Ditidaht
FIRST NATIONS

Written Submission to the Expert Panel for the Review of Environmental Assessment Processes

Submitted by the Ditidaht First Nation

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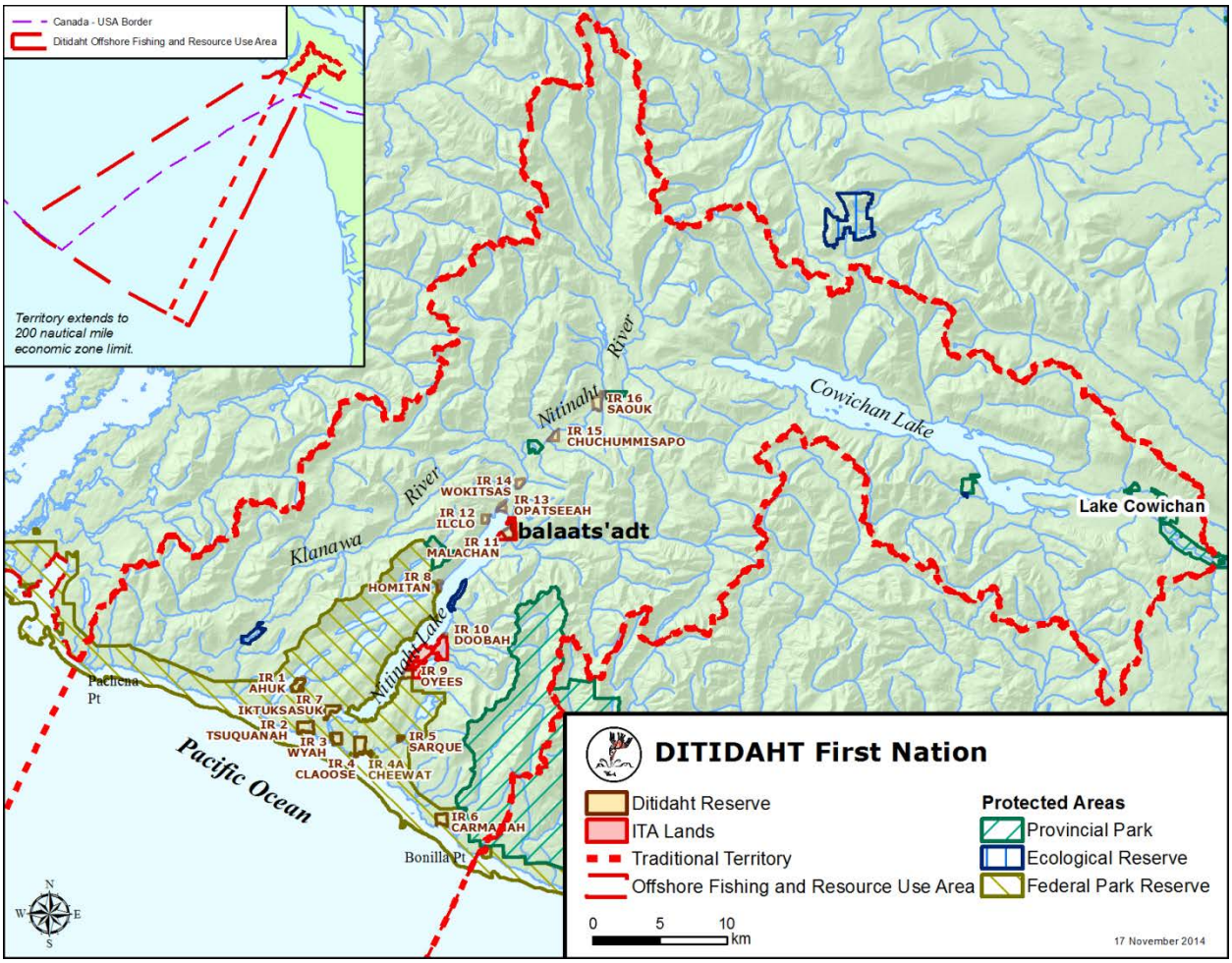
Table of Contents

1. Ditidaht First Nation 1
2. Ditidaht Concerns with Federal Environmental Assessment Processes 2
3. Environmental Assessments Must Foster Meaningful Indigenous Participation 3
   a. Incorporating Indigenous Knowledge 3
   b. Timelines 7
   c. Funding 7
   d. First Nation Led Assessments 8
4. Environmental Assessments should be based on appropriate direct and cumulative effects methodology 9
   a. Require consideration of effects on Aboriginal and Treaty rights 9
   b. Meaningful Cumulative Effects Assessment Methodology 11
5. Environmental Assessments Must Support Meaningful Consultation with First Nations 14

1. Ditidaht First Nation

The Ditidaht First Nation (Ditidaht) thanks the Expert Panel for the opportunity to present written submissions regarding our concerns and future vision for federal environmental assessment processes.

At the time of European contact, Ditidaht exclusively occupied our traditional territory and we claim Aboriginal title to the lands, waters and marine areas within our traditional territory. Our traditional territory includes the lands and waters between Bonilla Point on the east and Pachena Point on the west. It extends inland to include Nitinat Lake, the Nitinat River and their drainage systems. The marine portion of our traditional marine territory extends offshore as far as the Vancouver Island mountains are visible from a canoe. Ditidaht has 17 reserves that have been set apart for our population of approximately 750 members. The following map indicates our territory and the location of our reserve lands.



2. Ditidaht Concerns with Federal Environmental Assessment Processes

The lands and waters within our traditional territory are intimately connected and linked to the identity of our people as a distinct culture. Our oral histories focus on the history of our lands and waters, and how our territory has formed our understanding of ourselves and our identity. The importance of the connection between Ditidaht and our traditional territory – including our lands, waters and marine territory – cannot be overstated. Without access to our traditional lands, waters and aquatic resources, we would not be who we are as Ditidaht peoples.

At the time of contact, Ditidaht carried out a variety of customs, practices and traditions within our traditional territory that continue today, including hunting and trapping various animals; harvesting timber, and various plants, roots, and berries; and fishing and gathering marine resources within our territory. These activities are central to our distinctive culture as Ditidaht people and Ditidaht claims an aboriginal right for each harvesting activity.

Ditidaht is presently in stage four treaty negotiations with Canada and British Columbia, and is advanced in negotiations to reconcile our Aboriginal rights and title claims in a way that recognizes, respects and protects the lands, waters and resources throughout our traditional territory.

Ditidaht does not have confidence that the present environmental assessment system is capable of informing decisions that may impact our culture and rights. Our present concern is that this system will undermine the hard earned recognition we are on the cusp of attaining through the BC Treaty Process. Our view is that the current assessment system does a very poor job of including Indigenous groups and meaningfully considering their rights and interests. However, even when Indigenous interests are considered, the methodologies used by proponents and sanctioned by government tend to mischaracterize the nature of our rights and minimize the significance of potential effects on our ability to exercise our rights. These failings undermine our confidence in project assessments and the meaningfulness of Crown consultation in regard to those assessments.

Ditidaht's request is for the Expert Panel to recommend that the statutory framework for federal environmental assessment be amended so that these processes:

1. Foster meaningful Indigenous participation;
2. Be required to use methodologies that properly assess potential direct and cumulative effects to Ditidaht rights and interests; and
3. Better inform and support consultation with First Nations with the goal of obtaining the free, prior and informed consent required under the United Nations Declaration on the Rights of Indigenous Peoples.

In these submissions we expand on these 3 themes and provide concrete suggestions for change.

3. Environmental Assessments Must Foster Meaningful Indigenous Participation

a. Incorporating Indigenous Knowledge

Ditidaht's view is that confidence in the federal environmental assessment process would best be fostered by requiring that assessments incorporate Indigenous knowledge (also known as "Traditional Knowledge (TK)" or "Aboriginal Traditional Knowledge (ATK)"). Presently, Indigenous perspectives and Indigenous laws are not adequately incorporated into the current Environmental Assessment process. "Indigenous knowledge" includes ecological knowledge, social rules, spirituality and Indigenous philosophy. "Indigenous perspectives" include the views, opinions, perceptions and interpretations of circumstances or events shaped by the world view of an Indigenous people. "Indigenous laws" means the laws of an Indigenous

community, including traditional teachings, protocols, rules of conduct and laws of more recent origin.

The lack of respect for Indigenous knowledge, perspectives and laws which is often shown in the EA process undermines the ability of Indigenous peoples to fully participate and is inconsistent with the principles of the United Nations Declaration on the Rights of Indigenous Peoples and the concept of reconciliation. In panel reviews, elders and other knowledge holders are commonly subject to irrelevant cross-examination. It is neither appropriate nor relevant, for example, for elders or Indigenous knowledge holders to be subject to cross-examination focusing on their lack of "formal" (non-Indigenous academic, scientific or technical) education or training. Formal education in non-Indigenous institutions is not the source of the value, legitimacy or reliability of Indigenous knowledge; rather it is based in culture, experience and oral tradition. To encourage more respectful engagement with Indigenous knowledge, perspectives and laws the "Purposes" of CEAA, 2012 should be amended to include:

> 4(1)(j) to respectfully engage with and consider Aboriginal knowledge, Aboriginal perspectives and the laws of Aboriginal people in environmental assessments;

This purpose should inform and be reflected in Agency and Panel procedures at all stages of the process.

First, the Act currently states that environmental assessment "*may* take into account community knowledge and Aboriginal traditional knowledge" (emphasis added).[1] This should be made mandatory and the Act should be amended to instead read:

> …must take into account community knowledge and <u>Aboriginal knowledge, Aboriginal perspectives and laws of Aboriginal people, where this information is provided to the review panel or responsible authority</u>.[2]

Indigenous knowledge and Indigenous perspectives must inform every stage of environmental assessment. It is important that Indigenous peoples' views are incorporated in the early stages of review, such as the Terms of Reference in a Panel EA or the EIS Guidelines and EIS in an Agency EA. If Indigenous perspectives are not incorporated at this stage, the assessment can be framed in a way that devalues Indigenous knowledge. Terms of Reference and EIS Guidelines should explicitly require that each potentially affected Aboriginal group's perspective inform the development of Valued Components, rather than being left up to the discretion of the proponent.

[1] Section 19(3).

[2] We have used the word "Aboriginal" rather than "Indigenous" in our suggested changes to the Act because of its recognized meaning in Canadian law and use in section 35 of the *Constitution Act, 1982.*

This is important if impacts to Aboriginal and treaty rights are to be properly characterized and assessed. For example, in considering the impact to a hunting right, the Indigenous perspective requires consideration of much more than the number of animals available to hunt, such as:

- what conditions are required for the exercise of rights;
- what cultural connections does the Indigenous group have to the area and resources in that area;
- what is the timing of harvest;
- what is the availability of the resource;
- what is the quality of the resource;
- is there potential for avoidance reactions (e.g. might the exercise of the right be impacted by safety concerns or concerns over contamination of wildlife);
- what cultural transmission activities occur in the area;
- what is the habitat availability and quality in other accessible areas; and
- where and when do members of the Indigenous community prefer to exercise their rights.

The development of Valued Components and the assessment of impacts should also consider whether the Project may directly or indirectly violate or disrupt any Indigenous laws. For example, there may be a law that harvest of a particular resource should occur only at certain sites which the Project will render unusable, forcing community members to hunt elsewhere in violation of their own Indigenous laws.

Second, more flexibility should be accorded in agency environmental assessments and panel reviews to accommodate culturally appropriate ways to receive and consider Indigenous knowledge. In addition to changes to the panel process such as restrictions on irrelevant cross-examination, this might also include mechanisms to protect Indigenous knowledge information that is considered confidential by the community from release to the public.

Third, for panel reviews where infringement of Aboriginal and treaty rights by the project is reasonably likely, the panel should include Indigenous member(s). Section 42(1) of CEAA, 2012 should be amended to include the language underlined below:

> 42(1) Subject to subsection ~~(2)~~ (3), if the environmental assessment of a designated project is referred to a review panel, the Minister must establish the panel's terms of reference and appoint as a member one or more persons who are unbiased and free from any conflict of interest relative to the designated project and who have knowledge or experience relevant to its anticipated environmental effects.
>
> <u>(2) Where the project has the potential, prior to consideration of any effect of mitigation measures, to have adverse impacts on Aboriginal or treaty rights, at least one</u>

of the panel members appointed under subsection 1 must be an Aboriginal person or have knowledge or experience relevant to the consideration of Aboriginal knowledge, perspectives and laws.

Finally, EA Reports should include an explanation of how Indigenous knowledge, Indigenous perspectives and Indigenous laws were considered and incorporated into the Environmental Assessment. In this regard, the *Reference Guide Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the* Canadian Environmental Assessment Act, 2012[3] provides good guidance that is not consistently put into practice. It recognizes that western and traditional knowledge will often provide complementary insights in the EA, however, where they cannot be reconciled, the EA should demonstrate how each type of knowledge was considered. To ensure consistency, this should be a legislated requirement for EA Reports. This could be done by revising sections 22 and 43 of the Act as follows:

Responsible authority's obligations

22 The responsible authority with respect to a designated project must ensure that

(a) an environmental assessment of the designated project is conducted; ~~and~~

(b) a report is prepared with respect to that environmental assessment; and

(c) the report demonstrates how any information provided to the Agency regarding Aboriginal knowledge, Aboriginal perspectives and laws of Aboriginal people were considered in the environmental assessment.

Review panel's duties

43 (1) A review panel must, in accordance with its terms of reference,

(d) prepare a report with respect to the environmental assessment that sets out

(i) the review panel's rationale, conclusions and recommendations, including any mitigation measures and follow-up program, ~~and~~

(ii) a summary of any comments received from the public, including interested parties, and

(iii) how any information provided to the Agency regarding Aboriginal knowledge, Aboriginal perspectives and laws of Aboriginal people were considered in the environmental assessment.

[3]Canada, Minister of Environment. Ottawa: Public Works and Government Services Canada, 2014, p. 6

b. Timelines

Improving opportunities for Indigenous participation in the environmental assessment process also requires that the timelines for environmental assessment set out in sections 27(2) (365 days for an assessment by a responsible authority and the Minister's decision) and 38(3) (24 months for an assessment by a review panel and the Minister's decision) be replaced with statutory provisions that account for the unique challenges that face Indigenous peoples in environmental assessments.

The current legislated timelines hinder the collection of Indigenous Knowledge to inform the environmental assessment process and to adequately review and comment on (often voluminous) materials delivered by proponents. While there is discretion to extend the above noted timelines, that discretion is very limited and not sufficient to respond to the needs of Indigenous participants in environmental assessments.

We have several recommendations for how the problematic timeline approach in the Act might be addressed:

1. Grant the Agency, federal departments participating in assessments, and the Minister broader statutory powers to suspend and/or extend timelines for completing environmental assessments and decision making.
2. Set minimum time periods in the legislation for comment on draft Environmental Impact Statement Guidelines, comments on Environmental Impact Statements and any revisions to the EIS, comments on panel Terms of Reference and comments on the draft environmental assessment report.
3. These minimum time periods should "stop the clock" like requests to Proponents for further information, and not be counted towards the overall time.
4. Provide triggers for extending these minimum timelines and the overall timelines for the environmental assessment process including those relevant to engagement with Indigenous peoples such as:
    a. An automatic extension of timelines if participant funding is delayed; and
    b. Request by an Indigenous community participant, provided they give reasonable justification for their request.

c. Funding

Funding levels currently provided under the Agency's Participant Funding Program hinder meaningful Indigenous participation in EA processes. These processes are complex and given the importance of the environmental assessment in informing the duty to consult, the consequences are significant. Indigenous peoples will often need to retain consultants with

legal, technical or scientific expertise to support their participation. The current reality Indigenous peoples face in the EA process is that the information provided by Indigenous knowledge holders needs to be "legitimized" by the involvement of experts (anthropological, sociological, technical, scientific or legal) when it is in conflict with other legal, scientific or technical information provided by a proponent.

Often, funding provided by the Agency will not even cover a review of the impact assessment materials, let alone technical or legal review or any of the myriad steps required of First Nations that disagree with the results of the proponents initial impact assessments.

One way to address the shortfall in funding provided to Indigenous communities for participation would be to increase the funding available to indigenous communities and broaden the cost recovery provisions under s. 59 of the Act and the *Cost Recovery Regulations* to provide the Agency with power to recover costs related to funding Indigenous participation in an EA from proponents in order to cover the difference.

d. First Nation Led Assessments

In addition to participation in EAs under *CEAA 2012*, Indigenous groups across the country are increasingly conducting EAs of their own. This may be done as an exercise of Indigenous law, under a land code or other framework. New federal legislation should consider how meaningful recognition of these other assessment bodies could uphold principles in UNDRIP, including article 18 which recognizes that

> *Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*

Additionally, EA processes where Indigenous groups are decision-makers are another way of fulfilling the principle in UNDRIP article 32(1) where Indigenous groups have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. In light of the Truth and Reconciliation Report (TRC) calling on all levels of government and sectors of Canadian society to adopt UNDRIP as a framework for reconciliation, mechanisms in federal legislation should be considered to meaningfully integrate Indigenous environmental assessments into environmental management and decision making.

There are a range of examples in Canada where First Nations are working with provincial and territorial governments to develop collaborative models for environmental assessment that advances recognition of First Nations' inherent jurisdiction as stewards of their lands. In the Northwest Territories, the Mackenzie Valley Environmental Impact Review Board is a co-

management board responsible for the environmental impact assessment process in the Mackenzie Valley. Aboriginal land claim organizations nominate half of the board members and the federal and territorial governments nominate the other half of the board members. In Ontario, the provincial government is negotiating with a group of First Nations in northern Ontario to develop a terms of reference for a joint review panel that includes a First Nation appointee, and that accommodates First Nation decision making in respect of panel recommendations.

As Ditidaht moves forward in the BC Treaty process, we hope that collaborative decision making processes included in our agreement are respected where there is overlap with federal environmental assessment processes. With this in mind, we request that federal legislation be amended to include provisions to harmonize timelines and information collection between federal, provincial, and Indigenous assessments processes where Indigenous groups chose to conduct their own, stand alone assessments.

4. Environmental Assessments should be based on appropriate direct and cumulative effects methodology

a. Require consideration of effects on Aboriginal and Treaty rights

The concept of free, prior and informed consent requires that Indigenous peoples and the Crown be informed about the potential effects of proposed development on the ability of Indigenous peoples to continue to exercise constitutionally protected aboriginal and treaty rights. For First Nations to have confidence in environmental assessment processes, these processes must assess the potential adverse effects of development on aboriginal and treaty rights. The present statutory and regulatory scheme does not require that effects to aboriginal or treaty rights be assessed in the context of federal environmental assessments.

Instead, section 5 of the *CEAA, 2012* limits the consideration of effects on the environment that may impact aboriginal peoples to the four aspects covered in 5(1)(c) (health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes, or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance).

This narrow definition unduly constrains environmental assessments and deprives First Nations and the Crown of the knowledge necessary to understand whether a proposed land use will diminish the ability of First Nations to exercise aboriginal and treaty rights. This definition imposes an undue constraint as impacts to the continued ability of First Nation to exercise rights on lands and waters cannot be assessed by evaluating the likely impacts of a development on the current use of lands by First Nations or on physical and cultural heritage.

Effects on aboriginal and treaty rights must instead be informed by understanding the nature of the asserted or proven rights, including the conditions necessary for First Nations to exercise those rights.

Collecting this information and conducting a direct assessment on potential effects to aboriginal and treaty rights is a necessary component of reconciliation. Unless this information is collected, First Nations cannot provide informed consent to resource development that may impact their rights, and the Crown cannot fulfill its constitutional obligations to not infringe upon those rights. A renewed environmental assessment process can replace guess work with evidence based analysis on the potential impacts of proposed land uses.

The assessment of potential effects to Treaty rights must take place as part of the Crown consultation process, but is currently being conducted separately from those carried out under CEAA 2012, if at all. For example, with respect to the Northern Gateway project, the majority of the Federal Court of Appeal wrote that:

> The inadequacies—more than just a handful and more than mere imperfections—left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. Many impacts of the Project—some identified in the Report of the Joint Review Panel, some not—were left undisclosed, undiscussed and unconsidered. It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples. But this did not happen.[4]

Environmental assessments can be appropriate and flexible enough to identify the effects of proposed projects on section 35 rights. When Aboriginal nations are included in the scoping of environmental assessments they can inform the selection of biophysical and human components studied in the assessment process. There are many examples of environmental assessments that have been conducted to determine effects on Aboriginal interests including section 35 rights. By updating the factors that must be considered in section 5 of CEAA to include the Aboriginal and treaty rights recognized and affirmed in section 35 of the Constitution Act, 1982, it will be made clear that environmental assessments must include an assessment of project effects directly on the rights of Aboriginal peoples.

Requiring the identification of indicators that can credibly represent each Aboriginal group's rights, the collection of information regarding those indicators, and an assessment of that information in the environmental assessment process will allow the EA to meaningfully inform Crown consultation. Project proponents are expected to assess all other potential Project

[4] *Gitxaala Nation v Canada*, 2016 FCA 187.

effects; the potential effects on the rights of Aboriginal peoples should be treated no differently. The cost of assessing effects on Aboriginal peoples and their rights should be borne by proponents and not by Aboriginal groups. While project proponents are in a position to mitigate some of the direct effects of their operations on Aboriginal and treaty rights, some effects of development are more properly addressed by governments. Requiring proponents to identify such effects will provide the Crown with information it can use in its accommodation process.

To ensure that environmental assessments evaluate potential effects to aboriginal and treaty rights, we request that CEAA, 2012 be amended to expressly require that aboriginal and treaty rights protected under s.35 of the *Constitution Act, 1982* be defined either as a "component of the environment" under s.5(1)(a) or as an aspect of the effects that are required to be assessed under s.5(1)(c). We also request that the "Purposes" section of CEAA, 2012 be amended to include, as a purpose of the act, "to protect aboriginal and treaty rights guaranteed under s.35 of the *Constitution Act, 1982".*

b. Meaningful Cumulative Effects Assessment Methodology

The *CEAA, 2012* model of determining significant impacts and potential mitigations for project by project approvals misses the long term adverse impacts of development. This is particularly the case in green field scenarios where the approval of one project may cause a domino effect of further development and infrastructure approvals. It is also the case where significant development has already occurred and a further project approval can be 'the straw that broke the camel's back' with respect to the ability of Indigenous peoples to continue to practice their Aboriginal and Treaty rights.

The case law provides guidance on the proper approach to meaningful assessment of the cumulative effects a proposed project may have on Aboriginal and Treaty rights. The Honourable Chief Justice Finch of the British Columbia Court of Appeal in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, endorsed an approach that takes historical erosion of Treaty rights into consideration when assessing the affects of a new industrial activity:

> [117] I do not understand Rio Tinto to be authority for saying that when the "current decision under consideration" will have an adverse impact on a First Nations right, as in this case, that what has gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners' treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt.

> [118] The amended permits authorized activity in an area of fragile caribou habitat. Caribou have been an important part of the petitioners' ancestors' way of life and cultural identity, and the petitioners' people would like to preserve them. There remain only 11 animals in the Burnt Pine herd, but experts consider there to be at least the possibility of the herd's restoration and rehabilitation. The petitioners' people have done what they could on their own to preserve the herd, by banning their people from hunting caribou for the last 40 years.
>
> [119] To take those matters into consideration as within the scope of the duty to consult, is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs.

Chief Justice Finch's reasons in *West Moberly* also mandated a broad forward looking approach to cumulative effects assessment in considering impacts on Aboriginal and Treaty rights:

> [122] It is correct that the consultation in this case must be directed at the Bulk Sampling and Advanced Exploration Permits and their impact. However, the result of this consultation will necessarily determine not only what constitutes reasonable accommodation for the exploration permits, but will also affect subsequent events if the exploration proceeds.
>
> [123] On my reading of the chambers judge's reasons, it does not appear that he gave much, if any, weight to the potential impact of a full mining operation as a relevant factor in the Crown's duty to consult. However, the whole thrust of the petitioners' position was forward looking. It wanted to preserve not only those few animals remaining in the Burnt Pine caribou herd, but to augment and restore the herd to a condition in which it might once again be hunted. If that position were to be given meaningful consideration in the consultation process, I do not see how one could ignore at least the possibility of a full mining operation, if it were shown to be justified by the exploration programs. That was the whole object of the Bulk Sampling and Advanced Exploration Programs.

An approach to cumulative effects assessment that can provide meaningful insight into the real impact of a proposed development on Aboriginal and Treaty rights could be secured by amendments to CEAA 2012 that require proponents to provide, and assessors to consider, information such as the following:

1. a description of existing and potential cumulative impacts or changes to the environment caused by all past, present and reasonably foreseeable future projects and

human activities, including the potential social, cultural, health, economic and environmental impacts on Aboriginal and Treaty rights, and which shall include:

a) amount (quantity and percentage) of potential industrial development within the traditional territory of each Indigenous group;
b) amount (quantity and percentage) of lands within the traditional territory of each Indigenous group that is currently leased for exploration and industrial development;
c) percentage of tenures developed within the traditional territory of each Indigenous group in past 10 years;
d) amount of land within each Indigenous group's traditional territory taken up for other developments (i.e., converted from natural vegetation);
e) amount of each Indigenous group's traditional territory no longer available for exercise of Aboriginal rights because of direct, indirect and cumulative impacts of existing, planned and reasonably foreseeable development;
f) identification of all linear corridors (pipelines, transmission lines, roads, seismic lines) within each Indigenous group's traditional territory and in the vicinity of the project;
g) estimated size of area of direct and indirect disturbance to wildlife within each Indigenous group's traditional territory and in the vicinity of the project, and description of methodology for gathering such information;
h) identification of all other tenure holders within the vicinity of the project, including exploratory leases or tenures, and the size of area held by other tenure holders within the vicinity of the project;

2. a description of the pre-disturbance baseline from which to assess the project's cumulative impacts, in order to fully understand the potential adverse impacts of existing and planned development in the project area upon section 35 rights, including changes in the patterns of resource use and the exercise of rights by the Indigenous groups and the reasons for such changes;
3. all relevant and previous baseline information and studies, submissions, reports and applications related to the project;
4. quality baseline data, benchmarks and modeling that identifies the pre-development situation with respect to vegetation, fish and wildlife populations and habitat, access and pre-development uses, and the exercise of Aboriginal and Treaty rights; and
5. the assessment of the current situation of vegetation, fish and wildlife populations and habitat, access, permanent structures and the exercise of Aboriginal and Treaty rights.

A related methodology concern of assessing cumulative effects under *CEAA 2012* is the practice of only assessing cumulative effects with other anticipated projects for the valued components for which a residual effect has been determined. This should be prohibited by the legislation, as

it misses many cumulative effects that will occur when multiple minor effects can combine to have serious implications for ecological and socio-economic well being

In addition, cumulative effects assessments under CEAA 2012 have tended to focus on ecological components; human well-being and regional sustainability must be included in these cumulative effects assessments by mandating it in the legislation.

Finally, the ideal framework for project assessment should not be "mitigation of significant adverse effects" but a more positive and comprehensive objective of "contribution to sustainability", which should include a comparative evaluation of best options for making positive contributions to lasting wellbeing.

5. Environmental Assessments Must Support Meaningful Consultation with First Nations

Environmental Assessments are an important forum in which First Nations can engage with the Crown regarding projects that can have serious consequences for their way of life. Because the Crown often relies on EAs to discharge its duty to consult, the constitutionality of Canada's actions, progress towards reconciliation and Canada's commitment to the United Nations Declaration on the Rights of Indigenous Peoples are at stake in these processes

Creating appropriate federal engagement with indigenous peoples in assessments is necessary. It is necessary from the perspectives of good EA practice. It is necessary from the perspective of the United Nations Declaration on the Rights of Indigenous Peoples. And, should the Crown continue to rely on EA processes for consultation, it is necessary from the perspective of the duty to consult. Improved Crown engagement in EAs should have the following elements:

1. clearly defined roles of the Agency, Panel or responsible authority, the Minister, the relevant departments and staff and the powers and mandate necessary to carry out those roles;

2. if the government is going to rely on the EA process to fulfill the duty to consult, clearly established powers, mandates and processes for Crown participants (or the agency identified above) to carry out that duty in full. To carry out consultation the Agency or other responsible authority must be given the explicit power and mandate to:
    - Engage early with First Nations;
    - Engage in dialogue with First Nations;
    - Assess the strength of Section 35 Rights claims;
    - Assess impacts to Section 35 Rights;
    - Assess whether there is a potential infringement of those rights;
    - Assess the adequacy of consultation given the potential infringement;

- Respectfully engage with and consider Indigenous knowledge, perspectives and laws;
- Request information from other departments or ministries as necessary to provide information to First Nations or provide First Nations with feedback as necessary to carry out this mandate;
- Bring in and facilitate discussions with other departments or ministries where necessary to provide appropriate accommodation;
- Order proponents to undertake mitigation measures; and
- Provide accommodation.

3. if the role of the EA process in consultation is to be one of only informing the consultation process, it can only do this if the Agency or responsible authority has the power and mandate to:
    - Assess impacts to Section 35 Rights;
    - Assess whether there is a potential infringement of those rights;
    - Assess the adequacy of consultation given the potential infringement;
    - Respectfully engage with and consider Indigenous knowledge, perspectives and laws;
    - Request information from other departments or ministries as necessary to provide information to First Nations or provide First Nations with feedback as necessary to carry out this mandate; and
    - Order proponents to undertake mitigation measures

4. explicit requirement for the Crown to identify of effects resulting from proposed projects directly on Aboriginal and treaty rights;

5. clearer requirements for Crown engagement with aboriginal groups at key steps in an assessment;

6. statutory minimum standards for terms of reference for EAs that require that the factors and indicators of interest to First Nations are included in assessments;

7. requirements for indigenous involvement in the design, scoping and carrying out of studies pertaining to, at a minimum, assessing project effects on rights and culture;

8. Clearer authority for federal departments to gather information requested by First Nations and to provide feedback to First Nations, when so requested, in EA and factors to guide the exercise of that authority; and

9. Where the Crown intends to rely on an EA process for consultation, it should clearly indicate that it will do so before the commencements of the process and require the relevant decision maker to assess the adequacy of consultation