla First Nation**

114. This issue is particularly important for the Haisla First Nation, whose traditional territory is at the end of a proposed natural gas pipeline. The Haisla First Nation is in a unique position given strong Asian demand for liquefied natural gas. In the Asia-Pacific region, countries are increasingly turning to clean burning natural gas to produce power. In British Columbia, the Provincial government argues that the liquefied natural gas development will generate close to \$1 trillion in cumulative Gross Domestic Product (GDP) within British Columbia over the next 30 years (an assumption tested by the fall in energy prices in 2014-2015).

115. Two major factors put the Haisla Nation in a strong position. The Douglas Channel is ice-free, providing ready access for deep-sea vessels. The Haisla lands are

---

<sup>107</sup> Geoffrey Morgan, "First Nations LNG deals with B.C. will help in making final investment decisions, industry says," *Financial Post*, 11 May 2015.

also comparatively close to the source of the gas in northern BC and Alberta and can be connected to existing Canadian natural gas transmission facilities. This opportunities has drawn the Haisla into a series of projects, including:

1. Kitimat LNG (KLNG) (with Apache Canada and Chevron Canada)
2. Pacific Trail Pipeline (with Apache, Chevron and 14 other BC First Nations)
3. Douglas Channel Energy Project (with LNG partners)
4. LNG Canada (with Shell, Mitsubishi, Korean Gas and PetroChina)

The Kitimat LNG project includes an equity arrangement between the Haisla Nation and other partners. If it proceeds in full, it will result in the development of natural gas liquefaction, LNG storage and marine on-loading facilities, to be built on Bees Indian Reserve near Kitimat.<sup>108</sup>

116. The Haisla also signed an impact benefit agreement with the project proponents. This agreement included an option to purchase close to 1/3<sup>rd</sup> equity in the project. When Apache Corporation took over the project, the Haisla sold its share to the company for \$50 million. As of 2015, KLNG is jointly owned by Apache Canada Ltd. and Chevron Canada Ltd. In selling the Haisla equity stake, approximately two-thirds of the \$50 million was put into long-term investments with the rest of the funds shared equally by band members. To expedite the project, the Haisla worked with Canada and the Province of BC to create the Haisla Natural Gas Facility Regulations in January 2013.<sup>109</sup> The regulations were created under the *First Nations Commercial and Industrial Development*

---

<sup>108</sup> The Haisla view on this project is provided on their website at <http://www.bcabc.ca/content/haisla-first-nation>.

<sup>109</sup> Ibid.

*Act*,. This legislation permits the creation of regulatory system that cover reserve-based industrial lands and seeks to ensure federal and provincial engagement in subsequent monitoring and oversight. Another important aspect of LNG production is the Pacific Trails Pipeline. This line is designed to connect the Horn and Liard River basins in North Eastern B.C. to the liquefaction facilities on the Northwest Coast. The \$1-billion pipeline will be developed by the Pacific Trail Pipelines Limited Partnership (PTPLP). This project is also jointly owned by Apache Canada Ltd. and Chevron Canada Limited.<sup>110</sup>

117. The Haisla Nation was aware that challenges and delays would occur if the Pacific Trails pipeline group tried to concluding separate negotiations with each of the affected First Nations, as the communities would bring to the table their specific environmental, cultural and financial issues. The Haisla played a central role in bringing 15 First Nations together to create the First Nations Limited Partnership (FNLP).<sup>111</sup> The creation of a single commercial arrangement was deigned to maximize benefits for participating First Nations, improve the chances of the project proceeding, and provide long-term financial returns for the First Nations.

118. The initial agreement in 2009 provided for the following benefits for First Nations as part of the agreement:

1. The Province agrees to provide up to \$35 million for equity investment
2. PTPLP agreed to provide \$8.5 million to FNLP (First Nations)

---

<sup>110</sup> Ibid.

<sup>111</sup> “First Nations (PTP) Group Limited Partnership Comments on Issuance of Export License to Kitimat LNG,” 26 October 2011. <http://www.marketwired.com/press-release/first-nations-ntp-group-limited-partnership-comments-on-issuance-export-license-kitimat-1578170.htm>.

3. Cash flows are expected to be in the range of about \$540 million to \$553 million
4. The provision of a 30% ownership to First Nations<sup>112</sup>

119. As noted above, Haisla Nation sold its equity interest. In February 2013, the Province of BC, PTPLP and FNLP signed a revised benefits agreement that will provide the First Nations with \$200 million in total financial benefits over the term of the project.<sup>113</sup> The agreement is designed to ensure First Nations business and training opportunities, along with an option to acquire an equity interest in the project.

#### **8.4.2 Lake Babine First Nation**

120. In 2015, the Lake Babine First Nation signed its own pipeline benefits agreement as part of the TransCanada's Prince Rupert Gas Transmission project. The Lake Babine First Nation will receive about one-time payments during the construction phase and annual payments for the life of the pipeline.<sup>114</sup> Lake Babine Nation is also entitled to a share of \$10 million a year in ongoing benefits for First Nations along the pipeline route. According to Lake Babine's chief, "[t]his project meets Lake Babine Nation's conditions for consent: it can be built in a way that is safe for our territory and resources; it has been developed and will be built with our meaningful involvement; and it will bring significant economic benefits to our people."<sup>115</sup>

---

<sup>112</sup> FNLP briefing note, 2009, located at <http://www.turtleisland.org/news/kslproject.pdf>

<sup>113</sup> Apache Corporation press release, <http://investor.apachecorp.com/releasedetail.cfm?ReleaseID=742889>

<sup>114</sup> "TransCanada inks agreement for PRGT project with Lake Babine Nation," World Oil Magazine, 13 May 2015.

<sup>115</sup> Province of British Columbia Media Release, "First Nation, Province Partner on Natural Gas Pipeline," 12 May 2015 [http://www2.news.gov.bc.ca/news\\_releases\\_2013-2017/2015ARR0014-000658.htm](http://www2.news.gov.bc.ca/news_releases_2013-2017/2015ARR0014-000658.htm)

### 8.4.3 Kinder Morgan: Increasing Pipeline Capacity

121. The current Kinder Morgan proposal, perhaps the closest example to Enbridge's Line 3 project, calls for a major expansion of the Trans Mountain Pipeline, which runs from Strathcona County, Alberta to Burnaby, British Columbia. The proposed expansion would more than double current capacity.<sup>116</sup> Kinder Morgan's Trans Mountain project is viewed by governments and energy companies to be a means of breaking the Canadian energy industry's reliance on the U.S. export market, where the bulk of Alberta's crude is sold at an international discount. President Ian Anderson said that Kinder Morgan has reached "mutual benefit agreements" with 20 First Nations, seven directly along the pipeline route, which include measures for "prosperity-sharing" and that indicate the support of some First Nations for the proposal.<sup>117</sup> First Nations from the BC Interior, Fraser Valley and the West Coast have reached agreements.<sup>118</sup> Not all First Nations are on board, with particular opposition from the Tsleil-Waututh in British Columbia's Lower Mainland, whose traditional lands and waters are at the coastal terminus of the proposed pipeline.<sup>119</sup>

## 9.0 Examples from Other Jurisdictions

---

<sup>116</sup> <http://www.kindermorgan.com/business/canada/projects.aspx>.

<sup>117</sup> Derrick Penner, Trans Mountain project signs 20 First Nation agreements, but opposition remains, *The Vancouver Sun*, available online at: <http://www.vancouversun.com/Trans+Mountain+project+signs+First+Nation+agreements+opposition+re+mains/10809556/story.html#ixzz3h99HSmYW>.

<sup>118</sup> Aboriginal Project Benefits, available online at: <http://www.transmountain.com/aboriginal-project-benefits>.

<sup>119</sup> Jeff Lewis, Dissent in the Inlet: How an aboriginal group is determined to stop Trans Mountain's expansion, *Financial Post*, available online at: <http://business.financialpost.com/news/energy/dissent-in-the-inlet-how-an-aboriginal-group-is-determined-to-stop-trans-mountains-expansion>.

122. Indigenous peoples around the world are, like those in Manitoba, seeking to assert authority over traditional lands, protect the environment and secure decent returns for community members from nearby resource projects.<sup>120</sup> In countries, as in South East Asia, with minimal protection for Indigenous rights, opposition typically comes in the form of civil disobedience and public demonstrations. In others, as in the United States, where there is a strong legal foundation for the recognition of Indigenous sovereignty, Indigenous peoples have been able to secure substantial returns.

123. American Indian governments exercise their sovereignty in a variety of ways, from rejecting resource development on traditional territories to embracing the revenue-making potential of direct involvement. As an example of the first approach, Indigenous opposition to proposed port and infrastructure development in Alaska led directly to protests against the planned Alaska oil pipeline and, by forcing the government's hand, to the Alaska Native Claims Settlement Act of 1971. There is no single Indigenous response to resource projects or to Indigenous engagement with infrastructure, but rather a variety of approaches that reflect the specifics projects and the needs and aspirations of the Indigenous governments and people involved.

124. The Southern Utes are an excellent illustration of an American Indian tribe that has been able to develop a niche in the resource sector. Each year, the Southern Utes, whose reservation surrounds Ignacio, Colorado, get a share of the profits from a series of tribal business ventures. Years before, the Ute tribe, which controls large amounts of

---

<sup>120</sup> For a global comparison of Indigenous circumstances and encounters with development, see Ken Coates, *A Global History of Indigenous Peoples* (London: Palgrave Macmillan, 2005).

natural gas, struggled to establish itself as a legitimate part of the American energy industry and struggled with energy companies to open one of the first Native American gas-production operations.<sup>121</sup> Their investment strategies ran into opposition from their membership when they opted to reinvest most of the profits into real estate and energy ventures as far away as Hawaii and Canada. The investment decisions proved to be prudent. As of 2003, the Ute tribe had business interests with \$1.45 billion in assets (they are now estimated to be well over \$4 billion),<sup>122</sup> making it one of the richest American Indian tribes in history and one that is not reliant on gambling. This wealth allowed the Utes to develop its own infrastructure and community facilities, such as a fibre-optic network.

125. In the 1980's, energy companies implemented extraction technology that could pull natural gas from coal. The Southern Utes had substantial coal reserves. But this time the tribe did not want to rely on outside companies to extract the fuel. If the tribe controlled natural-gas production, the reasoning went, it would keep more of the revenue and profits. In the late 1990s, the tribe got a boost when Amoco, now part of British Petroleum, agreed to turn over a 32% working interest in 400 wells on the reservation in order to settle a lawsuit. The tribe now has stakes in pipelines controlling 1% of America's natural gas.<sup>123</sup>

---

<sup>121</sup> Ianthe Jean Dugan, "Business Empire Transforms Life for Colorado Ute Tribe," *Wall Street Journal*, 13 June 2003. <http://www.wsj.com/articles/SB105545319897604000>

<sup>122</sup> Shannon Shaw Duty, [Standing Bear administration plans to develop oil and gas](http://osagenews.org/en/article/2015/06/02/standing-bear-administration-plans-to-develop-oil-and-gas/), *Osage News*, 2 June 2015., available online at: <http://osagenews.org/en/article/2015/06/02/standing-bear-administration-plans-to-develop-oil-and-gas/>.

<sup>123</sup> Dugan.

126. As of 2007, the Ute tribe employed more than 600 people in several states and was expanding steadily. The Southern Ute's energy division owns 3,000 miles of pipelines, and it processes natural gas and delivers it to transmission pipelines and elsewhere.

### **9.1 Navajo Nation**

127. The Navaho Nation provides another example of Indigenous engagement with the natural resource sector. The Navajo Nation Oil & Gas Company (NNOGC) is owned and operated by the Navajo Nation. The NNOGC operates the Running Horse Pipeline in southeast Utah and northwest New Mexico and runs gas stations on the Navajo Nation under the Navajo Petroleum and Chevron brands. NNOGC owns and operates numerous oil and natural gas interests.<sup>124</sup> The following illustrates the extent of the NNOGC's financial impact<sup>125</sup>:

- 2014 revenues: \$155 million
- 2014 operating income: \$49 million
- \$450 million in assets

---

<sup>124</sup> Fact Sheet: Navajo Nation Oil and Gas Company, [http://www.nnogc.com/Forms/FactSheet\\_NNOGC\\_081114.pdf](http://www.nnogc.com/Forms/FactSheet_NNOGC_081114.pdf) .

<sup>125</sup> In 2014, Navajo Nation Oil and Gas reported their revenues were up \$156.3 million from the previous year, an increase of 16.8%. The added revenue increased the company's total assets from \$437 million to \$458 million and decreased liabilities from \$207 million to \$179 million.

The Navaho have other resource projects underway, including the Navaho Generating Station (with Peabody Energy) and the Kayneta Mine.

### **10.0 Indigenous Engagement with Natural Resource Projects**

128. These examples, drawn from across Canada and the United States, demonstrate some of the arrangements that Indigenous peoples have secured with major resource companies, including pipeline development firms. They illustrate a pattern of constructive, mutually beneficial arrangements that permitted construction to proceed with the support and engagement of Indigenous people and communities. In each instance, these agreements emerged from intense discussions, and often following difficult debates inside the Indigenous communities as well as lengthy negotiations with corporations and government agencies. Most of these developments emerged within the last two or three decades, following generations of Indigenous marginalization related to the use and occupation of traditional Indigenous lands.

### **11.0 Best Practice and Opportunities for Cooperation with First Nations**

129. Even with a history of resource development that has been disruptive and often traumatizing to Indigenous communities, Indigenous peoples and governments have been willing to work with governments and resource companies to use the resources on their ancestral territories. In instances of the redevelopment of earlier projects, First Nations have taken the opportunity to voice their concerns about both the initial and future projects. They expressed their insistence on being consulted directly about the undertaking that related to their communities, pressed for appropriate recognition of their

Aboriginal and treaty rights and sought compensation for the risks and dislocations associated with the projects. The responsibility of the Elders and community leaders to respect and protect their lands remains in place, amidst the complexities and high pressure of 21<sup>st</sup> century developments. The political, cultural and commercial relationships of the past decades have been replaced, at least in part, by more collaborative and culturally sensitive approaches. At the starting point, proceeding with resource and infrastructure projects on Indigenous territories would, of necessity, require a close and respectful listening to presentations by First Nations Elders and leaders and, even more importantly, to sit in ceremony with Elders and the community. It would also require the recognition that relationships are being established for the long-term and not as short-term concessions to secure agreements to proceed.

130. Best practice, in terms of collaboration between Indigenous communities, resource developers and governments, as it has emerged in recent years, requires the following:

- Recognition by project promoters that the Indigenous peoples are the traditional owners of the land, that the environment has sacred and deep cultural significance to the Indigenous communities, and that the projects should proceed as real and sustained partnerships;
- Extensive pre-construction consultation and engagement, marked by the substantial ability of First Nations to influence project design and operations;

- Integration of First Nations historical, cultural and environmental knowledge and ceremony in project planning and operations, with particular emphasis on environmental monitoring and remediation;
- An appropriate sharing of revenue or “prosperity” arising out of the completion of the project, in the form of direct compensation, equity arrangements, employment and skills training, joint ventures and business procurement arrangements with First Nations companies, and other elements as deemed appropriate to the First Nations and project proponents.
- Ongoing and long term respect for and engagement with First Nations peoples, cultures and traditions, in ways that demonstrate that real and sustainable partnerships have been formed.

131. None of these elements are unreasonable or are beyond the realm of current Canadian or international practice. Equally, it is appropriate that First Nations exercise their Aboriginal and Treaty rights, as needed, to express their concerns or even objections to major resource and infrastructure projects. While Canadian legal and political practice to date has stopped short of granting equal status to First Nations law and customs, the Aboriginal and Treaty rights defined within Canadian law and by Canadian courts have recognized the significant and ongoing authority of First Nations over projects undertaken on their traditional territories. Whether a greenfield resource project, a hydro generating station, a mine, a major forestry operation, or the redevelopment and expansion of an existing pipeline are involved, First Nations have the right to expect that

their interests will be respected and that approval and development processes will take their concerns, needs and aspirations into account.