USING INDIGENOUS LEGAL PROCESSES TO STRENGTHEN INDIGENOUS JURISDICTION: SQUAMISH NATION LAND USE PLANNING AND THE SQUAMISH NATION ASSESSMENT OF THE WOODFIBRE LIQUEFIED NATURAL GAS PROJECTS

by

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

Doctor of Philosophy

in
THE FACULTY OF GRADUATE AND POSTDOCTORAL STUDIES
(Law)

THE UNIVERSITY OF BRITISH COLUMBIA

(Vancouver)

October 2021

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Using Indigenous Legal Processes to Strengthen Indigenous Jurisdiction: Squamish Nation Land Use Planning and the Squamish Nation Assessment of the Woodfibre Liquefied Natural Gas Projects

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Abstract

This dissertation examines how Squamish Nation has created its own legal processes in land use planning and environmental assessment to strengthen its jurisdiction over land, water, and resources in Squamish Nation Territory. It provides a case study of Squamish Nation’s development of the Xay Temíxw Land Use Plan for Forests and Wilderness of Squamish Nation Traditional Territory, its negotiation of an agreement on land use planning with the Province of British Columbia, and its creation of an environmental assessment process (the Squamish Process) to assess liquefied natural gas (LNG) projects being proposed in Howe Sound. The case study reveals Squamish Nation’s motivations for developing the processes; the type of community engagement it used; the perspectives, values, and laws Squamish members brought to their deliberations in the processes; and how Squamish Nation made its final decisions. It illuminates how these processes articulate Squamish legal principles to wider Canadian audiences through the plans, reports and agreements that have emerged from the processes. It also shows how these processes placed pressure on the state, as well as third parties, and how these pressures led to shifts in state/proponent practices and behaviours that have strengthened Squamish Nation jurisdiction. The research suggests that successful implementation of the doctrine of free, prior, and informed consent (FPIC) will be better achieved if Canadian governments shift their focus away from narrow judicial interpretations of the duty to consult, and toward Indigenous-led processes for establishing consent, articulated through Indigenous legal orders.
Lay Summary

Section 35 of Canada’s Constitution entrenches Aboriginal rights, and the Supreme Court of Canada has indicated that this places a duty on Canadian governments to consult Indigenous nations whose rights could be adversely affected by government decisions. Governments have largely turned to the courts for answers regarding how to interpret the duty to consult, but increasingly, Indigenous nations are developing their own processes for making decisions regarding resource development in their territories. This dissertation provides a case study of Squamish Nation’s Xay Temíxw Land Use Plan; its negotiation of an agreement on land use planning with BC; and its creation of a Squamish Nation-led environmental assessment process used to determine whether Squamish Nation could provide consent to liquefied natural gas (LNG) projects being proposed in its traditional territory. The research concludes that Canadian governments should shift their focus away from court decisions interpreting the duty to consult, and toward Indigenous processes for establishing consent.
Preface

This dissertation is an original intellectual product of the author, Jennifer M. Sankey.

The research for this project has been approved by the University of British Columbia’s Behavioural Research Ethics Board (Certificate H18-01166).

The research for this project has also been approved by the Squamish Nation Rights and Title Committee (Research Agreement between Jennifer M. Sankey and Councillor Chris Lewis, Squamish Nation, 29 March 2019).
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<th>Definition</th>
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<tbody>
<tr>
<td>AJAX G2G Agreement</td>
<td>Ajax Government-to-Government Agreement</td>
</tr>
<tr>
<td>ATBC</td>
<td>Allied Tribes of British Columbia</td>
</tr>
<tr>
<td>BCFNEMC</td>
<td>British Columbia First Nations and Energy Mining Council</td>
</tr>
<tr>
<td>BCTC</td>
<td>British Columbia Treaty Commission</td>
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<tr>
<td>BCTP</td>
<td>British Columbia Treaty Process</td>
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<tr>
<td>CEAA</td>
<td>Canadian Environmental Assessment Act</td>
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<tr>
<td>CORE</td>
<td>Commission on Resources and the Environment (BC)</td>
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<tr>
<td>DRIPPA</td>
<td>Declaration on the Rights of Indigenous Peoples Act (BC)</td>
</tr>
<tr>
<td>EA</td>
<td>Environmental assessment</td>
</tr>
<tr>
<td>EAA</td>
<td>Environmental Assessment Act (BC)</td>
</tr>
<tr>
<td>EAO</td>
<td>Environmental Assessment Office (BC)</td>
</tr>
<tr>
<td>FCA</td>
<td>Federal Court of Appeal</td>
</tr>
<tr>
<td>FNS</td>
<td>First Nations Summit</td>
</tr>
<tr>
<td>FPIC</td>
<td>Free, prior, and informed consent</td>
</tr>
<tr>
<td>IA</td>
<td>Impact assessment</td>
</tr>
<tr>
<td>IAA</td>
<td>Impact Assessment Act (Canada)</td>
</tr>
<tr>
<td>IA Agency</td>
<td>Impact Assessment Agency of Canada</td>
</tr>
<tr>
<td>IBA</td>
<td>Impact benefit agreement</td>
</tr>
<tr>
<td>IRA</td>
<td>Indian Rights Association</td>
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<tr>
<td>JCPC</td>
<td>Judicial Committee of the Privy Council</td>
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<tr>
<td>LNG</td>
<td>Liquefied natural gas</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<td>--------------</td>
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<tr>
<td>LRMP</td>
<td>Land Resource Management Plan</td>
</tr>
<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
</tr>
<tr>
<td>NEB</td>
<td>National Energy Board</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-governmental organization</td>
</tr>
<tr>
<td>PABCA</td>
<td>Protected Areas of British Columbia Act</td>
</tr>
<tr>
<td>SCC</td>
<td>Supreme Court of Canada</td>
</tr>
<tr>
<td>SCMA</td>
<td>Special Cultural Management Area (in Wild Spirit Places)</td>
</tr>
<tr>
<td>SOI</td>
<td>Statement of Intent (under BC Treaty Process)</td>
</tr>
<tr>
<td>SN-EA Agreement</td>
<td>Squamish Nation Environmental Assessment Agreement</td>
</tr>
<tr>
<td>SFN-BC LUP Agreement</td>
<td>Agreement on Land Use Planning between the Squamish First Nation and British Columbia</td>
</tr>
<tr>
<td>SSE WMA</td>
<td>Swel’wil’em Squamish Estuary Wildlife Management Area</td>
</tr>
<tr>
<td>SSN</td>
<td>Stk’emlúpsemc te Secwepemc Nation</td>
</tr>
<tr>
<td>TFL</td>
<td>Tree farm license</td>
</tr>
<tr>
<td>TMEX</td>
<td>Trans Mountain Pipeline Expansion Project</td>
</tr>
<tr>
<td>TRTFN</td>
<td>Taku River Tlingit First Nation</td>
</tr>
<tr>
<td>TUOS</td>
<td>Traditional Use and Occupancy Study</td>
</tr>
<tr>
<td>TWN</td>
<td>Tsleil-Waututh Nation</td>
</tr>
<tr>
<td>UBCIC</td>
<td>Union of BC Indian Chiefs</td>
</tr>
<tr>
<td>UNDRIP</td>
<td>United Nations Declaration on the Rights of Indigenous Peoples</td>
</tr>
<tr>
<td>VC</td>
<td>Valued Component</td>
</tr>
<tr>
<td>WCWC</td>
<td>Western Canada Wilderness Committee</td>
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<tr>
<td>WSP</td>
<td>Wild Spirit Place</td>
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Acknowledgements

This dissertation has been a long journey and I owe thanks to many who have supported me through the process. First, I would like to extend my profound gratitude to all the interview participants who generously shared their knowledge with me. The interviews form the foundation of this dissertation. I am particularly grateful to Squamish Nation member and legal counsel, Aaron Bruce, for his time and guidance as this project unfolded. Aaron’s commitment to the Squamish-led environmental process undoubtedly brought it to life. I would also like to expressly thank Squamish Nation Hereditary Chief Bill Williams, Squamish Nation Hereditary Chief Ian Campbell, Squamish Nation Councillor Chris Lewis, Tyler Gray, and Byng Giraud.

I am deeply grateful for my supervisory committee: Dr. Douglas Harris, Dr. John Borrows and Dr. Jocelyn Stacey. Thank you for your conversations, support, and insightful comments and critiques of my dissertation. It has been a pleasure to work with such excellent supervisors. I want to also thank my external examiner, Dr. Dayna N. Scott, and my examination committee Dr. Kevin Hanna and Dr. Mary Liston – your observations and comments on my dissertation were greatly appreciated.

I am thankful for the grants I received from the Social Sciences and Humanities Research Council and the University of British Columbia while pursuing doctoral studies. I am also very grateful for the conversations I have had with fellow graduate students who are also parents. Balancing parenthood with doctoral work amid a global pandemic is a challenging experience and the support and encouragement of peers helped me keep things in perspective. Finally, I want to thank my parents, my partner, Dan, and my children, Maia, Thomas and Emilia for their loving support and encouragement along the way.
Chapter 1: Strengthening Recognition of Indigenous Jurisdiction in BC, Squamish Nation Experiences

1.1 Introduction

In recent decades, Indigenous nations in British Columbia have begun to explore alternative ways to strengthen their jurisdiction over the land, waters, and resources in their traditional territories outside of modern treaty-making. Squamish Nation/Skwxú7mesh Uxwumixw is a notable example. Its traditional territory is 6,732 square kilometres and encompasses parts of the cities of Vancouver, Burnaby, New Westminster, and Port Moody, all of North and West Vancouver, and runs north to include the District of Squamish and the Resort Municipality of Whistler (Squamish Territory). Howe Sound, known as Átl’ka7tsem or

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1 The terms “Indigenous,” “Aboriginal” and “First Nation” are used throughout this paper and are chosen based on the context in which they are used. I use the terms Indigenous nations or peoples interchangeably and as much as possible. When referring to issues involving the BC Treaty Process (BCTP) or agreements made between Indigenous nations and governments/third parties, I often use First Nation because that is how the Indigenous nation identifies for political and legal purposes. When referring to the Canadian Constitution or Canadian jurisprudence, I use the term Aboriginal to stay consistent with the legal doctrine. I refer to the law made by Canada concerning Indigenous peoples as Canadian Aboriginal Law, and the laws made by Indigenous nations as Indigenous law. Historical references often include use of the terms “Indians” or “Natives.”

2 Modern treaty making in BC occurs through the BC Treaty Commission (BCTC), overseer of the BCTP, online: <http://www.bctreaty.ca/>

3 This spelling is consistent with the Squamish Nation Education Department, Skwxwu7mesh Sníchim – Xweliten Sníchim Skexwts Squamish-English Dictionary (North Vancouver and Seattle, University of Washington Press, 2011) [Squamish-English Language Dictionary].

4 The boundaries of Squamish Territory are described in the Squamish Nation Statement of Intent filed with BCTC as follows: Lower Mainland region of BC from Point Grey on the south to Roberts Creek on the west; then north along the height of land to the Elaho River headwaters including all the islands in Howe Sound and the Sound drainages; then southeast to the confluence of the Soo and Green Rivers north from Whistler; then south along the height of land to the Port Moody area including the entire Mamquam River and Indian Arm drainages; then west
Txwnéwu7ts in the Squamish language and meaning paddling north or south through the fjord.\(^5\) is located within these boundaries. It holds much significance to Squamish Nation people. This deep and narrow fjord runs 42 kilometers from West Vancouver to the District of Squamish.\(^6\) Tall granite mountains, covered in coastal temperate rain forest and topped with snowfields and glaciers, rise from this ocean strip.\(^7\) The diverse marine life of the Howe Sound waters and the terrestrial species that inhabit the surrounding land have sustained Squamish people for millennia.\(^8\) Indeed, Squamish Nation’s system of governance, traditional and cultural practices, spirituality, and harvesting activities are inextricably linked to the lands, waters and resources of this area.\(^9\)

It is in this place that settler society opened the Britannia Copper Mine in 1905, the Port Melon Pulp Mill in 1908, and the Woodfibre Pulp Mill in 1912.\(^10\) A railway linking Squamish to North Vancouver was built in 1956, and a chlor-alkali chemical plant was opened on the

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5 *Squamish-English Language Dictionary*, supra note 3.
7 *Ibid*.
8 Interview of Squamish Nation Hereditary Chief and Councillor Ian Campbell/Xalek Sekyu Siyam (19 August 2019) [Interview of Chief Campbell].
Squamish waterfront in 1965.11 The Squamish Nation way of managing the land was displaced by a different vision of how human beings relate to their natural environment.12 The extent and speed of settler industrialization left the waters of Howe Sound polluted, and the surrounding environment damaged for decades. Squamish Nation people experienced significant alienation from this part of their territory during this time. Their ability to utilize the marine resources to sustain their livelihoods was disrupted by development that profited settler society without any meaningful consultation with, or economic benefit flowing to, Squamish Nation.13 Indeed, the health of the Howe Sound ecosystem has only just begun to recover through government remediation and collaborative revitalization programs established by segments of settler society and the Squamish Nation.14 This experience has left Squamish Nation people with a mistrust of industry and government, and a deep desire to have more robust decision-making power in any future development in Howe Sound.15 Squamish Nation wants its territory to be governed in accordance with its land management laws and values, and to this end, in recent decades, the Nation has carved a path to strengthen its decision-making power in regard to land and resource use in Squamish Territory.16

11 Ibid.
12 For more discussion on human relationships and reconciliation with the earth see John Borrows, “Earth-Bound: Indigenious Resurgence and Environmental Reconciliation” in Michael Asch, John Borrows and James Tully eds. Resurgence and Reconciliation Indigenous-Settler Relations and Earth Teachings (Toronto: University of Toronto Press, 2018) 49.
13 Interview of Chief Campbell, supra note 8.
15 Interview of Chief Campbell, supra note 8.
16 Ibid.
In the early 2000s, in the wake of much industrial logging throughout BC, Squamish Nation engaged in a community-based land use planning process to develop the Xay Temíxw Land Use Plan for the Forests and Wilderness of the Squamish Nation Traditional Territory (Xay Temíxw).\(^{17}\) Xay Temíxw sets out Squamish Nation’s vision for the use of forest and wilderness lands in Squamish Territory based on the values and laws articulated by its community, and it served as an important springboard for the 2007 *Agreement on Land Use Planning Between the Squamish First Nation and the Province of British Columbia* (the “SFN-BC LUP Agreement”).\(^{18}\) BC’s recognition of Squamish Nation’s land use vision in the SFN-BC LUP Agreement (and subsequent statutory protections) have enabled the Nation to have greater influence over proposed developments in Squamish Territory. A salient example is the Woodfibre liquefied natural gas (LNG) Project in Howe Sound.

In 2013, Squamish Nation learned of a proposal by Woodfibre LNG Limited (Woodfibre LNG) to build an LNG production facility at the old Woodfibre Pulp Mill site in Howe Sound (a former Squamish Nation village site called Swiŷát\(^{19}\)).\(^{20}\) The facility would receive sweet natural

\[\text{\ldots}\]

\(^{17}\) Squamish Nation (Land and Resources Committee), Xay Temíxw Land Use Plan for the Forests and Wilderness of the Squamish Nation Traditional Territory, First Draft, (May 2001) [Xay Temíxw].


\(^{19}\) This spelling of Swiŷát is consistent with the *Squamish-English Language Dictionary*, supra note 3.

\(^{20}\) In the Matter of the Environmental Assessment Act SBC 2002, c 43 and An Environmental Assessment of the Proposed Woodfibre LNG, Order Under Section 10(1)(c), (27 November 2013).
gas through a pipeline that FortisBC\(^{21}\) would expand pursuant to its proposed Eagle Mountain – Woodfibre Gas Pipeline Project\(^{22}\) (herein the projects will be referred to collectively as the “Woodfibre LNG Projects” or the “Projects”). The proposed pipeline would operate parallel to an existing FortisBC pipeline to increase capacity and to deliver natural gas to the Woodfibre LNG facility.\(^{23}\) In response to the proposed Projects, Squamish Nation developed its own environmental assessment (EA) process (the “Squamish Process”) to determine if it could provide consent.\(^{24}\) The Nation wanted to establish a decision-making model, separate from the Crown’s EA process, through which it could make an informed decision based on its own legal considerations, and ensure that were it to give consent, Squamish Nation would have a stronger governance role in the future of the Projects.\(^{25}\) The Squamish Nation’s EA model involved legally binding the proponents to its process through private contractual agreements.\(^{26}\) It is a rare example where proponents agreed to be contractually bound to an Indigenous-led EA running separate from, but parallel to, a Crown EA process.\(^{27}\) The Squamish Process, like Xay Temíxw,

\(^{21}\) The full name of the company is FortisBC Energy (Vancouver Island) Inc. (herein referred to as FortisBC).

\(^{22}\) In the Matter of The Environmental Assessment Act SBC 2002, c 43 and An Environmental Assessment of the Proposed Eagle Mountain Woodfibre Gas Pipeline, Order Under Section 10(1)(c), (1 August 2013).


\(^{24}\) Interview of Squamish Nation legal counsel Aaron Bruce/ Kelts’-tkenem (13 May 2019) [Interview of Aaron Bruce].

\(^{25}\) Ibid. The level of governance over the future of the Projects that Squamish Nation was able to establish through its process, would not be attainable under the Crown EA.

\(^{26}\) Ibid.

\(^{27}\) Justine Hunter, “Seeking reconciliation of a different kind: LNG”, Globe and Mail (14 January 2017); Woodfibre LNG, “Squamish Nation Environmental Assessment Process” (2020), online: <https://woodfibrelng.ca/about-
illustrates how Squamish Nation is using its own community decision-making processes to strengthen recognition of its jurisdiction by both Canadian governments and third parties.

Squamish Nation has always maintained its inherent right to govern Squamish Territory, stating as such in its Assertion of Title filed with the BC Treaty Commission:

The Squamish Nation has existed and prospered within our traditional territory since time immemorial. Our society is, and always has been, organized and sophisticated, with complex laws and rules governing all forms of social relations, economic rights, and relations with other First Nations. We have never ceded or surrendered our title to our lands, rights to our resources, or the power to make decisions in our territory. 28

Squamish Nation’s understanding of its sovereignty and jurisdiction is also set out in the SFN-BC Agreement, where it asserts:

That the Squamish Nation hold aboriginal title, rights and other interests to its Traditional Territory, including the right to make decisions on how the lands, waters and resources are used and the responsibility to steward such lands, waters and resources on behalf of this and future generations.

That the lands, waters and resources in the Squamish Nations territory belong to the Squamish Nation and are subject to their inherent sovereignty, jurisdiction and collective rights. That the Squamish Nation Territory has never been ceded, sold or surrendered to the Crown or otherwise.

That the Squamish Nation intends to manage the lands and resources in accordance with its laws, policies, customs and traditions.29

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29 SFN-BC LUP Agreement, supra note 18.
Notably, within the SFN-BC Agreement, BC also asserts its vision of its sovereign jurisdiction over the same territory. BC asserts:

The lands, waters and resources within the Sea to Sky LRMP area are Crown lands, waters and resources subject to the sovereignty of Her Majesty the Queen and the legislative jurisdiction of the Province of British Columbia.\(^{30}\)

Despite these different and independent assertions of sovereignty, the parties proceed to come to an agreement regarding management of the land in the territory where these competing claims exist.

Jeremy Webber posits that agreements between Canadian governments and Indigenous nations that acknowledge the co-existence of competing claims of sovereignty may be indicative of a “bracketing of the question of sovereignty, not in a way that ignores the question, but that suspends its final determination, allowing multiple assertions of sovereignty to exist in a continual, unresolved – perhaps never resolved – tension.”\(^{31}\) He suggests that what one might be seeing reflected in these agreements is a willingness on behalf of the parties to “agree to disagree” in order to move forward, and moreover, a willingness to acknowledge that a different model of sovereignty may be possible. What might be occurring, in other words, is a reconstruction of the traditional concept of sovereignty (where ultimate authority must rest with one governing authority), toward recognition that multiple governing authorities (state and

\(^{30}\)Ibid.

\(^{31}\) Jeremy Webber, “We are Still in the Age of Encounter: Section 35 and a Canada beyond Sovereignty,” in Patrick Macklem & Douglas Sanderson, eds., *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) at 64. Webber contends that “some provincial governments – especially in British Columbia – have shown a willingness to agree to disagree, expressly on the location of sovereignty. The most striking (but not the only) example is the *Haida Gwaii Reconciliation Act* of 2010, an act of the BC Legislature.
Indigenous) can co-exist, in an undetermined way, within one constitutional order. Webber suggests that if one sees sovereignty as originating and emerging from a legal tradition and its legal institutions, then there is possibility for multiple, co-existing sovereignties to operate through the various legal orders that exist in Canada.

This dissertation examines ways in which Squamish Nation is working to broaden recognition of Squamish Nation jurisdiction in Canadian society through the Squamish legal order. The Nation is doing this through creatively developing legal processes that challenge the ubiquity of Crown authority, and by entering agreements with the Crown and third parties which acknowledge Squamish Nation’s competing jurisdiction. By examining Squamish Nation’s experiences in land use planning and environmental assessment, these sites, where competitions between Crown and Indigenous jurisdiction have played out, are illuminated. The analysis enables one to see, in a tangible way, how jurisdictional competitions operate on the ground. It also provides insights into how better relationships between legal orders may be established.

1.2 Research Question and Objectives

Much scholarly attention has focused on Canada’s Constitution and Supreme Court of Canada (SCC) jurisprudence for answers regarding recognition of Indigenous jurisdiction and reconciliation (particularly the doctrine of the duty to consult). This dissertation shifts the lens toward Indigenous communities. It asks: how has Squamish Nation worked outside the treaty process to create space for its own legal processes and to strengthen recognition of its jurisdiction over land, waters, and resources in Squamish Territory? The central objective is to learn how Squamish Nation established processes for consultation and consent at the community level in order to strengthen recognition of Squamish jurisdiction more broadly. In other words, it
seeks to understand how these Squamish-based decision-making processes led to a sequence of events and actions on behalf of the state and third parties which are building recognition of Squamish Nation jurisdiction beyond a local scale.

To answer my research questions, I conduct a case study of Squamish Nation’s development of Xay Temíxw, its negotiation of the SFN-BC LUP Agreement with the Province, and its creation of the Squamish Process used to assess the Woodfibre LNG Projects. I consider these to be examples of Squamish Nation legal processes because they were initiated by the Squamish Nation and involved community engagement, deliberation, and decision-making about problems faced by the Squamish Nation community. The case study reveals Squamish Nation’s motivations for developing these processes; what forms of community engagement were used; what perspectives, values and laws community members brought to the discussions; how final decisions were made; and perhaps most importantly, how Squamish values and laws shaped the plans, reports, and agreements that emerged following the community deliberation that took place in these processes. It demonstrates how these processes reflect a contemporary Squamish legal order, in other words, how these processes continue to re-generate contemporary articulations of Squamish law. It also examines how, through these processes, Squamish Nation has pushed back on Crown-imposed law, which created tension for the state legal order, as well as impacted the behaviour of third-party proponents. The result has been a broadening of the recognition of Squamish Nation jurisdiction.

32 My case study provides more in-depth examination and analysis of the Squamish Process because it addresses pressing and timely questions concerning how Indigenous models of consent are operating in the context of Canadian environmental assessment today.
A secondary aim of this dissertation is to illuminate how Squamish law, like all law, is not static, but fluid. It is created and recreated through deliberative processes, and thus it is important to consider how creating greater space for the operation of Indigenous deliberative processes within a wider Canadian legal context can help revitalize Indigenous legal orders and build recognition of Indigenous jurisdiction within Canadian society. With this objective in mind, this dissertation focuses more on describing the development and operation of Squamish legal processes, than on examining the specific principles of Squamish law. In other words, it pays attention to the way Squamish Nation developed legal processes and how the values and laws expressed by the community during these processes were translated into various legal forms (i.e. plans, reports, agreements etc.).

John Borrows observes that “[l]aw is, among other things, a social experience that requires us to associate with one another and communicate about how we should best conduct our affairs.” Law emerges from human interactions focused on resolving current problems. In other words, law is reflective of practices used to address problems and organize society; it is

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34 Jocelyn Stacey defines deliberation as “debate and discussion aimed at producing reasonable well-informed opinions in which participants are willing to revise preferences in light of discussion, new information, and claims made by fellow participants;” see Jocelyn Stacey, “The Deliberative Dimensions of Modern Environmental Assessment Law” (2020) 43:2 Dal LJ 865.

always being created and re-created. By recognizing this “active dimension of law,” one can gain a better sense of how respectful relationships can be struck between different legal orders. Jeremy Webber argues that when we appreciate the “active dimension of law,” it becomes clear what we should seek to protect when we set out to respect another legal order:

We should not aim to protect a predetermined body of norms, for legal orders are always richer, more complex, and more dynamic than a focus on norms alone would suggest. We should respect that order’s practices of normative deliberation and decision-making – the processes by which normative claims are discussed, disagreement adjudicated (in the largest sense of “adjudicate,” including all means of settling disputed norms), and the resultant norms interpreted and elaborated.

As Webber points out, respecting a legal order is not just about distilling specific legal principles and then putting them to use (although this may be an aspect of it). More importantly, respecting a legal order requires understanding the contexts and/or processes necessary for the generation of legal norms, and discovering how the legal processes of different legal orders can co-exist and flourish. By examining how Squamish Nation is using its own deliberative processes to make decisions about its territory (concurrent with state governments), we can gain a better understanding of how legal pluralism operates in Canada, and/or how the Canadian legal system can be modified, or better structured, to respect and accommodate Indigenous legal orders.

Indeed, the state-created processes for land use planning and EA (discussed in following chapters) have largely failed to establish successful sites for communication between Canadian

38 Webber, “Human Agency”, supra note 36 at 170.
and Indigenous legal orders. This has compelled various Indigenous nations to reject the state processes and instead develop their own.\textsuperscript{39} In examining how Indigenous nations are constructing environmental processes, we can learn more about the possibilities and limitations of their operation within, or adjacent to, Crown-led processes. We may also gain normative insight into the ways in which different legal orders communicate with, and influence, one another.

In the remainder of this introductory chapter, I do five things. First, I discuss different scholarly perspectives on Indigenous reconciliation and resurgence and situate this dissertation within that literature. Second, I discuss why communication across Canada’s legal traditions is an important aspect of restructuring the political relationship between Canada and Indigenous peoples. This sets context for the examination of Squamish Nation legal processes in subsequent chapters. Drawing on scholarship concerning the revitalization of Indigenous law in Canada, I

consider some of the inherent challenges in this work, and then explain why examining concrete examples of Indigenous processes operating in BC today is useful. Third, I situate myself in relation to this research project and explain the origin of my interest in the topic of Squamish Nation jurisdiction. Fourth, I describe how I developed my methodological approach and my research arrangement with the Squamish Nation. Finally, I lay out the trajectory of this dissertation with an overview of the chapters.

1.3 Reconciliation and Indigenous Resurgence in Canada

While reconciliation may mean many things, in its broadest sense it can be understood as a concept that entrenches processes aimed at restructuring the colonial relationship between Indigenous nations and Canadian governments to enable a more equitable and just co-existence. Much legal scholarship on reconciliation focuses on Canada’s constitutional entrenchment of Aboriginal and treaty rights, and on the Supreme Court of Canada’s use of reconciliation as one of the central organizing principles in its jurisprudence. Indigenous scholarly perspectives on reconciliation vary. Indigenous legal thinkers such as John Borrows, Dale Turner, and Val Napoleon reject the narrow interpretation of constitutional reconciliation offered by the Canadian judiciary, which sees reconciliation as the balancing of Indigenous rights with the state’s unquestioned assumption of sovereignty over what is now Canada. They endorse a more robust approach to reconciliation which involves refusing the colonial narrative of the state’s assumption of sovereignty over Indigenous peoples, restructuring state institutions to account for Indigenous knowledge, legal orders, and jurisdiction, and ultimately transforming the political and constitutional relationship between the Crown and Indigenous peoples to enable mutual
Indeed, much of their scholarship addresses why and how space must be created for Indigenous thought, legal perspectives, and legal orders within a wider Canadian legal context, including within state institutions. They advocate for greater recognition of the plurality of Indigenous legal traditions operating within Canada; these traditions are important sources of law that should be constitutionally recognized alongside common and civil law traditions and provided the institutional support necessary to develop and flourish.

Other Indigenous scholars adopt a more critical view of Indigenous peoples working in conjunction with the state. Critical Indigenous thinkers have interrogated the concept of reconciliation and other legal principles that form the foundation of Canadian Aboriginal law, asking whether power asymmetries in the relationship between the state and Indigenous peoples prevent just and honourable relationships from ever occurring. Leanne Simpson worries that Indigenous participation in reconciliation processes “will benefit the state in an asymmetrical fashion, by attempting to neutralize the legitimacy of Indigenous resistance.” Taiaiake Alfred criticizes state-sanctioned processes for reconciliation because he believes they amount to masked assimilation efforts and a preservation of the status quo; in his view “[r]econciliation


gives Onkwehonwe [Indigenous peoples] a place inside Settler society with no requirement for Settlers to forego any of their ill-gotten gains personally or collectively.”^{42} Glen Coulthard argues that the assumption that the colonial relationship between Indigenous peoples and the Canadian state can be reconciled through a liberal “politics of recognition” is misguided.^{43} He describes the “politics of recognition” “as a recognition based approach to reconciling Indigenous peoples’ assertions of nationhood with settler-state sovereignty via the accommodation of Indigenous identity-related claims through the negotiation of settlements over issues such as land, economic development, and self-government,” and believes that reconciliation processes remain rooted in colonialism due to the fact that they are still “structurally committed” to dispossessing Indigenous peoples of their lands and self-determining authority.^{44} For many critical Indigenous scholars, the path forward does not involve reconciling with the state, but rather the development of unique forms of Indigenous political resistance. Audra Simpson calls this form of resistance “refusal,” and defines it as a “political and ethical stance that stands in stark contrast to the desire to have one’s distinctiveness as a culture, as a people, recognized.”^{45} For Audra Simpson, “[r]efusal comes with the requirement of having one’s political sovereignty acknowledged and upheld, and raises the question of legitimacy for


^44 *Ibid* at 151.

those who are usually in the position of recognizing” [i.e. the Canadian state and its institutions].

Borrows and James Tully explain that the term “resurgence” has become a popular way to refer to “Indigenous peoples exercising powers of self-determination outside of state structures and paradigms. It is deployed by communities as a force for reclaiming and reconnecting with traditional territories by means of Indigenous ways of knowing and being.” However, they note that there is distinct disagreement among Indigenous scholars, and their allies, regarding the types of practices that constitute resurgence, and that many Indigenous peoples support forms of resurgence that do not necessarily involve a dramatic rejection of the state, as is advocated in many critical Indigenous political circles. Indeed, Indigenous scholar, Aaron Mills, explains that it is unclear to him how one goes about turning away from the state given the interdependence between Indigenous and non-Indigenous peoples. Mills acknowledges the position of scholars such as Alfred, but also heeds the advice of Anishinaabe elder, Fred Kelly, who Mills interprets as saying, “despite all injustice, our profound interdependence means that any approach to improving our relationship based on a strict us-them (i.e., settler-Indigenous)

46 Ibid.
48 Ibid at 5.
divide must fail.” Mills concludes that “turning away is much more complicated than it might at first seem.”

Borrows and Tully are concerned with the polarized debates which occur between those that embrace “separate resurgence” and those that adopt a “reconciliation” approach. In trying to make headway through this debate, they distinguish different forms and meanings of reconciliation and resurgence. One form of reconciliation is that which involves practices that reconcile Indigenous peoples and settlers to the status quo; they reject this form. Another form involves practices that result in “transformative” reconciliation; this form of reconciliation involves resurgent practices that have the potential to transform unjust relationships between the state and Indigenous peoples.” Transformative reconciliation is “empowered by robust practices of resurgence.” Borrows and Tully advocate for moving beyond dichotomous thinking toward collaboration on the types of practices that involve robust resurgence leading to transformative reconciliation.

In addition, Borrows cautions against advocating for a universalized approach to Indigenous resurgent practices, and problematizes the assumption made in many Indigenous political circles that “state institutions are irredeemable and do not have any positive role as instruments of change in Canada.” He suggests that Indigenous engagement with the state and

50 Ibid at 141.
51 Ibid.
52 Borrows and Tully, supra note 47 at 5.
53 Ibid.
54 Ibid.
55 Ibid.
56 Borrows, Freedom, supra 40 at 162.
its institutions are merited if it will lead to a healthier future, and he, like Mills, points out that “humans are deeply interdependent on one another for their health and vitality.”  

Borrows raises concern that “if the only response to state power is ‘essentialized’ resistance at every turn, this may overturn current configurations of power (though not necessarily so), but such reordering does not inevitably lead to healthier futures.”  

He notes: “[t]hose whom we oppose do not go away if the axis of power shifts. New relationships will be needed that require institutional and structural components. Politics is always with us, and it is usually messy and requires some degree of compromise.”  

Borrow also points out that adopting a universalized perspective on Indigenous resistance narrows Indigenous freedom, and Indigenous peoples should not be confined in this way:

Tribes and First Nations can absolutely or with qualifications embrace the nation state. Similarly they can reject the nation state and attempt to operate outside its parameters. Neither approach inexorably leads to freedom. The trick is to chart the course which is less oppressive in the short and long term, while leaving broad possibilities for engaging in alternative ways of acting in the real world when better options present themselves. Whether freedom is enhanced and good lives are made more attainable depends on the contextual contingencies which must be judged on ever-shifting, complex multidimensional grounds.

To this end, Borrows advocates for a careful, nuanced, and multi-dimensional approach to reconciliation and resurgent practices.

Aligned with Borrows’ and Mills’ modes of thinking, this dissertation recognizes the interdependency between Indigenous and non-Indigenous communities. It sees that creative

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57 Ibid.
58 Ibid.
59 Ibid.
60 Ibid at 179.
Indigenous political and legal strategies are capable of, and necessary in, interrupting and disrupting colonial narratives that underpin the operation of state institutions and its legislative frameworks. Once the disruption occurs, however, it becomes necessary to work collaboratively to dispel colonial assumptions that inform state institutions, and to restructure the frameworks upon which state institutions are built. This inevitably requires Indigenous nations and Canadian governments build relationships, relationships that are subject to continual negotiation. To this end, this dissertation adopts a relational approach to reconciliation. It advocates for the type of approach put forth by James Tully – “reconciliation is neither a form of recognition handed down to Indigenous peoples from the state nor a final settlement of some kind. It is an on-going partnership negotiated by free peoples based on principles they can both endorse and open to modification en passant.”

1.4 Reconciliation and Indigenous Legal Processes in a Multi-juridical Canada

Val Napoleon finds the definition of reconciliation put forth by the Truth and Reconciliation Commission of Canada useful: “reconciliation is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country. For that to happen, there has to be awareness of the past, acknowledgement of the

61 James Tully, *Public Philosophy in a New Key* (Cambridge: Cambridge University Press, 2008) at 223. Tully believes the path toward reconciliation involves restructuring the colonial relationship between Indigenous and non-Indigenous peoples to reorient the relationship around the principles of mutual recognition, intercultural dialogue, mutual respect, sharing, and mutual responsibility (223). A relationship based on the aforementioned principles “preserves the values of a liberal democracy in a way appropriate to a just, culturally diverse society,” and in this sense can “be an exemplar for the plural societies in the twenty-first century” (252).
harm that has been inflicted, atonement for the causes, and action to change behaviour.”62 And, she emphasizes that “the ambit of what is imagined in the name of reconciliation must include legal orders – Indigenous and Canadian – as the starting point.”63 Indeed, a fundamental element in restructuring the relationship between Canada and Indigenous peoples is establishing respectful relationships between state and Indigenous legal orders. This involves fostering engagement between Canada’s three legal traditions: common law, civil law, and Indigenous legal traditions. A central challenge today is to develop mechanisms and processes which enable effective communication between these legal traditions,64 such that each is respected and has space to adapt and grow in an everchanging contemporary society. To date, Canadian


63 Napoleon, supra note 62 at 5.

64 Merryman and Perez-Perdomo define a “legal tradition” as “a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective” in John Henry Merryman and Rogelio Perez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America, 4th ed (California: Stanford University Press, 2018) at 1. Canada’s common law tradition derives from the common law of England and its civil law tradition derives from Roman law and the Napoleonic Code; both were brought to Canada through European settlement. Canada’s Indigenous legal tradition is comprised of multiple Indigenous legal orders that pre-existed the common and civil law in Canada. Within these multiple Indigenous legal orders are the laws and legal processes specific to each Indigenous group. For further discussion on the role of Indigenous legal traditions in Canada, see John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19 Wash UJL & Pol’y 167 online: <http://openscholarship.wustl.edu/law_journal_law_policy/vol19/iss1/13 at 174> [Borrows, “Legal Traditions”]; Borrows, Indigenous Constitution, supra note 35; Napoleon, “Thinking”, supra note 33; Indigenous Law Research Unit, University of Victoria Faculty of Law, online: <https://www.uvic.ca/law/about/indigenous/workwithindigenouslaw/index.php> [ILRU].
governments and courts have recognized limited forms of Indigenous jurisdiction, and while Canadian jurisprudence speaks to the importance of using Indigenous laws to interpret constitutional issues and resolve disputes,\(^{65}\) this rarely plays out in practice.\(^{66}\) Even when the legal and political will are there, Canadian judges, lawyer, and politicians frequently lack understanding of how to engage effectively with Indigenous legal traditions. As former Chief Justice of the BC Court of Appeal, Lance Finch, articulated, there is great need for the non-Indigenous Canadian legal profession – judges, lawyers, lawmakers, and academics – to better understand “how” to recognize and conceptualize Indigenous law.\(^{67}\) Learning “how” involves turning the focus toward Indigenous nations.

Many Indigenous nations are developing creative and innovative methods to build or reconstruct their own laws and legal processes, particularly as they pertain to governance over their lands, waters, and resources.\(^{68}\) Nations are reclaiming their jurisdictions by rebuilding their

\(^{65}\) See for example *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para 84:

This appeal requires us to apply not only the first principle in *Van der Peet* but the second principle as well, and adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts.  In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past (my emphasis added).


laws in various ways that are relevant and meaningful to their communities today, and which can be communicated to a wider Canadian audience. The complexity of this task of this cannot be overstated. Canadian colonial history has caused erosion and fragmentation of many Indigenous legal orders, as Val Napoleon and Hadley Friedland explain:

We are not starting from a neutral spot, where Indigenous legal traditions are completely intact, left magically untouched by hundreds of years of colonialism. The task of greater recognition and use of Indigenous laws in Canada requires more than simply uncovering pristine laws in protective bubbles to isolate them from the damages of colonization. It is not an exercise in legal archeology. Colonialism has disrupted Indigenous laws, legal pedagogies, and historic means of legitimization and promulgation. Today’s work is about recovering and then taking up an interrupted, intergenerational conversation, with all its complexities and tensions.

Many Indigenous communities are engaged in the complex task of revitalizing their laws for their own communities as well as developing mechanisms to enable the communication of their laws across legal traditions. As Leclair, Papillon, and Forget note “Indigenous peoples are increasingly developing their own mechanisms to assert their rights and exercise greater control over consultation processes concerning development of their lands.” Part of taking up these

[Note: Footnotes are included for additional sources and references.]


70 Napoleon & Friedland, “Inside Job”, supra note 68.

71 Jean LeClair, Martin Papillon, & Hubert Forget “Consultation Protocols Unilaterally Adopted by Indigenous Communities in Canada: A Convergence Model of Indigenous and State Orders?/Les protocoles de consultation
conversations today involves addressing the accessibility and intelligibility of Indigenous law in contemporary Canada. Borrows, Napoleon and Friedland point out that intelligibility and accessibility are central challenges to the revitalization of Canada’s Indigenous legal tradition, and are closely related, but different concepts. Borrows notes that intelligibility relates to one’s ability to “foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.” In other words, intelligibility in law relies on the ability of individuals to understand what is expected of them based on known principles. Accessibility, on the other hand, involves knowing where to go to find the law. In Borrows’ words, “[l]aws are accessible when people know where to find them, how to learn from them, and who to speak to if they have questions about them.” Because sources of Western law and Indigenous law often differ, accessibility and reciprocal intelligibility between Canada’s legal traditions is complicated. Western law is entrenched in formal proclamation and written record, whereas Indigenous laws are often unwritten and are located in various cultural sources including stories, songs, rituals, ceremonies, maps, language and even in the land itself. Based on these differences “concerns have been raised that Indigenous legal traditions may not be sufficiently precise or intelligible to be accessible and to be relied upon as laws” within Canada’s common and civil law traditions.


72 Ibid. See also Napoleon & Friedland, “Gathering Threads”, supra note 68; Borrows, Indigenous Constitution, supra note 35.

73 Borrows, Indigenous Constitution, supra note 35 at 138 -139.

74 Ibid. at 142.

75 Ibid. at 23 – 55.

Indeed, Canada’s civil and common law traditions, structured in accordance with a precise hierarchy, struggle to understand concepts or sources of law that do not easily fit their paradigm.

The Indigenous Law Research Unit at the University of Victoria states that “[a] robust engagement with Indigenous laws includes making these laws more accessible, understandable and applicable today. Thus, the work ahead involves both revitalizing Indigenous legal orders as well as building the practical mechanisms needed to enable communication between Canada’s Indigenous, common, and civil law traditions. Napoleon and Friedland point out that “[a]s long as Indigenous laws are not accessible or usable, in a crunch, by default, both Indigenous and non-Indigenous people in Canada will turn to state law to resolve disputes. Inability to use Indigenous legal processes because of inaccessibility, perpetuates the colonial process of undermining and obscuring Indigenous legal traditions. Legal scholarship must therefore take up the question of figuring out “how” to overcome these challenges. A key way to do this is by examining concrete examples. In other words, learning “how” involves studying the ways Indigenous communities are experimenting with, and developing, legal processes and bodies of law within different contexts. Examining concrete examples provides a tangible set of considerations to reflect upon, and it illuminates the specific possibilities and challenges that need to be overcome.

77 ILRU, supra note 64.
78 Napoleon & Friedland, “Inside Job”, supra note 68 at 741.
79 Ibid.
80 Ibid at 733. In Napoleon & Friedland’s words: “we need legal scholarship that translates from the theoretical and the philosophical to the practical and concrete – and then back again.”
In tackling the “how” question, it must be noted that Indigenous nations in Canada are richly diverse and have experienced colonialism in different ways, particularly due to the regionalism of Canada. For this reason, the path toward regeneration and rebuilding Indigenous legal orders will be unique to each Indigenous community. Because law is fluid, and necessarily a product of social context, historic Indigenous legal principles and institutions will continue to be modified to respond to contemporary challenges.\(^81\) However, as Borrows notes, “the strength of a [legal] tradition does not depend upon how closely it adheres to its original form but on how well it develops and remains relevant under changing circumstances.”\(^82\) He advises that:

Indigenous peoples should draw upon their and other cultures’ best practices and procedures in the law-making powers. They should compare, contrast, accept and reject governmental and legal standards from many sources, including their own. Some might call this revisionist, and seek to undermine indigenous governance and law by the use of this label. Such a critique would be invidious. All governance is revisionist, as it must be continually re-interpreted and re-applied in each generation to remain relevant to changing conditions. Law would become unjust and irrelevant if it was not continually revised.\(^83\)

Borrows’ view is echoed in the words of Squamish Nation Hereditary Chief and Councillor Ian Campbell/Xalek Sekyu Siyam (Chief Campbell), who, in describing Squamish Nation’s motivation to build the Squamish Process, stated:

> We have managed our lands and resources for millennia. We have structures in place. We have laws. It is our exercise of governance and law in this process [the Squamish Process]. It is not going backwards in time to the way it was when our great grandparents lived on these waters and lands. It’s drawing that forward and applying it in a modern

\(^81\) For of this concept in relation to Tsilhqot’in Law, see Val Napoleon, “Tsilhqot’in Law of Consent” (2015) 48:3 UBC L Rev 873 at 886.


\(^83\) Borrows, “Legal Traditions”, *supra* note 64 at 200.
context utilizing the best tools available to us.\textsuperscript{84}

The work of making Indigenous law more accessible and intelligible in contemporary Canada requires using best practices across cultures, and often means working with translation techniques to facilitate broader understanding of Indigenous legal principles by non-Indigenous communities. Indeed, Indigenous legal processes can be important sites of legal translation where Indigenous communities and their governments work to decide how to apply their own laws and values to contemporary problems, and how to express their laws and decisions to a wider Canadian audience. This may involve an Indigenous nation adopting Western legal concepts and strategies to reach specific aims.

The concept of “translation” is often viewed as a coercive tool used to assimilate Indigenous knowledge into a Western knowledge paradigm. Serious criticism has been directed at translation processes that occur in co-management arrangements between Indigenous and state governments where, some have argued, Indigenous knowledge is converted into Western language, concepts, and procedures that can be antithetical to, or even undermine, Indigenous values and understandings.\textsuperscript{85} Marc Stevenson has studied environmental resource management

\textsuperscript{84} Interview of Chief Campbell, \textit{supra} note 8.

agreements between state and Indigenous governments in the North and argues that “concepts such as ‘stock’, ‘wildlife’, ‘harvest’, ‘quota’ etc. used in many agreements simply have no equivalents in most Aboriginal languages and collectively place control of the hunt entirely in human hands—a gross violation of traditional relationships with animals at best.”

Paul Nadasdy suggests that the integration of Western science and Indigenous knowledge, a necessity in co-management arrangements, “entails translating First Nation’s people’s life experiences into forms compatible with state wildlife management (e.g. numbers and lines on maps).” And, Hayden King argues:

> Not only do the bureaucratic land use regimes of the present force Indigenous peoples into an alien system of management that limits their decision-making power; the process also encourages them to surrender their values and, indeed, their cultural perspectives on land and resource use in favour of Western or Euro-Canadian notions of development, conservation, and science.

Finally, in the context of comprehensive claims settlement in the North, Coulthard observes that a negative effect of “this power-laden process of discursive translation has been a reorientation of the meaning of self-determination for many (but not all) indigenous people in the North.”

He explains this as “a reorientation of indigenous struggle from one that was deeply informed by the land as a system of reciprocal relations and obligations. . . to a struggle that is now

87 Nadasdy, “Re-evaluating”, supra note 85 at 1.
increasingly for land, understood as some material resource to be exploited in the capital accumulation process.”

It is important to carefully consider these critiques of translation. Indeed, power asymmetry between Indigenous and Western knowledge and legal orders cannot be ignored. However, it is nonetheless important not to dismiss the process of legal translation outright just because power imbalances exist. When Indigenous peoples take control of the translation processes and determine how to integrate Western concepts into their land and resource management laws, it is not necessarily a product of coercion. Indigenous nations can find utility in Western concepts. And, as Borrows notes, all law is subject to change – “all law and governance is revisionist, and must be continually re-interpreted and re-applied” to maintain its relevance in particular contexts. Thus, thus central questions to consider are: what is the context in which translation is occurring, who is making the translation decisions; and what is the short, and long term, objective of the Indigenous nation? Western concepts can be adopted strategically as part of a broader process to further Indigenous empowerment and self-determination. Some Indigenous nations conclude that it is worthwhile to pursue immediate possibilities and work from that point forward toward more substantive, transformative change. Indeed, Graham White argues that co-management regimes have empowered Indigenous peoples in the North, and in response to critics such as Stevenson, Nadasdy and King, he states:

90 Ibid.
91 For discussion on how Inuit and Western knowledge are used in a complementary way in impact assessments by the Nunavut Impact Review Board see Nicole Peletz, Kevin Hanna and Bram Noble, “The central role of Inuit Qaujimaningit in Nunavut’s impact assessment process” (2020) 38:5 Impact Assessment & Project Appraisal 412.
Without denying the hegemonic power of the Western bureaucratic paradigm, we should not underestimate the resilience of Indigenous cultures or their adaptability. Consider, for example, how modern communication technologies both threaten Indigenous cultures and are used to foster them. Does learning the rules of the co-management game, developing bureaucratic expertise, and engaging in the discourse of state management necessarily entail loss of culture for Indigenous people? Indigenous cultures are not static and have repeatedly demonstrated remarkable capacity to retain their central defining values in the face of changing circumstances. This observation is not to downplay the threats to Indigenous cultures from a host of developments, including loss of language and severing of links to the land, but, rather, to suggest that the health of Indigenous cultures is a complex matter.\(^{92}\)

Undoubtedly there is much complexity in the development of Indigenous legal processes in contemporary society, and creative engagement with different legal concepts is necessarily required. As White points out, while the Canadian state will continue to exert its jurisdictional power, the “state system is not imperviously fixed;” state systems and contexts can, and have, been influenced by Indigenous peoples.\(^ {93}\) In other words, to dismiss the ability of Indigenous nations to utilize Western legal concepts, and to engage in legal translation to make Indigenous law more widely understood, is to perpetuate a colonial holding pattern where state structures become the default in the absence of broader understanding of how to use the Indigenous ones.

Indigenous communities such as Squamish Nation are developing legal processes that engage translation techniques with the objectives of resisting imposed Crown processes, and of building recognition of their jurisdiction.\(^ {94}\) These processes are necessarily iterative and require creative experimentation to develop mechanisms that address colonial power dynamics.


\(^{93}\) *Ibid* at 322.

\(^{94}\) Curran explains how BC Indigenous Nations are “translating their laws into a Western scientific framework that can interact with state water governance while also repoliticizing provincial government decisions licenses and authorizations;” see Curran, *supra* note 69.
Squamish Nation embarked on the development of its own environmental assessment with the perspective that Squamish Nation, not the Crown or proponents, should conduct translation between Squamish and Western knowledge, values, and law. This was done through the lens of community members, Squamish Hereditary Chiefs and elected Councillors, a Squamish Nation lawyer intimately knowledgeable about the community, and an independently hired environmental consultant. The Squamish Process, therefore, became a way for the Squamish to reject the problematic manner in which Crown processes, the Crown’s EA process in particular, were translating Squamish values, and to take back control of the processes of translating Squamish values into contemporary forms. Through the Squamish Process, Squamish people, not the state or proponents, were able to decide what language to adopt; what procedures to follow; the modes of community engagement to use; the assessment methodology; and whether and how the community’s central concerns could be addressed by measures set out in contractual agreements with the proponents. While the backdrop of Canadian state law had (and has) significant influence, Squamish sought to minimize power asymmetries through its process. In other words, in stepping away from Crown-created structures that are implicated in the type of assimilationist translation techniques critics speak of, Squamish created a space where translation could better occur on Squamish Nation terms.

The Law Commission of Canada discusses different strategies Indigenous communities are using to create new legal processes to respond to their current circumstances. Some Indigenous communities have approached the challenge by:

reaching into the stories of their Elders to identify the essential values that guided their people historically and then using these values to guide their contemporary law making.

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95 Law Commission of Canada, supra note 76.
Other communities have drafted charters or constitutions based on the knowledge of their Elders, setting out the community’s principles, values, and customs for guidance of its citizens, government and law making. Still others are turning to communities with which they have close ties to explore traditions of those communities and use the information gathered to reconstruct their legal traditions.96

Some Indigenous communities, such as Squamish, are choosing to create new legal processes that blend their Indigenous laws with aspects of Western law to produce new legal models that fit their community’s current needs. As Chief Campbell stated in his oral testimony at the National Energy Board (NEB) hearing in 2014 to consider the expansion of the Trans Mountain Pipeline: “there’s many things the Nation is doing to continue to exercise our authority and our connection to our territories. We are not assimilated people. We simply adapt to our ever-changing environment.”97

1.5 Situating Myself in the Research

Before discussing methodology, it is important to explain how I came to this research project and how my experiences as a non-Indigenous scholar have shaped how I have proceeded with this research. When I began undergraduate study in sociology in the mid-1990s, the BC Treaty Process was relatively new and the Nisga’a Agreement in Principle98 had just been announced. At the time, I thought this first modern treaty in BC represented a monumental event for reestablishing the relationships between Canadian governments and BC Indigenous peoples. It appeared to be a time of great hope and promise, and when I graduated from UBC in 1998, I

96 Ibid at 11.
wanted to work for the BC Treaty Commission (BCTC). I thought that a law degree was the way
to get there, but I was hesitant to rush back to school right away so I took a year off to think
about it. During that time, I spent several months working on a project that involved researching
anger-management programs available to Indigenous women in BC. I worked for a Squamish
Nation organization called Salishan Pathways, located in the Eslha7ān Learning Center on the
Mission Reserve in North Vancouver. My job was to provide a literature review, attend a focus
group with Squamish Nation women, and conduct interviews of Squamish Nation members and
community justice workers. The objective was to learn more about anger experienced by
Indigenous women and what social programs were available. I would then write a report
summarizing the findings. It seemed like a straight-forward research agenda, but it turned out to
be much more complex.

During my research I was exposed to different ways of thinking and of conducting
myself. I became very conscious of the enormous gaps in my understanding of Indigenous
communities and that there were ways of doing things that were unknown to me. One day,
Teresa/Tlesaht, the head of the organization, told me that we needed to drive to Squamish to
meet with some people about the project. I spent the day with several Squamish Nation
community members gathering wood and collecting cedar branches to be used to build a sweat
lodge. Along the Squamish River, I learned how to find large flat stones, known as
“grandfathers,” to be used in the sweat. I also learned how to pick the heads off stinging nettles
to be used to make tea. At the time, I could not clearly understand how these experiences would
become part of our research project, but as years have passed, I have gained a better
understanding. It was not about incorporating that information into the project so much as it was
about shifting my lens. I needed those experiences to better understand the context in which I was working.

When I graduated from law school, I did not work for the BCTC. By that time, serious questions had arisen about the efficacy of the BCTC model, and the fact that Indigenous nations were required to relinquish claims to much of their territory in order to obtain a treaty. I decided to work in a large law firm practicing Aboriginal and environmental law. I then completed my LLM, using the opportunity to examine the relationship between globalization, law and transnational Indigenous advocacy through a case study of Indigenous nations from the Interior of BC that had submitted amicus curiae briefs to the WTO in the Canada-United States Softwood Lumber Dispute. Before taking a faculty position at Kwantlen Polytechnic University, I was again given the opportunity to work for another Squamish Nation organization. This time my job involved doing consulting work for an Indigenous communications company that was working for the Indigenous nations hosting the 2010 Winter Olympics (which included Squamish Nation). 99 This work caused me to consider different arenas in which relationships are built between Indigenous and non-Indigenous peoples. It appeared that much could be accomplished between the federal and provincial governments and Indigenous peoples when working outside of the treaty frame. I began to wonder how Canadian governments might better learn to work and build relationships with Indigenous groups if done outside a “land claims” context. I continued to consider how cross-cultural relationship-building could be learned in different spaces, and when

99 The name of the consulting company was Tewanee Consulting owned by former Squamish Nation Councillor, Tewanee Joseph.
I decided to pursue PhD research, I hoped that the work that Squamish Nation was doing to build relationships and to strengthen its jurisdiction over its territory would be part of it.

I discussed these ideas with Squamish Nation member and lawyer for the Squamish Nation, Aaron Bruce/Kelts’-tkinem, whom I had known for many years, and he explained how Squamish had stepped away from the BCTC, and was using various strategies to build its jurisdiction, including a recently developed community-based land use plan, Xay Temíxw. Throughout this research project he and I continued to have many conversations about Squamish initiatives, including Squamish Nation’s development of the Squamish Process. His knowledge about the potential of Indigenous-led EA to influence Crown processes are central to how this research project has unfolded. Indeed, Bruce was of the view that wider awareness of Squamish initiatives would be beneficial to the Nation, as well as other Indigenous groups and Canadian governments. With this in mind, I turned my research focus to the jurisdiction-building processes of Squamish Nation.

1.6 Methodology

1.6.1 Developing a Methodological Approach

In 2012, then Chief Justice of the BC Court of Appeal, Lance Finch, issued a challenge to the legal profession. The honour of the Crown, he asserted, imposes on all legal professionals a “duty to learn” how to “make space within the legal landscape for Indigenous legal orders.”101 In articulating this “the duty to learn,” he described it as a process whereby we take up the

100 I conducted an extensive formal interview of Bruce, as well as numerous meetings and telephone conversations.

101 Finch, supra note 67.
challenge of identifying the limitations present in Canadian legal perspectives, and recognize “the need for humility, respect and receptivity in our individual and collective approaches to Indigenous legal orders.”\textsuperscript{102} I interpreted Justice Finch’s challenge to mean that we must always consider the simultaneous operation of Indigenous law alongside federal and provincial law when grappling with legal problems, and I wanted to ensure that my research was framed such that the overlapping jurisdiction of provincial, federal and Squamish Nation was evident in my project. I also sought to ensure that my research embraced the duty to learn from Indigenous peoples themselves. I thus decided that an important part of the project would be the perspectives of those with direct experience building the Squamish legal processes. I wanted the analysis of documents to be heavily contextualized by the knowledge I gained directly from individuals who had participated in developing the processes being studied.

Furthermore, I wanted to take measures to present the research in a manner that made clear that the Squamish Nation people I interviewed were the experts of their legal processes. In other words, I wanted to adopt a method that ensures the voices of the interviewees are central. In her chapter titled, “Applying a Decolonizing Lens,” Margaret Kovach begins by asking “[w]hat knowledge do you privilege?”\textsuperscript{103} She explains how Indigenous knowledges have historically been marginalized by Western research processes and how decolonizing research

\textsuperscript{102} \textit{Ibid} at 2.1.2.

\textsuperscript{103} Margaret Kovach, \textit{Indigenous Methodologies: Characteristics, Conversations and Contexts} (Toronto: Toronto University Press, 2009), at 75.
practices depend on the methodological choices made by researchers in conveying information. Kovach states:

Representation and voice have particular relevance within qualitative research, whether this form of inquiry asks participants to share personal experience of an event, occurrence, or phenomenon. Choices made about representation in research and how participant ‘voice’ is presented reveal to the critical reader the researcher’s assumptions about knowledge.\(^{104}\)

When adopting a “decolonizing lens,” researchers must carefully consider how to represent the voice of participants involved in the study. This is even more imperative when a non-Indigenous researcher is conducting research involving Indigenous knowledge, as one runs the risk of perpetuating a colonial framework that marginalizes voices if the researcher does not pay attention to how the Indigenous voice is positioned in the research. Kovach states:

Indigenous research frameworks shift the power of the researcher in controlling the research process and outcome. Methodologically, this means gathering knowledge that allows for voice and representational involvement in interpreting findings. A powerful method for achieving this desire is the use of story, life history, oral history, unstructured interviews, and other processes that allow participants to share their experiences on their terms.\(^{105}\)

Kovach advocates for a research method that involves a conversational style with the interviewee, and an open-ended structure “that is flexible enough to accommodate principles of native oral traditions.”\(^{106}\) This, she argues, is more congruent with a decolonizing methodology as it allows the researcher to obtain knowledge in method that is more attune to Indigenous forms

\(^{104}\) Ibid at 81.
\(^{105}\) Ibid at 82.
\(^{106}\) Ibid at 124.
of communication. In light of this, I decided to conduct semi-structured one-on-one interviews in addition to document analysis. I approached my interviews with the notion that I would provide a general set of questions upfront but allow the interview to flow in different directions as the conversation dictated. I would record and transcribe each interview so that direct quotations could be used extensively in the presentation of the research. Presenting the knowledge obtained through extensive direct quotes would better enable me to center Indigenous voices in the research project.

This project engages both legal and qualitative research methods. Legal research enables one to understand social phenomenon through the study of case law, legislation, government filings and legal commentary. It is useful for understanding how social phenomena relates to, and is shaped by, state legal institutions, but it is narrow in the sense that it rarely captures the perspectives of the individuals involved and its formalism tends to marginalize Indigenous legal knowledge. The social context in which legal issues unfold is often blurry, or invisible, when legal research is the only method used. Qualitative research methods bring more social context to the analysis. As Van den Hoonard explains, qualitative research aims to enhance understanding of social phenomena using a variety of methods including “in-depth interviewing, participant observation, and document analysis to develop a rich understanding of social processes involved in everyday life.” I use personal interviews combined with analysis of case law, legislation,

\[107\] Ibid.


\[109\] Ibid at 2.
government filings, and various secondary source commentary to formulate a narrative on how Squamish Nation developed its own legal processes to address contemporary environmental issues within the context of overlapping and competing provincial and federal jurisdiction.

Combining qualitative and legal research methods has enabled me to develop a fuller account of the Squamish legal processes through the perspectives of principal architects of those processes, and to track how the state has responded within a particular socio-legal backdrop.

1.6.2 Parameters of the Case Study

Bromley defines a cases study as “a systemic inquiry into an event or a set of related events which aims to describe and explain the phenomena of interest.”\textsuperscript{110} Yin defines it as an empirical method that “investigates a contemporary phenomenon (the “case”) in depth and within its real world context.”\textsuperscript{111} Researchers choose the case study method when they want to better understand “a real world case” in which the social phenomena and the context are often not clearly defined.\textsuperscript{112} In other words, the researcher’s contribution through the case study is broadening understanding of the case and/or bringing clarity to how the case is situated within a particular context; to this end, multiple sources of data are used.\textsuperscript{113}

The research in this dissertation is presented in the form of a case study. My intent is to provide a deeply descriptive narrative account of how Squamish Nation built its own legal processes, and to examine the ways these processes have contributed to broadening state and

\textsuperscript{110} DB Bromley, “Academic contributions to psychological counselling: A philosophy of science for the study of individual cases” (1990) 3:3 Psychology Quarterly 299.


\textsuperscript{112} \textit{Ibid.}

\textsuperscript{113} \textit{Ibid} at 16.
third-party recognition of Squamish jurisdiction over land and resources. The case study, therefore, is focused on how Squamish legal processes were built and how they are situated in relation to state legal processes. It is not focused on evaluating the quality of the Squamish legal processes from Squamish Nation community members’ perspectives. My decision to examine Squamish legal processes within a wider Canadian context, and not an internal community context, was based on the agreement I entered with the Squamish Nation Rights and Title Committee which stipulated the parameters of my interviewing. It is also based on my own ethical perspective. I am of the view that an internal evaluation of the quality of Squamish legal processes is a research agenda better suited for a member of the Squamish Nation community, or a collaborative Indigenous and non-Indigenous research team, as opposed to a non-Indigenous scholar pursuing doctoral research.

Through interviews and document analysis, I use different sources of knowledge and data to construct a detailed narrative of the building of Squamish Nation legal processes. The interview data provides insights into the motivations and perspectives of the parties involved. This helps fill the social context gaps that are often missing when using legal research methods alone. My case study begins with the community development of Xay Temíxw and demonstrates how this process set the stage for the development of the SFN-BC LUP Agreement. These two events strengthened proponent recognition of Squamish Nation jurisdiction, which contributed to the Nation’s ability to compel proponent participation in the Squamish Process for the
assessment of the Woodfibre LNG Projects. By weaving legal document data with direct quotations from interviewees, I provide a deeply descriptive chronological account of how these processes were constructed. My aim is to reveal a deeper understanding of the interrelationship between the processes and the Canadian socio-legal context.

1.6.3 UBC Ethics Approval and Research Agreement with Squamish Nation

In carrying out the research for this dissertation, I recognized the importance of securing approval from two authorities, the University of British Columbia (UBC) and Squamish Nation. The UBC process required the submission of an ethics review application to the UBC Behavioural Research Ethics Board (UBC REB). It focused on identifying risks associated with the project and developing a process to ensure ongoing consent from research participants. The Squamish Nation research process required submission of a research proposal to the Squamish Nation Rights and Title Committee (the “Committee”), an oral presentation of my proposal to Committee members, and then a research agreement between myself and Squamish Nation to set the parameters of the research project (the “Research Agreement”). I presented my research proposal to Committee members at the Squamish Nation Band office in North Vancouver. After that, I worked with Squamish Nation legal counsel, Aaron Bruce, to prepare a Research Agreement.

114 Proponent recognition of the protections afforded to areas of Squamish Territory pursuant to the BC-SFN LUP were compelling reasons for the proponents of the Woodfibre LNG project to agree to participate in Squamish Nations’ EA under the Squamish Process.
The Research Agreement sets out: my research objectives; who I would be interviewing; how data would be collected and kept; how informed consent of interviewees would be obtained; and how I would communicate updates on the project to the Committee through Aaron Bruce as directed by Chief Campbell. Squamish Nation Councillor and Spokesperson, Chris Lewis/Syetáxtən, (Councillor Lewis), on behalf of the Committee, signed the Research Agreement in March 2019.

1.6.4 Document Data

Prior to interviews, I analyzed documents central to the Squamish legal processes so that I could later conduct my interviews from an informed position. These documents included: Xay Temíxw,115 the SFN-BC LUP Agreement,116 the Squamish Nation Environmental Assessment Agreement between Squamish Nation and Woodfibre LNG Limited,117 and the Squamish Nation Environmental Assessment Agreement between Squamish Nation and FortisBC Energy Inc.118 I also reviewed Squamish Nation’s submission to the federal government appointed Expert Panel Review of Environmental Assessment Processes,119 legal commentary written by lawyers Aaron

115 Xay Temíxw, supra note 17.
116 SFN-BC LUP Agreement, supra note 18.
117 Squamish Nation Environmental Assessment Agreement Between Squamish Nation and Woodfibre LNG Limited, (14 October 2015) [unpublished on file with author] [SN-EA Agreement].
118 Squamish Nation Environmental Assessment Agreement Between Squamish Nation and FortisBC Energy Inc. (22 June 2016) [unpublished on file with author] [SN-EA Agreement].
Bruce and Emma Hume on the Squamish Process, and multiple bulletins and press releases issued by Squamish Nation regarding the Squamish Process. These documents are not confidential. Some of them are readily available through public sources and others were given to me by interview participants. Squamish Nation entered into impact benefit agreements (IBAs) with FortisBC and Woodfibre LNG; these documents are confidential, and I did not review them as part of this research project. I was able to review the *Squamish Liquefied Natural Gas (LNG) Benefits Agreement* made between Squamish, BC, and BC Hydro, as it is publicly available.

To learn more about Squamish legal principles, I reviewed Squamish Nation’s Governance Policy, Squamish Nation community information bulletins, Squamish Nation’s oral presentation at the NEB hearing for the Trans Mountain Pipeline Expansion Project, books, journal articles, newspaper articles containing discussions of Squamish stories, songs sung by Chief Campbell, and the Squamish-English Language Dictionary.

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121 *Squamish Liquefied Natural Gas (LNG) Benefits Agreement Between Her Majesty in the Right of Province of British Columbia, British Columbia Hydro and Power Authority, and Squamish Nation*, (7 March 2019), online: <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/squamish-nation>.
123 Squamish Nation Oral Presentation Trans Mountain NEB Hearing, *supra* note 97 at paras 5262 – 5670. The oral presentations of Chief Ian Campbell, Mr. David Jacobs/Paitsmauk, and Chief Richard Williams provide a rich discussion of Squamish Nation’s connection to Squamish Territory.
125 *Squamish-English Language Dictionary, supra* note 3.
1.6.5 Interview Data

I interviewed four Squamish Nation individuals and two non-Squamish Nation individuals all of whom had direct involvement with the building of the Squamish Process for the assessment of the Woodfibre Projects. I focused on conducting interviews with the individuals I considered to be the most knowledgeable about the Squamish Process as I felt this would provide the most accurate picture of what had transpired. In other words, I focused on the individuals that I considered to be the experts on the Squamish Process. My original intent was to focus my case study primarily on the Squamish Process; however, as my interviewing progressed, I learned more about the significance of the Xay Temíxw process and the SFN-BC LUP Agreement to Squamish Nation. Two of the interviewees oversaw the Xay Temíxw community process and the negotiation of the SFN-BC LUP Agreement and provided me with insightful information on how these processes have operated to strengthen Squamish Nation jurisdiction. After completing my interviews and reflecting on what I had learned, I decided to expand my case to study to include a deeper examination of Xay Temíxw and the SFN-BC Agreement.

The names and contact details of potential interviewees with direct involvement with the Squamish Process were provided to me by Squamish Nation. I conducted interviews of the following individuals who agreed to have their names published in this dissertation: Squamish Nation legal counsel and member Aaron Bruce/Kelts’-tkinem,126 Squamish Nation Hereditary Interview of Aaron Bruce, supra note 24.
Chief Bill Williams/Találsamkin Siyám (Chief Williams), 127 Squamish Nation Hereditary Chief and Councillor Ian Campbell/Xalek Sekyu Siyam (Chief Campbell), 128 and Squamish Nation Councillor and Spokesperson, Chris Lewis/Syetá̱xtn, (Councillor Lewis). 129 I also interviewed Tyler Gray, Senior Environmental Consultant at PGL Environmental Consultants (Gray), 130 who was hired by Squamish Nation to conduct the technical review of the data in its assessment of the Woodfibre LNG Project. Finally, I interviewed Byng Giraud, former Woodfibre LNG Ltd. Vice President of Corporate Affairs (Giraud), who oversaw Woodfibre’s participation in the Squamish Process. 131

I wanted to ensure that the interviews did not pose a heavy burden on the participants, so I held the meetings over lunch, which I provided. The meetings were predominantly held in the offices of the participants. I travelled to the Squamish Nation Band Office on the Mission Reserve in North Vancouver, legal offices in North Vancouver, PGL Environmental Consultants office in Victoria; and held one interview at the UBC campus. The interviews were semi-structured. I prepared a set of questions ahead of time and sent them to each participant; however, the interviews themselves took an unstructured, conversational form. I allowed the

127 Interview of Squamish Nation Hereditary Chief Bill Williams/Találsamkin Siyám (Chief Williams) (21 August 2019).
128 Interview of Chief Campbell, supra note 8.
129 Interview of Squamish Nation Councillor and Spokesperson, Chris Lewis/ Syetá̱xtn (Councillor Lewis) (25 September 2019)
130 Interview of Tyler Gray, Senior Environmental Consultant at PGL Environmental Consultants (Gray) (22 August 2019).
131 Interview of Byng Giraud, former Woodfibre LNG Ltd. Vice President of Corporate Affairs (Giraud) (24 October 2019).
interviewees to move the interviews forward in the way they thought appropriate. By doing this, I allowed the interviewees to determine what was important and I gained knowledge in areas I would not have addressed including Squamish stories, maps, the significance of Squamish language place names to Squamish Nation land law, and Squamish Nation perspectives on the history and impact of industrial development in and around Howe Sound. Interviews were recorded, and written transcriptions were made so that I could later make use of direct quotes from the interviewees in the dissertation.

My longest interview was with Bruce, a key architect in the development of the Squamish Process. His interview was conducted over several hours in one day, with numerous follow-up meetings and telephone conversations. Bruce was my central point of contact throughout the research and writing of the project. Chief Campbell and Councillor Lewis provided considerable information regarding the development of the Squamish Process, as well as information regarding Squamish Nation’s participation in Crown environmental assessments more generally. Gray provided extensive knowledge regarding the technical environmental aspects of the Squamish Process. Giraud provided information regarding Woodfibre’s perspective on engaging with Squamish Nation and the Crown in two separate EA processes.

Chief Williams and Chief Campbell provided significant knowledge regarding Squamish Nation’s motivation for developing Xay Temixw as a means to strengthen Squamish jurisdiction outside the treaty process. Chief Williams provided me with a video documentary of the
community building of Xay Temíxw (the “Xay Temíxw Documentary”),¹³² which provides a good description of the community’s motivation behind Xay Temíxw and documents many Squamish Nation community members’ perspectives on their relationship to Squamish Territory. Upon hearing the Chiefs’ explanations, it became clearer to me why and how Xay Temíxw and the SFN-BC LUP Agreement are central to building recognition of Squamish jurisdiction. Thus, I decided that my case study should place emphasis on these processes, in addition to the Squamish Process. Describing the building of Xay Temíxw and the resulting SFN-BC LUP Agreement would not only demonstrate how the community has strengthened its land laws through a deliberative process, but also provide a richer context for understanding motivations to develop the Squamish Process.

In terms of the limitations of my research, I did not have the opportunity to interview anyone from FortisBC. Also, because I focused my interviews on the handful of individuals who had direct, expert knowledge of the building of the Squamish Process, I did not interview any female members of the Squamish Nation. I do wish to acknowledge that Squamish Nation member Leslhá7lhamaat, Elizabeth Ross, was recently hired as the Community Outreach Coordinator for the Woodfibre LNG/FortisBC Squamish Nation Environmental Assessment

Agreements in December 2020. She is responsible for future implementation of conditions placed on the proponents arising from the Squamish Process.

As this dissertation focuses on the development of Squamish legal processes, I chose not to interview representatives from the provincial government involved in the Crown EAs of the Woodfibre LNG Project or the FortisBC Eagle Mountain Pipeline Project. My intent in this dissertation is to demonstrate what Squamish Nation is doing outside of Crown processes, and thus I did not need to deepen my understanding of the Crown perspective beyond the documents that are publicly available. To understand the BC government perspective, I reviewed numerous documents filed with the BC Environmental Assessment Office (EAO) in relation to both Projects. These are available through the BC government’s EPIC website. I also reviewed the decision of the federal Canadian Environmental Assessment Agency in relation to the Woodfibre LNG Project.

1.6.6 Obtaining Consent from Interviewees

Each interviewee signed an informed consent form prior to the commencement of their interview. They agreed to having their names and data disclosed in the dissertation. Interviewees

134 Elizabeth Ross was hired following the completion of my interview process.
135 All of the documents for both projects are filed with the EAO and are available online: <https://projects.eao.gov.bc.ca/>.
were free to withdraw from participating in the project at any time. To ensure ongoing consent, I did the following: first, I provided each interviewee with a written transcript of our interview by email after the interview and asked them to edit it as they wished and return it to me; second, I provided each interviewee with copies of the chapters in which their data is used and asked them to indicate any changes they would like made. All interviewees provided approval for use of their data in the chapters where it is used.

1.6.7 Data Analysis, Interpretation and Presentation

Upon completing the interview process, I analyzed the interview and document data by carefully reviewing all the material to locate central and recurring ideas and themes. I discerned concerns and perspectives of the Squamish Nation interviewees that repeated throughout the different interviews. For the most part, the interviewees described the Squamish Nation processes in a chronological order, interjected with stories, anecdotes, and opinions. Different interviewees provided in-depth knowledge of different aspects of the processes. The analysis of both forms of data gave me a deeper and clearer picture of how the Squamish legal processes developed and how they relate to one another. Based on this analysis I determined that a chronological recounting of the legal processes would be an effective way to present the case study. I wrote my narrative beginning with the development of Xay Temíxw and ending with the development of the Squamish Nation process by weaving together the interview and document data. I used extensive quotes from interviewees to describe and explain various aspects of the processes. Extensive direct quoting is used to preserve the centrality of the voices of the interviewees.
1.7 Dissertation Outline

This dissertation examines how Squamish Nation is building recognition of its jurisdiction over Squamish Territory by developing community-based legal processes to address environmental issues and concerns faced by the Nation. The central contribution of this project is a case study of Squamish Nation’s development of the Xay Temíxw Land Use Plan, its subsequent negotiation of the SFN-BC LUP Agreement with the province, and its development of the Squamish Process used to assess the Woodfibre LNG Projects. To provide context for why Squamish Nation developed these processes, the dissertation begins in Chapter 2 with an historical overview of the origin and evolution of jurisdictional conflict between settler governments and Indigenous peoples in BC. Chapter 2 pays attention to how Indigenous agency has shaped the contours of Canadian jurisprudence concerning Aboriginal rights and title, and how significant government policy shifts toward recognition of Aboriginal rights and title are, in good measure, the result of court actions initiated by Indigenous nations. It outlines why and how the BC Treaty Process (BCTP) was implemented in the early 1990s, and the challenges it has faced as Canada’s legal landscape has shifted. Chapter 2 goes on to discuss how the emergence of the SCC’s consultation doctrine, and its first judicial declaration of Aboriginal title in BC, have strengthened the ability of Indigenous nations to negotiate agreements recognizing their governance outside the realm of treaty.

Chapter 3 turns to the Squamish Nation case study. It begins by providing background on Squamish Nation territory, Squamish Nation’s governance structure, and explains why Squamish Nation chose to step away from the BCTP to explore different ways to build recognition of its jurisdiction. To set cultural context for understanding the principles the community brought to the development of the Xay Temíxw Land Use Plan (as well as the Squamish Process later in
Chapter 5), a short discussion of Squamish Nation legal principles is provided. This helps to explain how Squamish law informs contemporary legal processes. Chapter 3 outlines the community process for developing Xay Temíxw, central content of Xay Temíxw, and how Xay Temíxw was impetus for Squamish Nation’s acquisition of a major tree farm license in Squamish Territory. Chapter 3 then discusses how Xay Temíxw is implemented through the SFN-BC LUP Agreement. It describes how Squamish Nation negotiated this agreement with BC outside the Province’s wider land use planning process in order to address Squamish Nation’s specific land use interests.

Chapter 4 shifts the focus back to Canadian case law and explains how the judicial interpretation of the duty to consult and accommodate has narrowed its reconciliatory potential. The integration of the duty to consult within administrative law processes, particularly in the realm of Crown EA, has created impetus for Indigenous groups to build their own processes of consultation and Indigenous consent. The Tsleil-Waututh assessment of the Trans Mountain Pipeline Expansion Project (TMEX) and the Stk’emlúpsece te Secwépemc Nation (SSN) Assessment of Ajax-Abacus Mine Project are briefly discussed to provide examples of how Indigenous groups are building their own mechanisms for consent, and to illuminate how different Nations are approaching the development of Indigenous-led EA in ways that resonate with their communities’ specific needs.

Chapter 5 returns to the Squamish Nation, providing in-depth analysis of the Squamish Process – the model created by Squamish Nation to assess the Woodfibre LNG Projects. This chapter explains the Woodfibre Projects, discusses Squamish Nation’s motivation for building the Squamish Process, and outlines the steps used to carry out the Squamish Process. It discusses how the Squamish community’s values and perspectives were brought to bear on the process,
and how that enabled the Squamish Nation Council to make an informed decision on whether to provide its consent to the Projects.

Chapter 6 analyzes the results of the Squamish Process. The first part of the chapter discusses the impacts of the conditions placed on the proponents through the Squamish Nation Environmental Assessment Agreements.\footnote{SN-EA Agreements, \textit{supra} notes 117 and 118.} It explains how the conditions enabled Squamish Nation to: change technology used in the Projects; alter the design of the Projects; commit the proponents to actions aimed at promoting sustainability and redressing cumulative adverse impacts sustained by Howe Sound; and secure promises from the proponents intended to address the community’s historical mistrust of industry. The second part of the chapter reflects on how the Squamish Process (as a whole) impacted the Crown process. It considers the communication between Squamish and Crown legal orders, the tensions that emerged, and the benefits and limitations of having three regulatory bodies oversee the Projects. It also considers how the Squamish Process may be viewed as a model of transformative EA based on the criteria suggested by Neil Craik, discusses issues raised by the use of private contract in resource development contexts, and examines how the Squamish Process reflects the principles of free, prior and informed consent (FPIC) entrenched within the United Nations Declaration on the Rights of Indigenous People (UNDRIP).\footnote{United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (Annex), UN GAOR, 61\textsuperscript{st} Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008).}

The dissertation concludes in Chapter 7 by reflecting on how reconciliation requires more robust recognition of Indigenous jurisdiction within a wider Canadian legal context. It discusses
how creating space for the recognition and operation of Indigenous legal processes in both
Crown legislative processes, and processes that run adjacent to the Crown, may enable the
implementation of FPIC on Indigenous terms, and moreover strengthen the multi-juridical
foundation of Canada.
Chapter 2: Origin and Evolution of Jurisdictional Conflict between Government and Indigenous Peoples in BC

2.1 Introduction

The colonies of Vancouver Island and British Columbia, and later the province of British Columbia (within the Canadian confederation), have had troubled relationships with Indigenous peoples. While colonial and federal governments engaged in early treaty-making with Indigenous nations in other parts of what is now Canada, treaty-making was largely absent west of the Rockies.\(^1\) The racist perspectives and policies of mid-1800 colonial politicians, and the societies they represented, took hold in BC and their refusal to recognize Aboriginal rights and title remained firm for well over a century. During this time, Indigenous peoples continued to assert their jurisdiction and to fight to resolve what became known as the “Indian land question,” while, in Paul Tennant’s words, white government officials continually “ignored, suppressed and distorted the question.”\(^2\) The injustices experienced by Indigenous peoples in Canada,

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particularly Indigenous women and children, laid bare by recent federal inquiries and commissions, are a product of colonial settlement and a reminder that BC governments chose a path of ignorance, inaction and racism. Any discussion regarding the resolution of jurisdicational conflict and a movement toward reconciliation today must be viewed in light of this socio-historical context. To this end, this chapter examines the origin and evolution of the jurisdicational conflict between BC and Indigenous peoples. It provides a brief historical overview of the relationship between Indigenous peoples and BC governments, demonstrating how Indigenous peoples’ political organization, resistance, and advocacy led to the development of a body of jurisprudence known as Canadian Aboriginal law. This work would eventually compel provincial politicians to begin to recognize Aboriginal rights and title after years of refusing to acknowledge or address them. The historical relationship between governments and Indigenous peoples in BC is complex and tangled, with an intricacy that is outside the parameters of this dissertation. The brief history contained within this chapter sets context for understanding why Squamish Nation is using its own legal processes to strengthen its jurisdiction over its lands,

waters, and resources outside of treaty-making.

2.2 Colonial Settlement and the Douglas Treaties

Before the arrival of settlers to what is now BC, Indigenous societies “lived as distinct, self-sufficient nations each having its own language, its own economy, its own system of law and government, and its own territory.”

The Report of the BC Claims Task Force (1991) explains that “in the decades following the first arrival of Europeans, the First Nations carried on a trading relationship as relative equals” and with “minimal contact there was little conflict.”

Once settlement became the central objective of the imperial government, however, the relationship between settler society and Indigenous peoples deteriorated. When Britain established the colonies of Vancouver Island and British Columbia in 1849 and 1858 respectively, it assumed that more European settlement would follow.

Settlers “would expect to own land in fee simple,” which would depend on “the Crown’s prior sovereign rights” to the land. Thus, the dominant colonial perspective was that Indigenous peoples would need to be dispossessed of their lands so that Britain could impose its own systems of governance and property rights over the territory.

Colonial governments in BC did not adopt a uniform approach to dispossessing Indigenous peoples of their lands. In the early settlement years, James Douglas, Chief Factor of

5 Ibid.
6 C Harris, supra note 2 at 17.
7 Ibid.
the Hudson’s Bay Company (HBC) who also became Governor of the colony of Vancouver Island in 1850, supported the notion of making land purchases from Indigenous peoples to address the land title question.\textsuperscript{9} He believed “it was in the interests of both justice and harmony that Native village sites, fields, and fisheries should be reserved and fully secured by law,” and that the rest of the land be purchased from Indigenous peoples.\textsuperscript{10} While there were differing views regarding the legality of Indigenous title to land in the London Colonial Office, the HBC secretary authorized Douglas to proceed according to his own discretion.\textsuperscript{11} Douglas made fourteen land purchase agreements with Indigenous peoples on Vancouver Island during the 1850s, but as Cole Harris points out, “when negotiated, there was a good deal of uncertainty about what had transpired, and what was understood to have transpired.”\textsuperscript{12} In later years the courts determined that these purchases were indeed treaties, commonly known as the Douglas Treaties or the Vancouver Island Treaties.\textsuperscript{13}

In the mainland colony of British Columbia, Indigenous land policy took a different form. Harris explains that following the creation of the colony in 1858, and the gold rush on the Fraser River, the question of Indigenous land title largely disappeared.\textsuperscript{14} Douglas’ policy shifted from land purchases (which acknowledged Indian rights in the land) to allocating reserve lands for Indigenous populations in the territories they inhabited. Title to reserve lands vested in the

\textsuperscript{9} \textit{Ibid.}
\textsuperscript{10} C Harris, \textit{supra} note 2 at 18.
\textsuperscript{11} \textit{Ibid} at 19.
\textsuperscript{12} \textit{Ibid} at 20. See also D Harris, \textit{supra} note 8 for discussion of the BCCA’s interpretation of the Douglas Treaties in \textit{R. v White and Bob}, (1964) 50 DLR (2d) 613 (BCCA), affd (1965) 52 DLR (2d) 48.
\textsuperscript{13} \textit{Ibid.}
\textsuperscript{14} C Harris, \textit{supra} note 2 at 31.
Crown to be held in trust for the Indigenous peoples, and thus could not be sold or leased to the local settler population.\textsuperscript{15} Scholars offer various reasons regarding why Douglas abandoned treaty-making with Indigenous peoples including: cost, pressures from the Colonial Office, and concern about the unequal bargaining powers between government and Indigenous nations.\textsuperscript{16} Harris argues that Douglas appeared to view reserve creation as a more just solution for Indigenous peoples than treaties. He adopted what was considered at the time to be a liberal approach to reserve land allocation, and he was insistent that Indigenous peoples have the ability to pre-empt land outside reserves in the same way that settlers could acquire land.\textsuperscript{17} Douglas expected that Indigenous peoples would become active participants in the expanding colonial economy.

Douglas’ approach to Indigenous land policy was short lived. As Harris notes, “[b]etween Douglas’s retirement in 1864 and British Columbia’s entry into Confederation in 1871, most of his Native land policy was abandoned.”\textsuperscript{18} In 1864, Joseph Trutch became Commissioner of Lands, and the central architect of the colony’s land policy going forward. As an engineer and businessman, Trutch was intent on furthering settler interests.\textsuperscript{19} He viewed the Douglas reserves as “unnecessarily large,” and he took away the capacity of Indigenous peoples to pre-empt land. His racist attitude toward Indigenous people led to the elimination of all policies that recognized any form of Indigenous jurisdiction. Trutch explicitly stated that “British Columbia Indians had

\textsuperscript{15} \textit{Ibid} at 28.
\textsuperscript{16} \textit{Ibid} at 32-33.
\textsuperscript{17} \textit{Ibid} at 33.
\textsuperscript{18} \textit{Ibid.} at 45.
\textsuperscript{19} \textit{Ibid}.
never owned the land,” and he embarked on a path of policy making which characterized Indigenous peoples as inferior and lacking the ability to own land or assume jurisdiction.20

2.3 BC’s Entry into Confederation and Early Indigenous Resistance to Colonial Policy

When BC entered Confederation, very little attention was given to Indigenous peoples by the federal and colonial governments. Galois notes:

In a single clause the roles of the respective governments towards the Aboriginal peoples of the new province were outlined. The federal government was charged with the “trusteeship” of the Native peoples of British Columbia; the province was to provide “tracts of land” for the “use and benefit” of the “Indians.” Needless to say, Native people were neither parties to the “Terms of Union” nor consulted about its contents.21

At the time, the federal government was largely unaware of the “peculiar” situation of Indigenous people in BC with respect to the absence of treaties,22 and conflicts between the federal and provincial government regarding reserve land allocation soon arose. Reserve allocation was complicated by the fact that the federal government had jurisdiction over “Indians and land reserved for Indians,” while the province had jurisdiction over the land.23 In an effort to resolve what became known as the Indian land question, the federal and provincial governments established the Joint Indian Reserve Commission (JIRC) in 1876 (renamed the Indian Reserve Commission in 1878).24 The commissioners were to allot and survey additional land to be set aside as Indian reserves, but the process broke down as the province became an increasingly

20 Tennant, supra note 2 at 39.
21 Galois, supra note 2 at 3.
22 Ibid.
23 This is outlined at sections 91 and 92 of the British North America Act, 1867, 30-31 Vict, c. 3 (UK).
24 C Harris, supra note 2.
unwilling partner. Provincial politicians sought to maximize the amount of land available for non-Indigenous settlement, while the federal government preferred that British Columbia follow the reserve policies in the rest of the country. Eventually, BC refused to provide reserve allotments altogether unless the federal government agreed to purchase lands or engage in a land exchange.

As the provincial government’s position on reserves and the Indian land question became more widely known, BC Indigenous peoples became active in their resistance. Despite many obstacles, they held inter-tribal meetings and formed various alliances and political bodies to advocate for recognition of their land rights based on their tribal jurisdiction to specific territories. In 1906, Coastal and Interior Salish Indigenous nations organized a delegation of chiefs (including Squamish Nation Chief Joe Capilano) to travel to England to raise the land claim question directly with the British government and King Edward VII himself. They prepared a petition outlining their unique position, which stated:

In other parts of Canada the Indian title has been extinguished reserving sufficient land for the use of the Indians, but in British Columbia the Indian title has never been extinguished.

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25 Galois, supra note 2 at 4.
26 C Harris, supra note 2.
27 Ibid.
28 Political organization and advocacy were challenging for Indigenous peoples in the late 1800s. Foster, supra note 2, notes that rapid settlement meant that Indigenous people had become a minority in BC by 1887, not only in number, but legally and politically too. Indigenous peoples “could not vote, stand for elected office, or pre-empt land as non-Aboriginal people could.” Furthermore, the doctrine of sovereign immunity meant that the Crown could not be sued without permission and thus “the issue of Indian title tended to arise only collaterally” in court cases.
29 Tennant, supra note 2 at 85. Chief Campbell sings the song given to Chief Capilano to present to the King on Xalek Sekyu Siyam/Chief Ian Campbell, “The Journey,” CD-ROM (West Vancouver: TRF Productions, 2001).
extinguished, nor has significant land been allotted to our people for the maintenance. The petition was addressed to King Edward VII, but the chiefs who travelled to England were not able to present it to him. The British government refused to address their questions arguing that Indian land claims were a domestic issue for Canadian governments. The chiefs returned home, but in 1908, another delegation of 25 chiefs travelled to Ottawa to present similar petitions of their grievances to Prime Minister Laurier. The Canadian government also rejected those petitions, but the process raised awareness of the issues and was impetus for increased inter-tribal political organization and land claims advocacy.

In 1907, the Nisga’a formed the Nisga’a Land Committee to advance their claims, and began to seek political alliances with other Indigenous nations. The Indian Rights Association (IRA) emerged around 1909, as did the Interior Tribes of British Columbia. In that same year, Indigenous leaders drafted the Cowichan Petition with the assistance of two non-Indigenous supporters, Reverend C.M. Tate and Reverend A.E. O’Meara. Foster describes the Cowichan Petition as “the first legally sophisticated articulation of the doctrine of Aboriginal title on behalf of Aboriginal people in British Columbia.” It relied on the Royal Proclamation of 1763 as the legal basis for recognition of Aboriginal title, and for establishing that Indigenous people

30 Galois, supra note 2 at 7, citing an article that appeared it the Times Colonist of the day.
31 Ibid.
32 Tennant, supra note 2 at 85.
33 Galois, supra note 2 at 8.
34 Tennant, supra note 2 at 85.
35 Ibid at 86.
36 Galois, supra note 2 at 8.
37 Foster, supra note 2 at 66.
retained rights in their land and resources upon European settlement. O’Meara brought the Cowichan Petition to London, but he too was instructed to return to Canada to have the issues addressed at home. However, his framing of the land question, citing the Royal Proclamation, compelled the federal government to consider it more seriously. Indeed, Canada contemplated raising the land question as a test case to the Judicial Committee of the Privy Council (JCPC), but BC was opposed, and instead, the two levels of government established a federal-provincial Royal Commission on Indian Affairs (the McKenna McBride Commission) in 1912, with a mandate to consider the “number, location, size and reversionary interest” of reserve lands in BC. The possibility of bringing the Indian land question to the Canadian judiciary was kept alive through continued Indigenous resistance. In 1916, Squamish Nation leader, Andrew Paull, and Haida leader, Peter Kelly, organized a large conference of 16 tribal groups from across the 

38 The Royal Proclamation of 1763 states:

It is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians . . . should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds . . .

And We do further declare it to be Our Royal Will and Pleasure, for the present . . . to reserve under our Sovereignty, Protection and Dominion, for the use of the said Indians, all the Land and Territories not included with limits of Our . . . new Governments, or within the Limits of the Territory granted to the Hudson’s Bay Company. George R, Proclamation, 7 October 1763, reprinted in RSC 1985, App, No. 1.

39 Galois, supra note 2 at 8.

40 Ibid at 6. The McKenna McBride Commission resulted in many reserves being altered including being cut back in size. See C Harris, supra note 2 for further discussion on the McKenna McBride Commission. See also Patricia E Roy "McBride of McKenna-McBride: Premier Richard McBride and the Indian Question in British Columbia" (2011-12) BC Studies 172; Reuben Ware, The Lands We Lost: A History of the Cut-Off Lands and Land Losses From Indian Reserves in British Columbia (Vancouver: Union of British Columbia Indian Chiefs, 1974).
province on Squamish Nation reserve lands in North Vancouver. The aim was to strategize regarding how to bring Indigenous land claims to Canadian courts. The conference resulted in the dissolution of the IRA and the formation of the larger Allied Tribes of British Columbia (ATBC), a province-wide political organization that pursued the land question in BC for the next 11 years.

Throughout the early 1900s, BC Indigenous peoples fought to bring the land issue before the courts, believing they might have more success with judges than with politicians. The “attractiveness of using litigation increased when, in a 1921 case arising in Nigeria, the JCPC ruled that Aboriginal title was a pre-existing right that must be presumed to have survived, unless established otherwise.” However, Canada foreclosed the possibility of raising a similar case in 1927 when the federal government amended the Indian Act, making it illegal for any person to raise funds for the purpose of pursuing “Indian” claims without the permission of a representative of the Crown. The amendment “made it impossible for any organization to exist if pursuing land claims was one of its objectives.”

Tennant, supra note 2 at 94.

Ibid.


McKee, supra note 43 at 25.

Amodu Tijani v Secretary, Southern Nigeria [1921] 2 AC 399, [1921] UKPC 80.

Ibid.

Indian Act, RSC 1985, c I-5.

Tennant, supra note 2 at 111.

Ibid at 112.
a “hammer blow” to the ATBC which folded in the wake of the legislation.⁵⁰

2.4 Indigenous Litigation in BC and the Development of Canadian Aboriginal Law

When, in 1951, Canada repealed the provisions in the *Indian Act* which had effectively denied Indigenous access to the courts to pursue land claims, BC Indigenous nations began again to mobilize.⁵¹ With the courts open to them, Indigenous peoples brought actions that, over decades, have produced a significant body of Canadian jurisprudence addressing Aboriginal rights and title. The 1972 Supreme Court of Canada (SCC) decision in *Calder*⁵² was pivotal. Here, the SCC set aside the 1888 decision in *St. Catherine’s Milling*⁵³, where the JCPC had interpreted the Royal Proclamation of 1763 as providing Indigenous peoples with a “personal and usufructuary right” to the land, dependent on “the good will of the sovereign.”⁵⁴ Justice

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⁵⁰ *Ibid*. Shortly after the ATBC folded, a new organization known as the Native Brotherhood of British Columbia emerged to advocate for Indigenous peoples, while avoiding what could be considered the “pursuit of land claims.”

⁵¹ Tennant, *supra* note 2 at 134-135. The Native Brotherhood of BC became a strong organization led by Haida leader Peter Kelly and Nisga’a leader Frank Calder. The Union of BC Indian Chiefs (UBCIC) was formed in 1969 when a number of chiefs across British Columbia (many from the Interior of BC) united in response to the federal government’s proposed “White Paper,” a policy paper in which the government proposed to dismantle the Department of Indian Affairs. George Manuel was the early leader of the UBCIC.

⁵² *Calder v. British Columbia (A.G.),* [1973] SCR 313 [*Calder*]. This case was initiated by Frank Calder. See *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, Hamar Foster, Heather Raven & Jeremy Webber, eds. (Vancouver: UBC Press, 2007) for further discussion on the *Calder* case and the legacy of Frank Calder.

⁵³ *St Catherine’s Milling and Lumber Company v The Queen* (1888) 14 App Cas 46 (PC) at 54.

Judson, in a much-cited passage, indicated that the Royal Proclamation of 1763 was not the source of Indian title in BC:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact that when the settlers came the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a “personal or usufructuary right.”

Judson J. went on to rule against the Nisga’a holding “that the introduction of general land legislation in the colony prior to 1871, constituted termination of whatever rights the Nishga Indians had to land outside the reserves.” In other words, the colony had extinguished Aboriginal title. Justice Hall, in dissent, found that Nisga’a title had not been extinguished, stating:

When the Nishga people came under British sovereignty . . . they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation.

Although the SCC refused to grant the Nisga’a the declaration they sought, six of seven SCC judges found that Aboriginal title existed at common law and continued to exist until extinguished. Justice Hall and the dissenting judges ruled that extinguishment must occur through clear and plain extinguishment, while Judson J., for the majority, ruled title could be extinguished through the province’s land legislation (which had created a process by which the Crown could make land grants). The Nisga’a lost the case, but with six judges confirming that Aboriginal title existed in Canadian law, the SCC in Calder was transformative. Following the

55 Calder, supra note 52 at para 328 (Martland and Ritchie JJ. concurring).
56 Sanders, supra note 54 at 16.
57 Calder, supra note 52 at para 402 (Spence and Laskin JJ concurring).
decision, the federal government agreed to enter land claims negotiations with the Nisga’a, but the provincial government continued to assert that Aboriginal title did not exist in BC.

In 1984, the SCC handed down its decision in Guerin, a significant win for Indigenous peoples in BC that outlined the fiduciary obligation of the federal government to protect an Indian Bands’ interests in Indian reserve land. Dickson C. J. reiterated that Aboriginal title is a pre-existing legal right that is not created by an act of government:

[Indigenous Peoples’] interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the Indian Act, or by any other executive order or legislative provision. It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases.

Dickson C.J.’s comments recognized the inherent nature of Indigenous land rights and had the effect of reinvigorating the Calder decision. Guerin also demonstrated to the provincial government in BC that courts might hold it to account for its failure to recognize Aboriginal title.

The Guerin decision came on the heels of the 1982 Constitutional amendments recognizing Aboriginal and treaty rights. Significant lobbying by both Indigenous and non-Indigenous people, led to the recognition and affirmation of Aboriginal and treaty rights in

58 Sanders, supra note 54 at 18. Sanders notes that Prime Minister Pierre Trudeau met with the Nisga’a Tribal Counsel following the judgement and stated that “perhaps Indians had more legal rights that he had thought” when his government had prepared the 1969 White Paper policy.

59 BC did not enter land claims negotiations with the Nisga’a until the 1990s.


61 Guerin, supra note 60 at 379.

62 The Constitution Express was a movement organized in the early 1980s to protest the lack of recognition of Aboriginal rights in the proposed patriation of the Canadian constitution by the Trudeau government. George Manuel, then president of the UBCIC, led activists to Ottawa to publicize concerns about Canada’s failure to address
s.35(1) of the Canadian Constitution. While this watershed event symbolized an important milestone for Canada in terms of beginning to reconcile the injustices of its colonial past, it was uncertain at the time what s. 35 would mean for Indigenous peoples in terms of tangible recognition of their rights to land and resources. Furthermore, despite constitutional recognition and mounting litigation by Indigenous nations, the BC government still refused to acknowledge the existence of Aboriginal title in BC. This caused immense frustration and resulted in a series of blockades initiated by Indigenous nations and environmentalists in the early to mid-1980s to prevent resource companies from logging and/or developing Indigenous claimed territories where the land question was still outstanding. Tensions between natural resource companies and Indigenous nations flared throughout the decade and the BC government continued to side with resource companies. This began to change in 1985, however, when Indigenous nations won a significant victory in the *Mullin* case. In *Mullin*, the BC Court of Appeal granted an injunction (requested by the Clayquot and Ahousaht Bands) to prevent logging company, MacMillan Bloedel, from continuing to log on Meares Island off the northwest coast of Vancouver Island. Justice Seaton, for the majority, indicated that the appellate court was no

Aboriginal rights. Activism continued to the United Nations and eventually the Trudeau government changed its position.

63 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11. Section 35(1) states: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

64 Constitutional conferences were held in 1984 and 1985 between Canadian federal and provincial governments and Indigenous nations to address Indigenous rights to self-government in the Constitution. No consensus could be reached through these discussions.

65 Tennant, *supra* note 2 at 222-226.

longer prepared to ignore the problem that the BC government had been refusing to address for decades: “[t]here is a problem about tenure that has not been attended to in the past. We are being asked to ignore the problem as others have ignored it. I am not willing to do that.”\textsuperscript{67} He found that the balance of convenience favoured the claims of the Clayquot and Ahousaht Bands, and that denying or postponing the right of Macmillan Bloedel to log the land would not cause irreparable harm – if it were decided at trial that MacMillan Bloedel had the right to log, “the timber would still be there.”\textsuperscript{68} Following Mullin, BC Indigenous nations continued to blockade to raise awareness of the non-recognition of Aboriginal title in BC. They were successful in obtaining injunctions to halt logging in other parts of the province, as well as a planned railway expansion along the Thompson River, and “resource development was stopped in the whole area that the McLeod Lake Band was seeking to have recognized as its reserve should its efforts to adhere to Treaty No. 8 be successful.”\textsuperscript{69} This put pressure on the BC government and, according to Tennant, “prompted major resource development corporations to begin considering whether their own interests would not be better served by the province’s negotiating with the Indians.”\textsuperscript{70}

In May 1990, the SCC handed down its decision in \textit{Sparrow}\textsuperscript{71}, its first interpretation of the meaning s. 35. Federal fishery officers had charged Ronald Sparrow, a member of the Musqueam Nation, pursuant to the Canadian \textit{Fisheries Act}\textsuperscript{72}, for fishing with a drift net longer than what was permitted by the terms of the Band's Indian food fishing licence. Sparrow admitted to the

\textsuperscript{67} \textit{Ibid} at para 78.
\textsuperscript{68} \textit{Ibid} at para 69.
\textsuperscript{69} Tennant, \textit{supra} note 2 at 225. See also McKee, \textit{supra} note 43 at 29.
\textsuperscript{70} Tennant, \textit{supra} note 2 at 225.
\textsuperscript{71} \textit{R v Sparrow [1990]} 1 SCR 1075 [\textit{Sparrow}].
\textsuperscript{72} \textit{Fisheries Act} RSC 1985, c F-14.
offence but defended the charge on the basis that he was exercising an existing Aboriginal right to fish and that the net length restrictions contained in the Band's licence were inconsistent with s. 35 of the Constitution and therefore were invalid. The SCC agreed, finding that an Aboriginal right is not extinguished merely by it being controlled in great detail by federal regulations – there must be clear and plain intent and there must be justification for infringement. The Court found that constitutional entrenchment protected all Aboriginal rights not extinguished prior to April 17, 1982, and imposed a fiduciary duty on the Crown in regard to those rights. To this end it ruled that government legislation can infringe rights protected by s. 35 only if it passes a two-step justification analysis: the legislation must further a “compelling and substantial” purpose and account for the “priority” of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown.

*Sparrow* demonstrated that there are limits on the capacity of government to impact Aboriginal rights, and it clarified that governments bear the burden of justifying infringement of those rights. *Sparrow* also set the precedent for the interpretation of s. 35. While the case has been criticized for perpetuating the *terra nullius* doctrine in Canadian law by assuming the Crown

73 *Sparrow*, supra note 71 at 158.
74 Ibid.
75 Ibid.
76 For further discussion on *terra nullius* see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 112. Borrows explains how the *terra nullius* doctrine is perpetuated in *Sparrow*: “Canadian courts have not given sufficient attention to the impact of Aboriginal legal perspectives on the country’s foundational legal doctrine, as evidenced in the unreflective statements like those made in R. v. Sparrow: ‘[t]here was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands [meaning Aboriginal lands] vested in the Crown.’ For further discussion on the
successfully asserted sovereignty over Indigenous nations, and for permitting governments to infringe Aboriginal rights (with justification), the SCC did make it clear that the BC could no longer ignore the existence of Aboriginal rights and title. Within a month of Sparrow, Manitoba MLA Elijah Harper, the only Indigenous MLA in Canada at the time, stood up in the Manitoba legislature eight times and said, “No” to the Meech Lake Accord on the grounds that it ignored the place of Indigenous peoples in Canada’s Constitution. The Meech Lake Accord failed, and Harper’s resistance is viewed by many as a turning point in Canadian history for Indigenous people. Harper’s actions brought Indigenous rights into the constitutional debate and illuminated in a very public way the colonial fallacy of recognizing Canada as simply a bi-juridical country.

As Aboriginal rights and title debates came to the fore, public knowledge and support for modern treaty negotiations in BC began to rise. In the summer of 1990, as BC Indigenous peoples blockaded logging sites in solidarity with the Quebec Mohawk Nation’s blockade at Oka, the BC government finally agreed to enter the land claims negotiations with the Nisga’a Nation and the federal government, which had been ongoing since the Calder decision. BC also agreed to establish a federal/provincial/Indigenous task force to develop a process for resolving outstanding Indigenous land claims in BC. Litigation, political advocacy, and direct action by

continuity of terra nullius in Canadian jurisprudence see John Borrows, Law’s Indigenous Ethics (Toronto: University of Toronto Press, 2019) 105 – 113. See also Drake, supra note 54.


McKee, supra note 43.

Ibid.
Indigenous peoples had increased public awareness and compelled the BC government to come to the table, but it remained to be seen how the land claims negotiation process would unfold.

2.5 The Birth of the BC Treaty Process

In December 1990, the province created a tri-partite BC Claims Task Force (the “Task Force”) at the behest of the First Nation Congress (later re-named the First Nations Summit (FNS)) to establish the purpose and principles for modern treaty-making in BC. Canada and BC each appointed two representatives while the FNS appointed three including Chief Joe Mathias, Hereditary Chief from the Squamish Nation, Chief Edward John, Hereditary Chief from the Carrier Sekani Nation, and Miles Richardson, president of the Council of the Haida Nation. The Task Force reviewed the nature of historical treaty-making in Canada, received submissions from a range of stakeholders in BC, and then put forward nineteen recommendations regarding how to proceed with treaty-making in the province. The first recommendation called for a “new relationship based on mutual trust, respect and understanding, through political negotiation.” The Task Force acknowledged that in establishing a new relationship between governments and First Nations, the conflicting interests between First Nations claims to territories and others who have received interests from the Crown must be reconciled. It stated that “whatever the issues may be, it is crystal clear that any new relationship must be achieved through voluntary

\[80 \text{Ibid at 32.} \]
\[81 \text{Ibid. at 33. Notably none of these Indigenous nations have completed treaties and all are engaged in different forms of asserting their jurisdictional claims.} \]
\[82 \text{British Claims Task Force, supra note 4.} \]
\[83 \text{Ibid.} \]
negotiations, fairly conducted, in which the First Nations, Canada, and British Columbia are equal participants.”\textsuperscript{84} The product of negotiations would be a modern-day treaty which would be protected under s. 35 of the Constitution and would entrench the new relationship established by the parties. The Task Force also indicated that “certainty was an objective shared by all,” and that because negotiations may take time, the Crown and First Nations may enter into interim agreements which “should be concluded without prejudice to the treaty negotiations.”\textsuperscript{85}

In September 1992, the three parties signed the BC Treaty Commission Agreement,\textsuperscript{86} accepting all the Task Force recommendations including the recommendation to establish the BC Treaty Commission (BCTC). The parties appointed the first treaty commissioners in April 1993. Their role was to facilitate the negotiations process and to allocate funding to ensure First Nations were able to prepare and participate in the negotiations. In its first year, the BCTC instituted the recommended six-stage treaty process, which begins with a First Nation submitting a Statement of Intent (SOI) and moves through a series of negotiation and agreements ending with treaty implementation at Stage Six.\textsuperscript{87} The BCTC received twenty-nine SOIs by First Nations on the first day it began accepting SOIs.\textsuperscript{88} By the following year, it had accepted 41 SOIs.\textsuperscript{89} The Commission acknowledged at an early stage that the treaty process would take time

\textsuperscript{84} Ibid at 8.
\textsuperscript{85} Ibid.
\textsuperscript{86} Ibid.
\textsuperscript{87} The six stages of the BCTP are as follows: stage 1 - filing a statement of intent to negotiate a treaty; stage 2-preparing for negotiation; stage 3- negotiating a Framework Agreement; stage 4 – negotiating an Agreement-in-principle; stage 5-negotiating a final treaty; and stage 6 – implementation of the treaty.
\textsuperscript{89} Ibid.
and would require “patience, goodwill, trust and understanding.”90 There was never any doubt that its mandate was ambitious and challenging; however, “after 140 years of inaction” the fact that the province was ready to negotiate treaties was a significant breakthrough and many British Columbians, Indigenous and non-Indigenous, hoped that the process would establish a new path toward reconciliation.

2.6 Limitations of the BC Treaty Process

When negotiations began in the early 1990s, it was thought that treaty-making would be complete by 2000. It is now evident that original expectations have not been met. In addition to the Nisga’a Final Agreement, which was completed outside the BCTP in 1999, only four modern treaties have been finalized.91 One key obstacle has been the different visions of the parties with respect to the purpose of treaty-making. Federal and provincial governments have approached the task with a concept of finality in mind. They have viewed treaties as a means to establishing certainty over the land by requiring Indigenous nations to convert undefined Aboriginal rights into clearly defined treaty rights and to surrender all Aboriginal rights not entrenched within the treaty.92 For many Indigenous peoples this approach amounts to an unacceptable

90 Ibid at 4.
91 Outside the Nisga’a Final Agreement which was not completed under the BCTP, only four treaties have reached final ratification. See Canada, British Columbia and Huu-ay-aht, Ka:'yu:'k't'h'/Che:k'tles7et'h', Toquaht, Uchucklesaht and Yuuluʔílʔath First Nations, The Maa-nulth First Nations Final Agreement (1 April, 2011); Canada, British Columbia and the Tla’min Nation, The Tla’min Final Agreement (5 April, 2016); Canada, British Columbia and the Tsawwassen First Nation, The Tsawwassen First Nation Final Agreement (3 April 2009); and Canada, British Columbia and the Yale First Nation, The Yale First Nation Final Agreement (11 April 2013).
“extinguishment” policy.\textsuperscript{93} Indigenous nations do not view their rights as undefined or uncertain, but rather come to the treaty tables with clear ideas about their Aboriginal title and inherent right to govern their lands, resources and peoples. For Indigenous peoples, the purpose of treaty-making is to reconcile Crown settlement and the Crown’s assertion of sovereignty over the lands and resources that Indigenous peoples have never ceded. The purpose of treaties, therefore, is to “work out relations of mutual sharing among equal and co-existing partners.”\textsuperscript{94}

In addition to differing views on the nature and purpose of treaties, another key obstacle to their fulfillment has been the strengthening of Aboriginal rights and title recognition by the Canadian judiciary. In 1997, the SCC handed down its major Aboriginal title decision, \textit{Delgamuukw}\textsuperscript{95}, which clarified the content of Aboriginal title in Canadian law for the first time. While BC argued that Aboriginal title merely encompassed “the right to engage in activities which are aspects of aboriginal practices, customs and traditions which are integral to the distinctive aboriginal cultures of the aboriginal groups claiming the right,”\textsuperscript{96} Lamer C.J. (for the majority) ruled that Aboriginal title engenders a broader set of uses:


\textsuperscript{94} Tully, \textit{supra} note 92 at 10. See also Royal Commission on Aboriginal Peoples, \textit{Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment} (Ottawa: Canada Communication Group, 1995).

\textsuperscript{95} \textit{Delgamuukw v. British Columbia}, [1997] 3 SCR 1010 [\textit{Delgamuukw}].

\textsuperscript{96} \textit{Ibid} at para 118.
Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s aboriginal title.\footnote{Ibid at para 111. For more discussion on differing views of the content of Aboriginal title see, Kent McNeil, “The Meaning of Aboriginal Title,” in \textit{Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference}. Michael Asch, ed. (Vancouver: UBC Press, 1997).}

Furthermore, the SCC held that Aboriginal title is protected as a matter of constitutional right:

Aboriginal title at common law is protected in its full form by s.35(1). This conclusion flows from the express language of s. 35(1) itself, which states in full: “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were “existing” in 1982. The provision, at the very least, constitutionalized those rights which aboriginal peoples possessed at common law, since those rights existed at the time s. 35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before 1982 (e.g., Calder, supra), s. 35(1) has constitutionalized it in its full form.\footnote{Delgamuukw, supra note 95 at 111.}

The SCC re-iterated that the purpose of s. 35 of the Constitution is to reconcile the pre-existence of Indigenous societies with the Crown’s assertion of sovereignty,\footnote{Ibid at para. 140.} and it set out a test that governments must meet to justify infringement of Aboriginal title.\footnote{For critique of how \textit{Delgamuukw} perpetuates colonialism see John Borrows, “Sovereignty’s Alchemy: An Analysis of \textit{Delgamuukw v. British Columbia}” (1999) 37 Osgoode Hall LJ 537. Borrows discusses how the SCC’s “unreflective acceptance of Crown sovereignty places Aboriginal title in a subordinate position relative to other legal rights.” He observes that “more rigorous application of the rule of law to the Crown in its dealings with Aboriginal peoples could generate greater equality and justice for Aboriginal peoples in their relations with the Canadian state.”}

\section*{Notes}

\footnote{Ibid at para 140.}
established in *Sparrow*, Lamer C.J. explained that in justifying infringement of Aboriginal title, “[t]here is always a duty of consultation.”\(^\text{101}\) He explained:

> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.\(^\text{102}\)

According to Sonia Lawrence and Patrick Macklem, in articulating a constitutionalized “duty to consult,” the *Delgamuukw* decision “appeared to many observers to establish new constitutional benchmarks in the relationship between the Crown and First Nations.”\(^\text{103}\) It created a stronger context for Crown and Indigenous peoples to negotiate agreements when Aboriginal rights and title could be impacted by Crown decisions. Indeed, the BCTC noted that *Delgamuukw* “was widely seen as a turning point for treaty negotiations,” and in the wake of the decision it engaged in a review of the BCTP to determine how treaty-negotiations could be modified given the new legal landscape.\(^\text{104}\)

Following *Delgamuukw*, it appeared that BC and Canada would have to change their approach at the treaty tables – they would have to start negotiation from the point of Aboriginal rights and title recognition and move negotiations forward from there. The province would also

\(^{101}\) *Delgamuukw*, supra note 95 at 168.

\(^{102}\) *Ibid.*


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have to change the way in which it managed and used “Crown” land by developing processes to carry out its duty to consult Indigenous peoples. However, BC took the position that Indigenous nations must first prove their Aboriginal rights and title through a judicial declaration or settled treaty before it was under a duty to consult and/or accommodate these rights. The Crown viewed the duty to consult as confined to the process justifying infringement of Aboriginal rights and title, and rejected the notion that it was triggered in the pre-proof stage.\textsuperscript{105} Lawrence and Macklem note that while the \textit{Delgamuukw} decision sought to promote more negotiation between the Crown and Indigenous nations, uncertainty regarding when the duty to consult was triggered led to increased litigation.\textsuperscript{106} Indigenous nations contested the Crown’s approach and took BC to court when it continued to issue tree farm licenses and approve mining developments in the face of unresolved Aboriginal title claims.\textsuperscript{107}

\section*{2.7 The Emergence of Consultation and Accommodation Jurisprudence}

In 2004, the SCC handed down its landmark consultation decisions in the companion cases of \textit{Haida}\textsuperscript{108} and \textit{Taku}\textsuperscript{109}, clarifying when the duty to consult is triggered. In \textit{Haida}, the BC government sought unilaterally to replace and transfer a tree farm license to Weyerhauser on Haida Gwaii, the area over which Haida Nation claimed Aboriginal rights and title. In \textit{Taku}, Redfern Resources applied to re-open the Tulsequah Chief Mine and build a new 160-km road

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\textsuperscript{105} Lawrence & Macklem, \textit{supra} note 103 at 262.
\textsuperscript{106} \textit{Ibid} at 254.
\textsuperscript{107} See \textit{Haida Nation v British Columbia (Minister of Forests)}, 2004 SCC 73 [\textit{Haida}]; \textit{Taku River Tlinget First Nation v British Columbia (Project Assessment Director)}, 2004 SCC 74 [\textit{Taku}].
\textsuperscript{108} \textit{Haida}, \textit{supra} note 107.
\textsuperscript{109} \textit{Taku}, \textit{supra} note 107.
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through territory claimed by the Taku River Tlinget First Nation (TRTFN). BC’s position in each case was that Aboriginal rights and title had not yet been proven via treaty or judicial declaration and thus the government did not have a duty to consult the Indigenous nations. The SCC rejected BC’s position:

The Province’s submissions present an impoverished vision of the honour of the Crown and all that it implies. As discussed in the companion case of *Haida*, supra, the principle of the honour of the Crown grounds the Crown’s duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown’s assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act 1982*, which recognizes and affirms existing Aboriginal rights and title. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown’s honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35.110

In *Haida*, the Court found that BC should have consulted with the Haida, knowing that the forest at issue was the subject of the Haida’s land claim.111 In the Court’s words: “[t]o unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to the resource, may deprive the Aboriginal claimants of some or all of the benefit of that resource. That is not honourable.”112 In *Taku*, the Court concluded that the process engaged in by the province under the *Environmental Assessment Act*113, which included representatives of the TRTFN, fulfilled the requirements of its duty to consult and accommodate the TRTFN.114

110 Ibid at para 24.
111 *Haida*, *supra* note 107.
112 Ibid at para 27.
113 *Environmental Assessment Act*, SBC 2002, c 43.
114 *Taku*, *supra* note 107. For more discussion on the jurisprudential interpretation of the duty to consult and accommodate see: Dwight G Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples*
The Court in *Haida* set out the fundamental principles of the duty to consult and accommodate stating that when the Crown contemplates an activity with real or constructive knowledge that Aboriginal rights and/or title may be adversely affected, the Crown has a duty to consult with the affected Indigenous nations and, if necessary, accommodate their interests. Drawing on *Delgamuukw*, it ruled that the level of consultation required by the Crown should be determined based on a spectrum analysis – if the strength of the Aboriginal rights or title claimed is strong and the potential for adverse effects high, then a greater level of consultation and accommodation is required than if a claim is weak and/or potential adverse impacts are minimal. The duty can range from the need to provide notice at the low end, to the need to obtain consent from the Indigenous nations at the high end. The Court stipulated, however, that the duty to consult and accommodate does not “give Aboriginal groups a veto over what can be done with land pending final proof of the claim,” and that the requirement for consent that was established in *Delgamuukw* “is appropriate only in cases of established rights, and then by no means in every case.”  


117 For more discussion on the requirement of Indigenous nations to engage in consultation with the Crown see Erin Hanson, *Coast Salish Law and Jurisdiction over Natural Resources: A Case Study of Tsleil-Waututh First Nation*, (MA Thesis, University of British Columbia, 2008).
Through its consultation decisions, the Court aimed to create a process to bring Indigenous nations, government, and industry together in dialogue, not litigation, regarding potential infringement of “yet to be proved” Aboriginal rights and title.118 Because the duty to consult and accommodate flows from the honour of the Crown principle entrenched within the Constitution, it compels governments to engage with Indigenous nations in a manner reflecting the reconciliatory purpose of s. 35. Indeed, the Court emphasized that reconciliation requires a process of negotiation:

The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982. This process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people.119

The SCC indicated that treaties are one manifestation of reconciliation; however, rather than viewing them as an endpoint, the Court pointed out that reconciliation “begins with the assertion of sovereignty and continues beyond formal claims resolution.”120 Here the judiciary explicitly acknowledged reconciliation as an ongoing relationship that extends past the resolution of a land claim settlement.

Brian Slattery contends that Haida and Taku are indicative of the Court’s understanding of s. 35 as “the basis of a generative constitutional order – one that mandates the Crown to

118 “Yet to be proven” in Canadian law, but not according to Indigenous legal traditions.
119 Haida, supra note 107 at para 20 (emphasis added).
120 Ibid at para 32 (emphasis added).
negotiate with Indigenous peoples for the recognition of their rights in a form that balances their contemporary needs and interests with those of the broader society.” 121 By emphasizing that the Crown has “the legal duty to achieve a just settlement of aboriginal claims by negotiation and treaty,” Slattery argues that the Court has infused s. 35 with a generative role – the Court “holds that the Crown, with judicial assistance, has the duty to foster a new legal order for aboriginal rights, through negotiation and agreement with the aboriginal peoples affected.” 122 He argues, therefore, that through the duty to consult and accommodate, s. 35 takes on a dynamic function, “one that does not come to an end even when treaties are successfully concluded.” 123 Slattery states that the Court’s reconciliatory approach to s. 35 “envisages aboriginal rights as flexible and future-oriented rights, which need to be adjusted and refurbished from time to time through negotiations with the Indigenous peoples concerned.” 124

In response to the consultation jurisprudence, the BC government developed the “referrals process” as a structured approach to carrying out the duty to consult. 125 Through the referrals process, when resource development is proposed in a particular area, the government decides which Indigenous nation(s) should be contacted depending on their strength of claim to the territory where the development is considered. Following that, a referral package is sent to


122 Ibid at 26.

123 Ibid.

124 Ibid.

the Indigenous nation(s) describing the proposed project and intentions of land use in the territory.\textsuperscript{126} The referral specifies that the Indigenous nation must respond within a set time-period otherwise the government will proceed with the application without the Indigenous nation’s input.\textsuperscript{127} It is common for Indigenous nations in BC to be overwhelmed with the number of referrals they receive from numerous unrelated government departments.\textsuperscript{128} Indeed, Julian Griggs noted that following the implementation of the referrals process, limitations quickly arose because “the volume and technical scope of the referrals frequently outstripped the capacity of Indigenous nations’ staff to respond in a meaningful way.”\textsuperscript{129} Later in this dissertation I discuss the significant uncertainty and limitations that have arisen with respect to the operationalization of the duty to consult and accommodate since \textit{Haida} and \textit{Taku} (as well as \textit{Mikisew}).\textsuperscript{130} However, it is important to note here that the emergence of a constitutional mandate requiring governments to consult and accommodate in the “pre-proof” stage of Aboriginal rights and title determination was viewed as a welcome change to the status quo at the time. It was

\begin{footnotesize}
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\item[127] Ibid.
\item[128] Griggs, supra note 125 at 25. For more discussion on pressures placed on First Nations to respond to referrals see Hanson, supra note 117.
\item[129] Griggs, supra note 125 at 1.
\item[130] Shortly following \textit{Haida} and \textit{Taku}, the SCC extended the duty to consult to apply in the context of an historical treaty in \textit{Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)}, 2005 SCC 69. In \textit{Mikisew} conflict arose regarding a winter road to be built in an area where the Mikisew Cree have treaty rights. The Minister planned to “take up” land under the treaty and the SCC ruled that consultation was required in order to ensure that there was an honourable process in place when executing the “taking up” provision of the treaty. The SCC found that consultation with the Mikisew had not been adequate. In 2010, the SCC found that the duty to consult can apply in the context of a modern treaty in \textit{Beckman v Little Salmon/Carmacks First Nation}, 2010 SCC 53.
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viewed as having potential to significantly strengthen government-Indigenous relationships by minimizing the role of the courts in settling jurisdictional conflicts and creating an arena for negotiation. In finding a pre-proof right to consultation and accommodation, the Court sought to strengthen its long-held position that Aboriginal rights and title are best addressed through negotiation in the political realm, rather than by the judiciary. And, arguably, the Court’s aim was accomplished when the BC government responded by adopting a new policy on building relationships with Indigenous nations soon after the consultation jurisprudence emerged. By setting the context for more robust negotiation to occur outside of treaty-making, *Haida* and *Taku* have had a significant impact on the relationship between the Crown and Indigenous groups and have disrupted the path of treaty negotiations for many Indigenous nations in BC.

### 2.8 BC’s New Relationship with Indigenous Nations

BC formalized a new approach to engaging with Indigenous nations outside of treaty in 2005 through a policy known as “The New Relationship.”\(^{131}\) This policy was directed at building government-to-government relationships based on respect, recognition and accommodation of Aboriginal title and rights.\(^{132}\) The New Relationship involved, *inter alia*, a commitment by government and Indigenous nations to develop new institutions and structures to negotiate government-to-government agreements and shared decision-making regarding land use planning,

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\(^{132}\) *Ibid*. Around the same time, Canada, BC, and BC First Nations entered into the Transformative Change Accord (online at: <https://www.fnha.ca/Documents/transformative_change_accord.pdf>) which was ultimately set aside when Prime Minister Stephen Harper came to power.
land management, tenure, and resource revenue and benefit sharing.\textsuperscript{133} The shift led to an exponential increase in negotiations between Indigenous nations and the Crown outside of the treaty process, and was impetus for a multitude of bilateral non-treaty agreements including reconciliation protocols, strategic engagement agreements, economic and community development agreements, consultation and revenue sharing agreements, joint resource management and land use planning agreements, and project-specific accommodation agreements (these are often referred to as reconciliation agreements).\textsuperscript{134} In his 2015 study of shared decision-making agreements between BC and Indigenous nations, Griggs noted that by 2009, over a dozen reconciliation protocols and strategic engagement agreements had been established across BC.\textsuperscript{135} He explained that each shared decision-making agreement is unique and addresses the specific concerns and priorities of the individual Indigenous nation involved.\textsuperscript{136} Since 2009, more than twenty shared decision-making agreements have been established, as well as

\textsuperscript{133} Griggs, \textit{supra} note 125.


\textsuperscript{136} Griggs, \textit{supra} note 125 at 2.
numerous other types of non-treaty agreements, some with significant recognition of Indigenous governance.137

Griggs’ study found that there are different perspectives on the purpose and utility of shared decision-making agreements, but when viewed through the lens of legal principles, they can be conceptualized in two quite different ways:

a) A form of interim accommodation of First Nations governance and decision-making rights that have the potential to serve as a stepping-stone to full recognition; and

b) An engagement framework to bring greater efficiency and predictability to the consultation process in the interim period, to reduce conflict over land and resource decisions, and increase land use certainty.138

Some view these agreements as expressions of shared-decision-making, while others see them more as an enhanced form of consultation. Most engaged in the process “assume there is value in building working relationships and establishing new forms of collaboration in decision-making” between BC and Indigenous nations.139 That said, critics such as Shiri Pasternak warn that the agreements emerging from the New Relationship are assimilationist and result in further

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137 BC Government website, “First Nations Negotiations: Reconciliation and Other Agreements” <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/reconciliation-other-agreements>. One of the most noteworthy reconciliation protocols is the Kunst’aa guu – Kunst’ayah Reconciliation Protocol (the Haida Protocol) established by the Haida First Nation and BC on 11 December 2009 (brought into BC law through the Haida Gwaii Reconciliation Act, SBC 2010, c. 17). The Protocol creates a Council and pursuant to both BC and Haida law, the Council is mandated to make shared resource-use decisions including implementation of the Haida Strategic Land Use Agreement, land use objectives for forest practices (including approving the annual allowable cut), and the development of conservation standards for heritage sites.

138 Griggs, supra note 125 at 4.

139 Ibid at 5.
marginalizing Indigenous economies.\textsuperscript{140} She notes that “rather than engage Indigenous peoples as property owners and title holders, the New Relationship re-defined ‘partnership’ in such a way as to maintain the state’s exclusive authority over resource regulation and approvals in forestry and mining.”\textsuperscript{141}

Indigenous nations have made it clear that shared decision-making agreements are “simply one modest step in their effort to realize their own nation’s vision, which often speaks to concepts such as social and economic well-being for the community, an equal say in decision-making within their own territory, and self-government.”\textsuperscript{142} In other words, Indigenous nations are entering into shared governance agreements with BC as a means of strengthening their jurisdiction through an incremental approach, and not as a final settlement. In this way, these types of agreements may represent an opportunity for the parties to be experimental and creative, and to allow for the continual modifications that are inevitably required as the jurisprudential and political landscapes shift.

\section*{2.9 Judicial Declaration of Aboriginal Title in BC}

In the 2014 \textit{Tsilhqot'in}\textsuperscript{143} case the SCC granted the first judicial declaration of Aboriginal title in Canadian history. After a 339-day trial, and detailed historical analysis, the judge ruled that the Tsilhqot’in people from the interior of BC would be entitled to a declaration of

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\textsuperscript{141} \textit{Ibid} at 317.

\textsuperscript{142} Griggs, \textit{supra} note 125 at 5.

\textsuperscript{143} \textit{Tsilhqot'in Nation v British Columbia}, 2014 SCC 44 [\textit{Tsilhqot'in}].
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Aboriginal title to a portion of the claim area, as well as another small area, but for a procedural failing.\textsuperscript{144} The BC Court of Appeal (BCCA) reversed the trial judge’s decision. It found that title had not been established, but left open the possibility that in the future, the Tsilhqot’in might be able to prove title to specific sites within the area claimed. For the rest of the claimed territory, the Tsilhqot’in Nation’s rights would be confined to Aboriginal rights to hunt, trap and harvest.\textsuperscript{145} The BCCA’s decision was criticized for endorsing a site-specific “postage stamp” approach to Aboriginal title, as opposed to a territorial approach that recognizes Indigenous rights to occupy and govern vast areas of its territory.\textsuperscript{146}

On appeal, the SCC in \textit{Tsilhqot'in} sided with the trial court’s determination of title, finding that “Aboriginal title flows from occupation in the sense of regular and exclusive use of land.”\textsuperscript{147} The Court acknowledged the need to consider both Indigenous and Canadian legal perspectives, stating that in determining what constitutes sufficient occupation, one must look “to the Aboriginal culture and practices, and compare them in a culturally sensitive way with what is required at common law to establish title based on occupation.”\textsuperscript{148} The SCC dismissed the postage stamp notion of occupation and ruled that “occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement, but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.”\textsuperscript{149} The Court ruled that

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\textsuperscript{144} \textit{Tsilhqot’in v. British Columbia}, 2007 BCSC 1700.
\textsuperscript{146} See Kent McNeil, “Aboriginal Title in Canada, Site Specific or Territorial?” (2012) 91:3 Can Bar Rev 745.
\textsuperscript{147} \textit{Tsilhqot’in}, supra note 143 at para. 2.
\textsuperscript{148} \textit{Ibid} at para 41.
\textsuperscript{149} \textit{Ibid} at para 50.
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Aboriginal title includes “the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.” In listing the rights associated with Aboriginal title, the SCC indicated that the correct approach is a territorial approach which contemplates governance rights in relation to the territory.

Tsilhqot’in is heralded as the first SCC declaration of Aboriginal title in Canada; however, despite this groundbreaking event, Borrows points out that the decision contains a major inconsistency. Tsilhqot’in states that the doctrine of terra nullius never applied in Canada, at the same time it asserts that the Crown acquired radical, or underlying, title to all the land in the province of BC upon assertion of Crown sovereignty. The unquestioned assumption of the Crown’s ability to assert sovereignty over Indigenous lands perpetuates the colonial doctrine and limits the potential of s. 35 to achieve reconciliation between Canadian governments and Indigenous peoples.

150 Tsilhqot’in, supra note 143 at 97.
151 For further discussion of territorial versus site specific approach see McNeil, supra note 146.
154 For discussion on how to reconcile Crown and Indigenous sovereignty within Canadian law see Felix Hoehn, Reconciling Sovereignties: Aboriginal Nations in Canada (Saskatoon: Native Law Centre, 2012).
### 2.10 Moving Toward Indigenous Consent

While *Tsilhqot’in* did not technically deviate from *Haida* (the SCC ruled that the duty to consult and accommodate does not provide Indigenous nations with a “veto” before Aboriginal title is established), the SCC did emphasize the advantage of obtaining consent from Indigenous nations before resource development takes place in Indigenous territories. It stated:

“[g]overnments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.”\(^{155}\) The SCC maintained its position that consent is required only after Aboriginal title is proven, but encouraged government and industry to seek agreements with Indigenous nations beforehand. The Court also clarified what is required by the Crown to justify infringement of Aboriginal rights and title.\(^{156}\)

*Tsilhqot’in* has strengthened Indigenous nations’ abilities to negotiate for recognition of their jurisdiction in their agreements with government. To this end, Indigenous nations and BC have been more actively engaged in discussions to explore new forms of shared decision-making.

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\(^{155}\) *Tsilhqot’in, supra* note 143 at 97.

\(^{156}\) The Court said that a justification for infringement requires the government demonstrate “both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group. This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, and the duty infuses an obligation of proportionality into the justification process: the incursion must be necessary to achieve the government’s goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest (proportionality of impact).” See also Borrows, “Terra Nullius”, *supra* note 152 and Christie, *supra* note 153 for critique of the justification doctrine.
arrangements. This has been facilitated by recent legislative changes including BC’s enactment of the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) which contains provisions for BC and Indigenous nations to exercise decision-making power jointly. The aim of DRIPA is to affirm the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and, in consultation and cooperation with Indigenous peoples, “take all measures necessary to ensure the laws of British Columbia are consistent” with the UNDRIP. While this nascent legislation has already been subject to criticism by Indigenous leaders such as Judith Sayers, who claims BC has not adequately brought Indigenous groups into the discussions concerning the enactment of BC legislation, a number of recent governance agreements have been negotiated between BC and Indigenous nations, which recognize Indigenous jurisdiction and more robust Indigenous decision-making powers (than predecessor agreements) consistent with s. 6 and s. 7 of the DRIPA. In its first annual report under the DRIPA, BC claimed that it is recognizing unique and distinct paths to Indigenous self-determination and cites three recent

158 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [DRIPA].
159 *Ibid* at s 6-7. The DRIPA was drafted collaboratively with Indigenous groups including the First Nations Leadership Council (BC Assembly of First Nations), the First Nations Summit, and the Union of BC Indian Chiefs. The Bill was passed on November 28, 2109. For more information see: British Columbia, Declaration on the Rights of Indigenous Peoples Act 2019/2020 Annual Report [DRIPA Annual Report].
161 DRIPA, supra note 158.
agreements as evidence.\textsuperscript{163} These include the tripartite Gwets’en Nilt’i Pathway Agreement, which “supports negotiations for the practical transition to Tsilhqot’in governance in the declared title area” that flows from the SCC decision; the Pathway Forward 2.0 Agreement between BC and Carrier Sekani First Nation; and the shíshálh Nation Foundation Agreement.\textsuperscript{164} All of these agreements are rooted in an Aboriginal rights recognition approach. Notably, BC also states in the DRIPA annual report that:

> For those First Nations that choose to participate in the modern treaty process with the provincial and federal governments, we have shifted to an approach based on recognition and continuation of rights and ensuring that agreements create a ‘living relationship’ that is capable of evolving and meeting new challenges and opportunities as they arise. This requires supporting more flexible, innovative and collaborative approaches.\textsuperscript{165}

An Aboriginal rights recognition approach is a significant shift and time will tell whether it induces more Indigenous nations to return to treaty negotiations.

Indigenous relationships with industry have also shifted dramatically in the post-Haida/post-Tsílhqot’in era. Indigenous nations are now routinely involved in land use decision-making processes in their territories, and because failure to fulfill the duty to consult and accommodate can result in legal action that can substantially delay or derail projects, many proponents are keenly interested in obtaining upfront Indigenous consent to their projects and seek to negotiate benefits agreements with Indigenous nations.\textsuperscript{166} Impact benefit agreements

\textsuperscript{163} DRIPA Annual Report, supra note 159 at 11.

\textsuperscript{164} All agreements are available on the BC government website at:

<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations>.

\textsuperscript{165} DRIPA Annual Report, supra note 159 at 11.

\textsuperscript{166} David Rosenberg, QC & Tim Dickson, “Mapping Aboriginal Title in British Columbia: Part I The Need for Transformative Change” (2016) 75:4 The Advocate 509.
IBAs are the legal vehicle through which industry proponents obtain consent from Indigenous nations with respect to proposed resource development in Indigenous claimed territories, and are often a critical aspect of fulfilling the Crown’s duty to consult and accommodate. IBAs are private, confidential agreements which have now become standard practice between Indigenous nations and industry in resource development contexts.\textsuperscript{167} However, while IBAs can bring immediate economic resources to a community, and are an important way of ensuring Indigenous peoples receive some benefit from projects where they tend to bear a disproportionate amount of the cost, for many reasons they are an inadequate means of attaining Indigenous consent.\textsuperscript{168} IBAs often reduce consent to a monetary question when Indigenous consent is, at its core, a principle of self-determination.\textsuperscript{169} In other words, Indigenous consent is a means to establish the broader goal of state recognition of Indigenous jurisdiction, and not simply about acquiring economic benefits on a case-by-case basis.

IBAs represent a very narrow vision of what Indigenous consent entails when one considers them in relation to the principle of free prior and informed consent (FPIC) entrenched


\textsuperscript{169} For detailed discussion on theoretical underpinnings of the concept of Indigenous free, prior, and informed consent (FPIC), see Cathal M. Doyle, \textit{Indigenous Peoples, Title to Territory, Rights and Resources: The transformative role of free prior and informed consent} (New York: Routledge, 2015).
within the UNDRIP, to which Canada became a signatory in 2010 and embraced without qualification in 2016.\footnote{The UNDRIP was adopted by the General Assembly in 2007; however, the Harper Conservative government refused to sign on until 2010, and then did so with the qualification that UNDRIP was an aspirational, non-legally binding document. The government did not think that FPIC was aligned with Canadian law, particularly the duty to consult. In 2016, the Trudeau government fully embraced UNDRIP without qualification when Minister Bennett addressed the Permanent Forum on Indigenous Issues at the UN stating, “We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution,” see Larry Chartrand, Oonagh E. Fitzgerald & Risa Schwartz, “Preface” in John Borrows, Larry Chartrand, Oonagh E. Fitzgerald and Risa Schwartz, eds, \textit{Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples} (Waterloo: Centre for International Governance Innovation, 2019) at x.} As Cathal Doyle explains, a significant outcome of the UNDRIP was the “affirmation of indigenous peoples’ right to self-determination in Article 1(1),”\footnote{Doyle, \textit{supra} note 169 at 117.} and the right of self-determination “serves to inform and condition the constellation of indigenous rights and associated State obligations” found throughout the UNDRIP.\footnote{\textit{Ibid} note 169 at 117.} Doyle explains that “the right of self-determination constitutes the primary foundation of the requirement of FPIC in the context of development projects in or near indigenous peoples’ territories.”\footnote{\textit{Ibid} at 130.} FPIC is found in six articles of the UNDRIP (10,11, 19, 28, 29, and 32), and Articles 19 and 32 are most relevant to this dissertation. Article 19 requires states to consult and cooperate in good faith with the affected Indigenous peoples “through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that affect them.”\footnote{UNDRIP, \textit{supra} note 160 at Article 19.} Article 32 requires states to obtain from Indigenous peoples their “free prior and informed consent prior to the approval of any project affecting their lands or
territories and other resources.” The UNDRIP also contains principles recognizing Indigenous rights to determine and develop priorities and strategies for the development or use of their lands and resources.

Discussion regarding operationalizing FPIC in BC will be discussed in subsequent chapters. However, it is important to note here that much uncertainty has arisen in recent years regarding how FPIC fits with the Crown’s duty to consult. Canada has yet to resolve how to implement FPIC in a manner that is satisfactory to Indigenous peoples and consistent with the right of self-determination under the UNDRIP. Indigenous nations argue that they should have greater decision-making roles with respect to if, and how, resource development can take place in their territories, while governments and the judiciary have tended to adopt a much narrower view that favours process over outcome (this will be discussed at length in Chapter 4). This has led to increased judicial review of development projects and direct action by Indigenous groups across Canada in recent years. In the face of rising frustrations from both Indigenous peoples and industry, BC and Canada have enacted new EA legislation containing greater recognition of Indigenous jurisdiction and participatory rights in EA processes.

Furthermore, as mentioned, BC enacted the DRIPA in late 2019 and in December 2020, the federal government tabled Bill C-15 – an Act Respecting the UN Declaration on the Rights

175 Ibid at Art. 32.
176 Ibid at Art 23.
178 Impact Assessment Act SC 2019 c 28, s 1; Environmental Assessment Act SBC 2018 c 51.
of Indigenous Peoples. Regulations pursuant to the new EA frameworks, particularly the BC *Environmental Assessment Act* dispute resolution regulation, are still being considered, and will likely have a significant impact on Indigenous peoples’ roles in Crown EA processes, and/or their decisions on whether to embark on developing their own Indigenous-led EAs (as both pieces of legislation make provision for Indigenous-led EAs). It is too early to assess the impact of these legislative changes. What is clear, however, is that governments are still grappling with how to implement FPIC, and, as will be described in chapters to follow, unless Indigenous nations themselves play a key role in defining what Indigenous consent means for their communities at a local level, frustration and uncertainty are bound to continue.

**2.11 Conclusion**

This chapter has explained the origin and evolution of jurisdictional conflict between BC and Indigenous nations. It discussed how Indigenous agency has been impetus for gains made

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180 *BC EAA, supra* note 178. Jessica Clogg explains that the new Act “provides for Indigenous-led assessments, in whole or in part. If an Indigenous nation gives notice that it wishes to conduct its own assessment of a project on the nation and its rights, the EAO must provide for that portion of the assessment to be carried out by the nation. Through government-to-government agreements, Indigenous-led assessments may also be substituted for the provincial process. Consensus-seeking with participating Indigenous nations, along with optional dispute resolution mechanisms, replaces a consultation-based model in the standard assessment process. The Act enables a new tariff of fees to be paid by proponents to defray the costs of participating Indigenous nations” in Jessica Clogg, “Why BC’s New Environmental Assessment Act is Worth Celebrating” (21 December, 2018), online:  

181 The BC website outlines which regulations are still under development:  
relating to recognition of Aboriginal rights and title in Canadian law, and has discussed why the shifting legal and political landscape has caused many Indigenous nations to consider alternative ways to build their jurisdiction outside of modern treaty-making. BC Indigenous nations are considering whether networks of shared decision-making agreements with the Crown and industry provide Indigenous nations with more opportunity to strengthen their jurisdiction and exercise their own laws over their territories, without having to relinquish claims to Aboriginal rights and title, which have been major obstacles in the BCTP. Today, ambiguity concerning the relationship between the duty to consult and FPIC is leading more Indigenous nations to build their own mechanisms for establishing Indigenous consent as part of broader efforts to assert their jurisdiction over their territories. This chapter has focused heavily on how the Canadian judiciary and governments have interpreted Aboriginal rights and title and the reconciliation process. The next chapter shifts to a local scale and looks at how Squamish Nation has sought to build recognition of its jurisdiction over Squamish territory within the context of land use planning.
Chapter 3: Building Recognition of Squamish Jurisdiction through Xay Temíxw and the SFN-BC LUP Agreement

3.1 Introduction

In recent decades Squamish Nation has turned its attention away from modern treaty making to explore alternative ways of asserting its jurisdiction over Squamish Territory. This has included entering into a variety of agreements and plans with government and industry, as well as purchasing a tree farm license and engaging in urban development projects.¹ While Squamish Nation is working to strengthen recognition of its jurisdiction throughout the entirety of its territory, this dissertation focuses on Squamish Nation’s actions in respect to Howe Sound and the northern forested region of its territory. Specifically, it examines the decision-making processes developed within the Squamish Nation community to address environmental concerns caused by industrial logging and a proposed liquified natural gas (LNG) production facility and pipeline in Howe Sound.

This chapter begins the case study on how Squamish Nation is using its own legal processes to strengthen its jurisdiction over the lands, waters, and resources in Squamish Territory. It does five main things. First, it provides a brief introduction to Squamish Nation and

¹ Squamish Nation has partnered with Westbank, a Vancouver developer, to build a residential high-rise on its 12-acre Kitsilano reserve (Senakw) which was returned to Squamish Nation, as part of the Omnibus settlement with the federal government in 2000 (discussed below). For more discussion on the history of Senakw see Douglas C. Harris, “Property and Sovereignty: An Indian Reserve and a Canadian City” (2017) 50:2 UBC L Rev 321. Squamish Nation has also partnered with Musqueam and Tsleil-Waututh Nations to form the MST Development Corporation, established to oversee properties owned by the MST Partnership. The Partnership is full or co-owners of six prime properties located throughout Vancouver. These properties total more than 160 acres of developable land and are currently valued at over $1 billion.
explains why Squamish stepped has away from the BCTP. Second, it sets a cultural context for understanding the values and laws reflected in Squamish legal processes. To this end, it highlights how Squamish people conceptualize Squamish language place names, stories, and land use practices, and how these concepts influence Squamish values and decision-making regarding land and resource use.² Third, it examines the motivation and development of the Xay Temíxw Land Use Plan for the Forests and Wilderness of the Squamish Nation Traditional Territory (Xay Temíxw).³ It explains what compelled the Squamish community to develop Xay Temíxw, how it carried out the process, and the central content of the land use plan. Fourth, it briefly discusses the significance of Squamish Nation’s acquisition of Tree Farm License (TFL) 38 in implementing Xay Temíxw. Fifth, it examines Squamish Nation’s negotiation of its land use planning agreement with the province (the SFN-BC LUP Agreement), which entrenches Squamish Nation’s vision set out in Xay Temíxw. The negotiation of the SFN-BC LUP Agreement took place outside a broader process of engagement between the province and stakeholders in relation to the Sea to Sky Land and Resources Management Plan. This was because Squamish Nation felt strongly that its jurisdiction and unique land use objectives needed


³ Xay Temíxw, supra note 2.
to be addressed separately. Protection of Squamish Territory through the SFN-BC LUP Agreement has fostered recognition of Squamish Nation jurisdiction and, as will be discussed in Chapters 5 and 6, it has compelled proponents to recognize a more robust role for Squamish Nation decision-making and governance in industrial projects developed in Squamish Territory.

3.2 Background on Squamish Nation

3.2.1 Squamish Nation People and Governance

Squamish Nation members are descendants of Coast Salish Indigenous peoples who lived in villages spread throughout Squamish Territory prior to the settlement of Europeans. Today, membership is approximately 4000. Half of the Squamish members live on reserves located in North and West Vancouver and the Squamish Valley; the other half live off reserve. The Indigenous language spoken in Squamish Territory is Sḵwx̱wú7mesh Sníchim, an independent language belonging to the Salish language family (which itself is comprised of 23 languages).


5 Lewis, supra note 4. See also Squamish Nation - Westridge Written Evidence, supra note 2.

While Squamish Territory is often described today using English language names, Sḵwx̱wú7mesh Sníchim place names preceded those names, identifying extensive areas and landmarks spread throughout the territory. Stelkáya (Roberts Creek), Átl’ka7tsem or Txwnéwu7ts (Howe Sound), Títemtsen (Port Moody), Xépxpayay (East Vancouver) and Elksen (Point Grey, Vancouver) are a handful of examples.

Squamish Nation has always maintained its inherent right to govern Squamish Territory and sets out this right in its Assertion of Title filed with the BC Treaty Commission:

The Squamish Nation has existed and prospered within our traditional territory since time immemorial. Our society is, and always has been, organized and sophisticated, with complex laws and rules governing all forms of social relations, economic rights, and relations with other First Nations. We have never ceded or surrendered our title to our lands, rights to our resources, or the power to make decisions in our territory.

For centuries, Squamish Nation governed its people, lands, and waters in accordance with its own legal order. This began to erode, however, when newcomers began to settle in what is now

7 The boundaries of Squamish Territory are described in the Squamish Nation Statement of Intent filed with BCTC as follows: “Lower Mainland region of B.C. from Point Grey on the south to Roberts Creek on the west; then north along the height of land to the Elaho River headwaters including all the islands in Howe Sound and the Sound drainages; then southeast to the confluence of the Soo and Green Rivers north from Whistler; then south along the height of land to the Port Moody area including the entire Mamquam River and Indian Arm drainages; then west along the height of land to Point Grey,” online: <http://www.bctreaty.ca/squamish-nation>. Certain parts of Squamish Territory overlap with the territories of other Coast Salish Indigenous nations.

8 Squamish-English Language Dictionary, supra note 6 at xiv. See also: Squamish Nation Oral Presentation Trans Mountain NEB Hearing, supra note 2.

called Vancouver in the 1860s. As Douglas Harris explains, early settlement was driven by settler desire to develop the forest sector of the economy:

[I]n the early 1860s, timber and the building of a water-powered sawmill drew the first permanent non-Indigenous population to the area. The mills brought ships, and BC lumber began moving through an emerging port, first to local markets and then around the Pacific.

Imperial and Canadian governments sought the rich natural resources of the region and gradually displaced existing systems of control by imposing their own system of governance on Squamish Territory and Squamish people. Squamish Nation jurisdiction became confined to reserves created by settler governments, and even that jurisdiction was heavily constrained by settler law. Squamish Nation traditional use of land and resources was also heavily curtailed by settlers’ laws. The history of Squamish Nation reserve allotment is complex and beyond the scope of this dissertation, but what is important to note is that the reserves allotted provided Squamish Nation members with a very small land base, dramatically limited the scope of their governance, and curtailed their ability to use their resources according to their own objectives.

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12 Ibid at 2-4. The percentage of Squamish Territory allotted to the people through reserves is roughly 0.4230%. For in-depth discussion of reserve allotment in BC see C Harris, *supra* note 10.

13 Ibid at 2-4. The percentage of Squamish Territory allotted to the people through reserves is roughly 0.4230%. For in-depth discussion of reserve allotment in BC see C Harris, *supra* note 10.

14 For in-depth discussion of reserve allotment in BC see C Harris, *supra* note 10.

15 Douglas Harris explains how Squamish Nation members’ use of the resources even on reserve lands was heavily curtailed by federal law. This is evident in the 1925 conviction of Dominic Charlie for a fisheries offence committed while he fished for salmon on the Capilano reserve; see D Harris, *Landing Native Fisheries* supra note 10 at 1-2.
The 1876 Indian Act16 gave federal officials the authority to reshape Indigenous governance systems by creating Indian bands led by Band councils on reserve lands. Tennant observes that for the most part “members of one community were designated as a band, but not infrequently several communities were lumped together.”17 Indigenous models of government were seriously disrupted as Band Councils were premised on a colonial elected model rather than the hereditary and kinship systems common to many Indigenous groups.18 The federal government’s objective was to create systems of administration for “Indians and land reserved for Indians” in accordance with its responsibilities under 91(24) of the BNA Act19 1867, and as well, to assimilate Indigenous peoples into colonial governance practices.20 Squamish Nation communities were not originally united under one Band Council, but in 1923, Hereditary Chiefs from the 16 occupied Squamish villages (24 Squamish reserves) signed a document called the Prayer of Amalgamation, stating their request to be united as one Band led by one Band Council.21 The Prayer of Amalgamation sent to Deputy Superintendent Duncan Campbell Scott of the federal Department of Indian Affairs on 23 July 1923 stated:

With a view of properly conducting the affairs of the Squamish Indians we have unanimously agreed to have a council to transact the affairs of our people in co-operation with the Indian Department, said council to be composed of all the Chiefs of the

16 Indian Act, RSC 1985, c I-5.
18 C Harris supra note 10 at 257. The Indian Act’s proscribed structure of government involved a Band Council presided over by an elected head Chief and Councillor(s).
19 British North America Act, 1867 30-31 Vict, c 3 (UK) s 91(24).
20 Ibid.
Squamish Nation of Indians, and we may say that said Council has met with the approval of every Chief of the Squamish Indians and people.\textsuperscript{22}

The federal Department of Indian Affairs eventually accepted Squamish Nation’s Prayer of Amalgamation, and the Squamish Band Council became comprised of 16 seats occupied by the Hereditary Chiefs of the villages. Today’s Council is still comprised of 16 seats, recognizing the continuity of the Prayer of Amalgamation. The Council now operates under a custom election model,\textsuperscript{23} whereby Squamish Nation members elect 16 representatives to fill Council seats for four-year terms.\textsuperscript{24} The Council is comprised of Squamish members who may, or may not, be Hereditary Chiefs. Two Co-chairs are elected by the Council, as well as two Spokespeople. Squamish members also elect a Band Manager.\textsuperscript{25} In its Governance Policy, under “The Principles of Governance,” Squamish states:

Membership is the foundation of our Nation and the governance principles listed below focus on protecting the Amalgamation and enhancing Uxumixw (the Nation’s) cultural values and traditions by promoting respect, equality and harmony for all.

The governing style of Chiefs and Council is based on Chiyaxw (Nation protocols) that protect the past, present and future of our Nation and emphasizes leadership based on:

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\textsuperscript{22} \textit{Ibid.}

\textsuperscript{23} Custom elections are codes created through the inherent power held by First Nations to govern themselves. The federal government recognizes custom election codes by listing the First Nation on a schedule attached to the \textit{Indian Act}, which has the effect of making the \textit{Indian Act} election rules no longer apply to that First Nation. The First Nation can then decide how its election will take place.

\textsuperscript{24} It should be noted that at the time of completing this dissertation, a process was underway within the Squamish Nation to change the composition of the Squamish Nation Council.

\textsuperscript{25} SN Governance Policy, \textit{supra} note 21 states: “The Squamish Nation is governed by a democratically elected Council on four-year terms. The rules governing these elections are contained in the 1981 Squamish Indian Band Election Regulations. Since their creation, the 1981 Election Regulations have not undergone a single change or amendment. In September 2015, the elected Squamish Chiefs & Council approved the creation of the Squamish Nation Election Commission an arms-length body of members to assist the Squamish People in exploring the topic of election reform.”
• healing and well-being of the community;
• creating a sustainable future for generations to come;
• proactive rather than reactive leadership;
• accountability and transparency; and
• a clear separation between the roles of the Chiefs and Council and the roles and activities of staff, while acknowledging that these will overlap from time to time, subject to committee and other approved tasks.26

The Principles of Governance further specify that Squamish Nation governance is based on “Tkwaya7nmin (to hear and listen),”27 whereby Chiefs and Council remain open to hearing diverse viewpoints and make the informed decisions for the Squamish people.

3.2.2 Impact of Settler Development on Squamish Nation Territory

Since the early 1900s, Squamish Nation Territory has been subject to extensive urban development and industrialization by settler society. Most relevant to this dissertation is the history of settler industrialization of the Howe Sound area. The Britannia Mine figures prominently in this history. In 1888, copper was discovered by a local medical officer and part-time prospector near what is now known as Britannia Creek.28 Knowledge of the copper ore discovery spread quickly among local prospectors and soon Vancouver and New York financiers became involved. Smitheringale explains that development to begin copper extraction began in

26 Ibid.
27 Ibid.
1899 and production was underway by 1905.\textsuperscript{29} The mine continued to grow as new deposits were found, and Britannia became a significant producer of copper in 1912. Mining camps for workers and mine administrators sprouted up in the area and eventually the townsite at Britannia developed.\textsuperscript{30} By 1912, both mill and mine towns had been established to house men and families of a permanent racially-mixed work force that numbered over 1,000 in 1929.\textsuperscript{31} Smitheringale notes that these towns were relatively isolated, but eventually more infrastructure was developed to facilitate wider transportation for these communities, including the “road from Squamish in 1949, the railroad from Vancouver in 1956, and the road from Vancouver in 1957.”\textsuperscript{32}

Britannia Mines remained profitable until the late 1940s, but when metal prices dropped in the 1950s, the Howe Sound Company chose to restructure and eventually liquidated the assets of the mines.\textsuperscript{33} Britannia Mines officially closed in 1974, and since that time, the extent of

\textsuperscript{29} \textit{Ibid} at para 46. Smitheringale explains the corporate history: In 1905, the Howe Sound Company created the Britannia Smelting Company to purchase the Crofton smelter on Vancouver Island; the Crofton smelter had been commissioned in 1902 to process ore from a nearby copper mine. The Britannia Power Co. Ltd. was formed to operate a hydroelectric power plant and dam, the first of several such installations that would enable Britannia to generate its own power for several decades to come. The final step in the corporate evolution of Britannia occurred in 1908, when the Howe Sound Company folded the assets of the Britannia Copper Syndicate, the Britannia Smelting Company and the Britannia Power Co. Ltd. into a single company, the Britannia Mining and Smelting Company (BM&S Co.), which was incorporated in BC. The Howe Sound Company, which was controlled by G.B. Schley, thus became the holding company of the Britannia operation and related assets.

\textsuperscript{30} \textit{Ibid} at para. 123.


\textsuperscript{32} Smitheringale, \textit{supra} note 28 at para 124.

\textsuperscript{33} \textit{Ibid} at para 141.
pollution caused by the mining operations has come to light. Mining drainage, known as acid mine drainage or acid rock drainage, was not properly managed during the operation of the mines; this resulted in extensive contamination of Britannia Creek and eventually the waters of Howe Sound. Smitheringale explains that “Britannia Creek was considered by some to be one of the worst single-point sources of pollutants in North America.” In the early 2000s, a complex remediation plan for the Britannia Mines site was developed through “a settlement agreement between the province and the potentially responsible parties.” The plan involved plugging a tunnel that discharged acid rock drainage into Britannia Creek, and the development of a water treatment facility.

Britannia Mines is one example of a set of cumulative negative impacts settler industrial development has had on Howe Sound, an area of central importance to Squamish Nation. At the same time the mines were being developed, two pulp mills were established in the same vicinity. The Port Mellon Pulp Mill was established in 1908 on the western shores of Howe Sound (north of Langdale), after a settler family sold the land to the British Canadian Wood Pulp and Paper Company. Paper production began at Port Mellon in 1909, and over the years the profitability of the company ebbed and flowed with market demand for paper. Corporate ownership of the mill changed hands a few times and was eventually purchased by Canadian Forest Projects; the

34 Ibid. at para 170.
36 Smitheringale, supra note 28 at para 170-171.
38 Ibid.
mill was then re-named Howe Sound Pulp and Paper Limited and continues to operate today. The second pulp and paper mill, Woodfibre Pulp and Paper, was established on the shores of Howe Sound near Mill Creek in 1912. This mill operated from 1912 to 2006, being bought and sold multiple times, and is now owned by Woodfibre LNG Limited.\textsuperscript{39} To facilitate the operations of the pulp and paper mills, a chlor-alkali chemical plant was built near the Squamish River estuary in 1965 by FMC Canada.\textsuperscript{40} It operated from 1965 to 1991 “to produce caustic soda, hydrochloric acid, and chlorine.”\textsuperscript{41} These products used mercury-cell technology which resulted in “losses of mercury to the environment via plant exhaust and effluent.”\textsuperscript{42} The result was that the southern six hectares of the plant site became “heavily contaminated with mercury at hazardous waste levels in an old lagoon and below the plant process area over the course of the plant’s 26 operative years.”\textsuperscript{43} In 1989, the plant was sold by FMC Canada to Nexen, which assumed environmental liability for the site and in 1991, the BC Ministry of the Environment shut the plant down due to mercury contamination. An extensive remediation was ordered by the province, which was completed in 2004. BC then transferred the site to the District of Squamish.

What is evident in this brief retelling of Howe Sound industrial history is the level of cumulative impact settler industrialization has had on the area, and the level of exclusion and/or lack of acknowledgement by settler society of Squamish Nation jurisdiction over the area. Indeed, this history illuminates Chief Campbell’s comments that settler society has profited

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\item[39] The history of the Woodfibre site will be discussed more in Chapter 5.
\item[41] Ibid.
\item[42] Ibid.
\item[43] Ibid.
\end{footnotes}
greatly from the use of Squamish Nation lands, waters, and resources without meaningful inclusion, compensation, or consent by Squamish Nation. It illustrates the extent to which the territory has been negatively affected by settler management of the land, waters, and resources, and, as will be discussed below, how this has disproportionately impacted Squamish Nation and its members who rely on healthy eco-systems for their uses and practices on the lands.

3.2.3 Squamish Nation Claims to Squamish Territory and the BC Treaty Process

At no point in history has Squamish Nation ceded its lands or jurisdiction to settler governments. Indeed, Squamish leaders have continued to advocate for rights to Squamish Territory since the time of European settlement. As Chapter Two explained, in 1906, Squamish Chief Joe Capilano traveled with a delegation of chiefs to both Ottawa and London to discuss Squamish Nation grievances regarding settlement on their lands. During the early 1900s, Squamish leader, Andrew Paul, was influential in bringing tribes together from around the province to pursue the Indian land question.\(^4^4\) In the 1980s and 1990s Squamish Chief Joe Mathias was instrumental in the development of the BCTP, as a means to resolving the land title question.\(^4^5\) Indeed, Chief Mathias’ name appears alongside four other Indigenous leaders representing the First Nations Summit in the 1992 BC Treaty Commission Agreement. However, despite Chief Mathias’ significant influence, Squamish Nation’s participation in the BCTP was impeded early on by its litigation against Canadian Pacific Limited (CP), the Molson Companies Ltd., and the federal government in relation to expropriated reserve lands. CP was attempting to

\(^4^4\) Tennant, *supra* note 17 at 94-95.

sell parcels of land that had originally been part of Kitsilano Indian Reserve No. 6 (Senakw), located on the south side of False Creek (adjacent downtown Vancouver) and Squamish Nation sought to prevent CP from selling the lands, requesting the court issue a declaration that title be granted to Canada for the use and benefit of the Squamish Nation.\textsuperscript{46}

The BCTP required First Nations not to engage in litigation concerning lands claims while participating in the process, so Squamish Nation was required to step away from the BCTP.\textsuperscript{47} In his interview, Chief Williams recounted these events and how they shifted Squamish Nation’s perspective on the BCTP:

Canadian Pacific Railway had some land in our old village site over in Kitsilano. They put it up for sale and as soon as our Council of the day heard about it, we went to the court system and said that that is wrong. That land was part of our land, taken, expropriated in 1913, originally called the village of Senakw, and it should come directly back to the Squamish Nation . . . Musqueam said that we are taking this to court and we are going to claim title to the land. It’s a land claim now. So Squamish got dragged into that. As soon as that happened, the federal government said, “Oh, it’s a land claim, it’s in court and we cannot discuss anything with you anymore because our law says that if you are in court discussing land issues, then the treaty discussions are off.” So we were taken out of the treaty negotiations.

When we settled out of court, we also took a look at what the legal system was saying about tribes and consultation and accommodation, and whether or not we have more rights outside of any kind of treaty discussions. And we learned in the first two years of negotiating with the federal government what limitations the federal government was actually giving the tribes, in terms of benefits. And, we determined at that time, that it was more beneficial to leave our title to our whole traditional territory, rather than claiming one quarter of our territory through the treaty process. That’s when we decided to break away from the treaty and never go back.\textsuperscript{48}

\textsuperscript{46} Canada (A.G.) v. Canadian Pacific 2000 BCSC 933. For more discussion on Senakw see: D Harris, “Property and Sovereignty”, supra note 11.
\textsuperscript{47} McKee, supra note 45.
\textsuperscript{48} Interview of Squamish Nation Hereditary Chief Bill Williams/Találsamkin Siyám (Chief Williams) (21 August 2019) [Interview of Chief Williams].
In June 2000, the BC Supreme Court ruled that the parcels of land put up for sale by CP in Kitsilano reverted back to Canada upon cession of rail traffic and were to be held “for the use and benefit of an Indian Band,” which the federal government later determined to be Squamish Nation.⁴⁹ This ruling led to a negotiated settlement between Squamish Nation and the federal government known as the Squamish Nation Omnibus Trust Action Settlement Agreement (Settlement Agreement).⁵⁰ Through the Settlement Agreement, Squamish Nation agreed to surrender claims to portions of the Kitsilano Reserve (and other reserve land expropriation claims from an earlier lawsuit),⁵¹ in exchange for 92.5 million dollars.⁵² The significant infusion of capital from the Settlement Agreement gave Squamish Nation more resources to examine how it wanted to proceed with asserting its jurisdiction and, as Chief Williams indicated, early days at the treaty tables led the Nation to decide that the benefits afforded through treaty were outweighed by its costs.⁵³

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⁴⁹ Mathias v The Queen, 2001 FCT 480.
⁵¹ Ibid. Squamish Nation had initiated a lawsuit against Canada regarding expropriated Squamish Nation reserve lands in the 1977 Omnibus Trust Action. These lands included: the Boiullon lands north of Capilano IR5, six former reserves in the Squamish Valley, lands under the railway lines through Mission IR1, Seymour IR2 and Capilano IR5, and lands under Third Street as it passes through Mission IR1.
⁵² Squamish Nation News, “Information Letter – July 11, 2000, Proposed Settlement $92.5 Million” online (pdf): <https://www.squamish.net/wp-content/uploads/2017/03/impoinfo.pdf>. The community voted and agreed to the Settlement Agreement rather than pursuing return of all of the lands. A significant reason was that much of former reserve land claimed is owned by third parties and therefore there was much uncertainty regarding whether Squamish Nation’s claims to land itself would succeed.
⁵³ Interview of Chief Williams, supra note 48.
3.3 Cultural Context for Understanding Squamish Legal Processes

3.3.1 Introduction

Before embarking on the analyses of how Squamish has used its own legal processes to build recognition of its jurisdiction, it is important to heed the advice of legal scholar Sarah Morales who has engaged in extensive empirical research on Indigenous legal orders, including her own Coast Salish legal order. Through her experiences working in Indigenous communities, she has learned that “[I]law cannot be separated from its surrounding culture.”54 She therefore states:

I believe that the starting point of any research pertaining to Indigenous law must be to gain a better understanding of the particular cultural context in which the laws and legal orders take place. A failure to do so would risk translating the laws and legal traditions through an inappropriate cultural lens.55

In this dissertation, I observe and describe how Squamish Nation created both a contemporary land use plan and an EA process informed by values and laws articulated by Squamish community members in their deliberations during these processes. This knowledge has been conveyed to me through interviews with Squamish Nation individuals who have direct knowledge of these processes, and through analysis of relevant document data. It is useful to establish a cultural context for reflecting on these legal processes, and thus I begin by briefly examining some sources for Squamish Nation land use laws.

55 Ibid at 149.
Indigenous scholars experienced in the study of Indigenous law and legal orders explain that Indigenous law tends to be decentralized.\(^{56}\) Indigenous law is found in many different cultural sources and communicated in various ways. Val Napoleon explains that Indigenous law is often “embedded in social, political, economic, and spiritual institutions,” and conveyed through social interaction, as opposed to state law which is conveyed through written enactments emanating from a central authority.\(^{57}\) However, regardless of whether it is centralized or decentralized it is considered law because “it lays down general rules or baselines that people figure out how to interpret and apply.”\(^{58}\) John Borrows explains that the rules and principles of Indigenous laws can be found in various sources such as sacred teachings, naturalistic observations, positivistic proclamations, deliberative practices, and local and national customs.\(^{59}\)

Drawing on the work of James (Sakej) Youngblood Henderson,\(^{60}\) Jessica Clogg et al. discuss how Indigenous law may be accessed:

> Indigenous legal traditions are best accessed in the context of Indigenous people’s language, stories, methods of communication, and styles of performance and discourse because these are mediums that frame understanding and encode values. These are the mediums used to communicate Indigenous law to the family and to the community, by conceptualizing values and good relationships. In the process of transmitting and negotiating Indigenous law, Elders (particularly those that are fluent in an Indigenous language) and other particularly knowledgeable community members, will be the primary


\(^{57}\) Napoleon “Thinking”, *supra* note 56 at 9.

\(^{58}\) Ibid.


\(^{60}\) Henderson, *supra* note 56 at 295.
authorities for interpreting Indigenous jurisprudence. 61

Xay Temíxw and the Squamish Process are Squamish legal processes which emerged from the desire of the community to protect and preserve land and resources in Squamish Territory. Both processes seek to strike the appropriate balance between resource development objectives and the need to sustain the environmental and cultural integrity of Squamish Territory. Community members hold different views regarding what this balance should be, but there are certain shared understandings about why protection of territory is necessary that stem from deeply held values concerning one’s relationship to the land and how the land connects past, present, and future generations of Squamish people. These are fundamental values encoded in various cultural mediums and communicated as Squamish legal principles within the Squamish community. 62 These principles are evident in Squamish language place names 63 and the stories attached to those places. 64 They are also evident in the ways people describe their relationship with land and the importance of continued land use. 65 What is evident from my interviews and analysis of documents, is that these principles informed Squamish Nation members’ deliberations while building Xay Temíxw, and later, the Squamish Process. The values and laws

62 I am borrowing the words of Clogg et al, supra note 61.
63 For more discussion on the interconnections between Indigenous languages and the transmission of Indigenous law see Lindsay Borrows, Otter’s Journey: Through Indigenous Language and Law (Vancouver: UBC Press, 2018).
64 Rudy Reimer, “Squamish Nation Traditional Use Study Draft: Squamish Traditional Use of Nch'íx̣ay Or the Mount Garibaldi and Brohm Ridge Area,” April 2003, prepared for Squamish Nation and Enkon at 17.
65 Interview of Squamish Nation Hereditary Chief and Councillor Ian Campbell/Xalek Sekyu Siyam (19 August 2019) [Interview of Chief Campbell].
that people brought to their deliberations and decision-making led to Squamish legal principles being considered and articulated in different forms, including written plans, maps and agreements that emerged in both the land use planning and EA contexts. A brief discussion of some of the central Squamish principles regarding use of Squamish land and resources follows.

3.3.2 Squamish Place Names, Stories and Connections to Land and Territory

Squamish language place names (Syemnint66), are of great significance to Squamish Nation.67 This is explained in the Xay Temíxw as follows:

Squamish place names exist throughout the territory. In many instances, a location has a particular meaning to Squamish people because of the existence of oral traditions that served to explain that place in the Squamish universe and the relationship of the Squamish people to their land.68

Councillor Chris Lewis explained that when he and Chief Campbell speak publicly, they follow a protocol of always using the Squamish language to describe the place that they are in, as it reminds people how Squamish people have related to that place for generations.69 In my interview with Chief Campbell, he showed me a large map of Squamish Territory and pointed out numerous Squamish language place names which exist throughout the entirety of the

66 Reimer, supra note 64.
68 Xay Temixw, supra note 2 at 6.
69 Interview of Squamish Nation Councillor and Spokesperson, Chris Lewis/Syeta’xtn, (Councillor Lewis) (25 September 2019) [Interview of Councillor Lewis].
territory. One example of a place of significance is Chi’iya’kmish - “Fish Weir Place.”\textsuperscript{70} In a Traditional Use Study, Squamish Nation archeologist, Rudy Reimer, explains:

\begin{quote}
[T]his name applies to the river and the lake now known as the Cheakamus River and Cheakamus Lake. Coho, Chum and Pink salmon were once abundant in the river. Village sites are located along the lower reaches of the river, with the main village located near the road bridge that crosses near its confluence with the Squamish River. The people of this village were closely linked to wolves due to one of their ancestors being raised by a wolf pack. People of the village had other special powers as well; they were proud and wealthy, big and tall. In the late 1800’s a total of 24 people lived at Chi’iya’kmish.\textsuperscript{71}
\end{quote}

Taktakmu’in tl’a in7inya’xa7en – “Landing of the Thunderbird” – is another place of importance.\textsuperscript{72} Reimer explains:

\begin{quote}
[T]his name applies to two mountains now known as the Black Tusk and Mount Cayley. Each mountain is located on opposite sides of the Cheakumus River valley. When the Thunderbird flaps its wings thunder is caused and lightning comes from the great bird’s eyes.\textsuperscript{73}
\end{quote}

A final example is Wa’wnti. There is no recorded English name for this place. Reimer states:

\begin{quote}
Wa’wnti is a person’s name that refers to a large cliff face near Cheakamus River. The Transformer brothers [also] turned this person to stone. People have been told not to mock the face and not to look at his face and to stay away from this place, if they did they would go mad. Wa’wnti watched over the river and made sure the people behaved “in a good way.” Wa’wnti also served as a forecaster for the salmon runs.\textsuperscript{74}
\end{quote}

Reimer’s explanations reveal how these places names, and the places themselves, hold important historical and cultural knowledge for Squamish Nation people; this influences how they relate to the areas and conduct behaviour.

\textsuperscript{70} Reimer, supra note 64.
\textsuperscript{71} Ibid at 17.
\textsuperscript{72} Ibid. This place is also explained in the Xay Temixw Documentary, supra note 67.
\textsuperscript{73} Reimer, supra note 64 at 17.
\textsuperscript{74} Ibid at 18.
The significance of many places and place names in Squamish Territory was discussed in great detail by Chief Campbell in his oral testimony at the NEB hearing for the Trans Mountain Expansion Project.\textsuperscript{75} Using a map, Chief Campbell reviewed multiple places in Squamish Territory explaining their Squamish language names and significance to Squamish people:

You have these important areas. Stítewekwis a place of clay that was used to manufacture mountain goat wool blankets. And then you have Senakw, which was a very major metropolitan centre for Coast Salish in proximity to all of the other Coast Salish tribes. They can come around the corner here and visit amongst our Coast Salish people here in Senakw.

Iyélmexw is the big village over in Jericho. And then you have all the pharmaceuticals that came out of these areas as well as on the north side of Burrard Inlet, you have Átsnach, which is the present village of our Tsleil-Waututh family.

St'itsma, which were the fishing grounds and fishing weirs that are just in those mud flats. I don’t know what the mud flats are called in English, but just off of Maplewood flats.

So that’s a village site there of St'itsma, and then you have the big villages of Ch'ich'e1xw7kw, which is recorded with --the first early Europeans recorded 600-foot long houses in that area. That’s why we call them “longhouses” because they would build --butted up against each other to be a contigous house. But in fact, they’re all compartmentalized, if you will, but it made it look as a really long single-sloped roof houses our Coast Salish people used. That was one of the large villages there with big longhouses.

You have Xa7élcha, which is a creek that we swim in today known as Lynn Creek. It’s a beautiful bathing creek. A few of us were there this morning to purify ourselves at daybreak, preparing ourselves to have a strong mind, strong body, connect to nature and to the keke7nex Xexe7ének Siyám, Creator, and give thanks.\textsuperscript{76}

Chief Campbell also told the story of Siwash Rock/ lhilhxí7els, illuminating how stories about places hold legal principles, and how these become imprinted in the land:

\textsuperscript{75} Squamish Nation Oral Presentation Trans Mountain NEB Hearing, \textit{supra} note 2.

\textsuperscript{76} \textit{Ibid} at paras 5358-5362. Note that a revised version of the NEB Oral Testimony is appended to Squamish Nation - Westridge Written Evidence. It provides the correct spellings of the Squamish Language place names.
lhilhxi7elsh is Siwash Rock off of Stanley Park [its] one of our ancestors who was transformed to stone. He was immortalized to demonstrate to each generation the importance of preparing ourselves for parenthood. And those – parents know that it is important that we prepare ourselves for that responsibility. So the story of Siwash Rock, lhilhxi7elsh, demonstrates the values of family and parenthood and how that man was praying and meditating and bathing himself. When the transformers came along, they told him, temí7 chexw ka, they said “Get out of the way.” And he did not break his concentration, so they immortalised him. They turned him into stone to remind us all of those duties and responsibilities. So a lot of our stories are written throughout the lands in these place names.\(^{77}\)

The story of lhilhxi7elsh illustrates why Squamish people will say that the law is written in the land itself. The land holds stories and meanings embedded with principles that guide and direct behaviour, in this case behaviour relating to the responsibility of parenthood. This concept of the interrelationship between stories, places and knowledge is stated in the Xay Temíxw document as follows:

Many sites and larger areas in the traditional territory have special meaning for Squamish people because of the way oral traditions explain those places. Stories of legendary creatures attached to places in the natural landscape contain the knowledge of the relationship of the Squamish people to the land.\(^{78}\)

Squamish member, Tracy Williams, is quoted in Xay Temíxw articulating this principle:

I think all the old stories about the legendary creatures are important: Smilaith, Kulkalaith, the little people, the two headed serpent all fit into a natural landscape. We need a natural landscape to be able to understand those stories and to keep them alive. These stories exist all over and tell of a time that we might have forgotten. These stories show our connection to the land. [They] show how long we have been here and where we came from.\(^{79}\)

Stories hold meaning and teachings for Squamish members and because stories often relate to particular places, or landmarks, they connect members in significant ways to Squamish

\(^{77}\) *Ibid* at paras 5355 – 5357.

\(^{78}\) *Xay Temixw, supra* note 2 at 39.

\(^{79}\) *Ibid* at 40.
Territory and provide direction on how to interact with the world. There are, for example, many stories that relate to the Stawamus Chief, Siyám Smánit, a giant rock face situated near the town of Squamish. In an article published in the *Squamish Chief*, Squamish Nation members recounted some of the stories they know relating to Siyám Smánit. Squamish Nation Language Teacher, Rebecca Duncan/Tsitsayxemaat, stated:

> When I was a little girl, my late papa used to take me up to Squamish every other weekend. We would pass by the Chief, go way up into Squamish Valley and go hunting or berry picking…. I’d get so excited because my papa would tell me the story of the two-headed serpent every time we’d pass by it.

> He’d time it just right so at the part in the story when the snake goes up over the mountain, he’d point out the mark going all the way up. That was a huge impact when I was a child. I loved it.

Duncan explains how Sinulhka was:

> [A] massive two-headed serpent that once roamed through the Squamish territory, its horrible shrieks frightening the people in the village of Stá7mes, Squamish. Xwechtáal, a young warrior, was tasked with killing the serpent. He pursued it up Siyám Smánit where it left a striking black streak, now known as the Black Dyke. For four years, Xwechtáal pursued the serpent until he was able to slay it as it rested in a lake. From its body, he procured a special bone with which he was able to induce trances in other beings, an ability which granted Xwechtáal substantial power. He stopped at neighbouring villages, gaining many wives on his return to Stá7mes. Stá7mes was one of the major villages in this region.

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82 *Ibid*.
Different versions of this story are told. In another *Squamish Chief* article, Squamish Nation writer, Chelachatanat, explained that “[e]very legend has a core story. Every family may tell it a bit differently.”"Chelachatanat’s story of Sinulhka involves a Chief’s son being asked by his father to leave on his wedding day to slay the serpent. The serpent slayer returns to the village months later and becomes very angry after learning his wife has remarried. He reacts by releasing the power he has obtained through killing the serpent and everyone dies. Chelachatanat says that listeners are asked to consider the story and decide for themselves what it means – “[s]ome listeners will be upset that everyone is killed. Some will think the serpent won in the end. Some will think, ‘why did his father ask on his wedding day?’” She explained that no answer is wrong and that the story “reminds us that everyone holds a two-headed serpent inside them. One good, one bad. Which one do you release?” Duncan and Chelachatanat’s explanations demonstrate how Siyám Smánit holds stories and teachings, and how the land can communicate important principles to Squamish people.

Squamish Nation Councillor, Khelsilem, founder of the Skwomesh Language Academy, told the *Squamish Chief* a story about the creation of Siyám Smánit:

It occurred during a time when four brothers, supernatural beings called Xaays, came to this region to give teachings and moral understandings of the world to people who were living here. They transformed the landscape, they transformed life; they created things, they destroyed things . . . The mountain, this granite monolith, was originally a longhouse, and there was a potlatch or a big feast going on. The longhouse was transformed into this mountain. All of the spirits that were in the longhouse at the time of


85 Ibid.
the transformation were stuck inside and so on the rock face today, you’ll see different
animals appearing through the rocks.\footnote{Copeland, supra note 81.}

Councillor Khelisem explained how today, “A lot of our elders and people often look at it and try
and make interpretations of what they see, the same way people look at the stars or clouds and
make meaning out of it.”\footnote{Ibid.} In other words, Siyám Smánit is a landmark that people use for
spiritual interpretation; it connects Squamish people to the place and links past and present
generations of Squamish people.

In his interview, Chief Williams discussed an important Squamish creation story
involving a great flood. This story explains the importance of Mt. Garibaldi/ Nch’ḵa’y to the
Squamish people:

We had a flood (probably at the same time you guys had a flood). We had 24 ocean-
going canoes. An ocean-going-canoe – today they are small – only about 65 feet or so. In
the old days, they were close to 100 feet in length and maybe 4-5-6 foot tall at the front.
24 of them tied up together and the 24 families – they ended up tying up to one mountain
and when the waters went over that mountain, they paddled to another mountain and tied
up there for awhile, then the waters went over that one, then we finally tied up at a
mountain called Nch’ḵa’y. Today it is called Garibaldi. Of the 24 ocean going canoes, 6 of
them broke away and floated off. They went south. We didn’t know where they went. We
thought they all had drown. Then about 500 years later, some of our people were
travelling down in Washington State (as they call it today) and they found these people
speaking our language – Squamish language.\footnote{Interview of Chief Williams, supra note 48.}

Reimer explains that there are many pictographs throughout Squamish Territory depicting the
events of the flood.\footnote{Reimer, supra note 64 at 9.} He also explains that “ethnographic accounts tell that the floodwaters
covered all the mountains except Mts. Garibaldi, Baker and Sakus.” The great flood story is an important historical event for Squamish Nation, explaining the significance of many landmarks and connecting Squamish people to the places in Squamish Territory since time immemorial.

Stories containing legal principles are not always spoken. They are also communicated through mediums such as carvings. This is evident, for example, on the surface of the large table where the Squamish Council holds its meetings. The Council table is carved by Squamish carver Rick Harry/Xalakten. It “carries significant messages from the past, and meaning for present and future generations of the Squamish Nation.” In this carving there are 12 significant depictions, one being: “The landmarks - Siỳáṁ Smánit (Chief Mountain), Nch’kaý (Garibaldi), and Kwetkwétxwem (Shannon Falls).” The Squamish Nation Governance Policy explains that the depiction of the landmarks “represents our lands and reminds us to protect our lands.”

3.3.3 Squamish Land Use Practices, Identity and Law

Land use practices themselves can embody legal principles. The importance of land use practices to Squamish Nation is explained in Xay Temíxw as follows:

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90 Ibid. at 11.
91 SN Governance Policy, supra note 21 at 2-3.
92 Ibid.
93 Ibid.
94 For more in-depth discussion of the importance of embodied knowledge to Indigenous cultures see Leanne Simpson, Dancing On Our Turtle’s Back: Stories of Nishnaabeg Re-creation, Resurgence and a New Emergence (Winnipeg: Arbeiter, 2011) at 42- 43. Simpson explains how a vast body of knowledge is accessed through “singing, dancing, fasting, dreaming, visioning, participating in ceremony, apprenticing with Elders, practicing lifeways and...
The Squamish define themselves in relationship to their land. The spiritual and cultural connection of the Squamish to the land and its bounty is deep. From time immemorial, the Squamish have lived throughout this territory, in harmony with the land and dependent on its richness. For the Squamish culture to survive, this interconnection to nature must be nurtured and the land base it is based on must be stewarded. The use of land in its natural state is a primary element of Squamish culture. Therefore, access to land in its natural state must be ensured. Without this land, there will be no Squamish culture.95

The connection of land with identity, and the need to use land in particular ways to foster that connection was explained by members of the community who participated in the development of Xay Temíxw. Former Squamish Nation Councillor, Byron Joseph, described the Elaho region of Squamish Territory as “an ancient forest that we believe is very much a part of who we are.”96

Former Squamish Nation Councillor Dennis Joseph explained:

People need places to practice traditional bathing. You need places to practice and harvest wood for sacred masks . . . a place to harvest and gather sacred animals that depict who we are as Squamish people . . . depict a known universe.97

In Joseph’s words one sees that certain practices on the land enable Squamish people to maintain a sense of who they are by connecting to a world which reflects the Squamish identity. Squamish people will often speak of the importance of maintaining a relationship with land, via land use, as a means through which to establish connections with ancestors.98 This guides the ability to make decisions about the future. Indeed, a principle often repeated in many Squamish cultural sources is the responsibility of current Squamish people to teach future generations of Squamish

living our knowledge” (42). In referencing the work of Sakej Youngblood Henderson she explains how the meaning of knowledge is acquired through the performance of culture (43).

95 Xay Temixw, supra note 2 at 7 [emphasis added].
96 Xay Temixw Documentary, supra note 67.
97 Ibid [emphasis added].
98 Xay Temixw, supra note 2 contains the perspectives of many Squamish Nation members.
members the lessons they learn from their ancestors, which are intimately connected to land use.

This is set out in Xay Temíxw:

In Squamish culture there is a responsibility to pass down and bestow knowledge from one generation to the next. There is a series of events in teaching and years of mentorship to understand how to use resources. In the sharing and teaching of cultural knowledge, the land is the classroom; this knowledge cannot be taught or replicated in any other way without the land. In this model of education, the process of learning is attached to the land. Access to plants, sites and broader wild areas is therefore very important for teaching and practicing the Squamish culture.99

In the Xay Temíxw Documentary, Squamish language teacher, Vanessa Campbell, noted that protecting Squamish Territory through a land use plan was especially important to the children because:

They need to have a real sense of connection to the land and to what the land was and can be to us. Otherwise, I think the decisions that the children make in the future, these people make in the future, won't be connected to the past.100

Chief Campbell explained the principle of connecting to the ancestors through land use as follows:

As a Nation we have never ceded our lands and it is through the strength of our Ancestors that we walk in their footsteps to create a legacy for future generations. We look to the past to guide our future, recognizing the respect and unity that comes from our teachings. Our connection to the land is strong, coming from our spirit and traditions and we can never be separated from this connection.101

Ensuring land is available to enable connection between past, present, future generations of Squamish people is a central principle in Squamish Nation land use law. In establishing a

99 Ibid at 39.
100 Xay Temíxw Documentary, supra note 67.
relationship through land, Squamish people maintain a connection with their ancestors, which guides behaviour and informs decision-making. Use of land and territory, therefore, are an important means through which Squamish Nation people express and learn principles that are central to their identity and legal order.

The objective of this brief discussion of Squamish legal principles relating to territory, land and land use has been to establish a cultural context for understanding the next part of the dissertation which focuses on Squamish legal processes that have addressed pressing environment issues faced by Squamish Nation. Indeed, Xay Temíxw and the Squamish Process are informed by land use values and legal principles found in a great many Squamish Nation cultural/legal sources. The remainder of this Chapter, and Chapters 5 and 6, will discuss in detail how the Squamish community, through its own deliberative practices, built legal processes that reflect central Squamish values and legal principles. These processes were built based on discussions and deliberations where community members provided their opinions and made decisions based on the knowledge and the laws relevant to addressing the current problems they faced. The documents and maps that emerge from these processes are therefore reflective of the contemporary Squamish legal order. They reflect the legal principles the community decided were necessary to make decisions in these specific contexts.

102 Jocelyn Stacey defines deliberation as “debate and discussion aimed at producing reasonable well-informed opinions in which participants are willing to revise preferences in light of discussion, new information, and claims made by fellow participants” in Jocelyn Stacey, “The Deliberative Dimensions of Modern Environmental Assessment Law” (2020) 43:2 Dal LJ 865.

103 Squamish knowledge regarding the interconnection of language, story and territory is complex and a deep understanding of these concepts is beyond the scope of this dissertation. It is, however, important to understand this
3.4  Xay Temíxw Land Use Plan for Forests and Wilderness of Squamish Nation Traditional Territory

3.4.1  Motivation for Developing Xay Temíxw

Squamish Nation’s decision to create Xay Temíxw came at a time when much conflict was occurring in BC between government, industry, Indigenous nations, and environmental non-governmental organizations (NGOs) with respect to industrial logging and BC’s forest practices (“the War in the Woods”). 104 There had been blockades in Clayoquot Sound by the Nuu-chah-nulth and NGOs to prevent the harvesting of old-growth forests by Macmillan Bloedel.105 The Coastal First Nations on the northwest coast of BC were actively engaged in campaigns with NGOs to protect the Great Bear Rainforest.106 In Squamish Territory, Western Canada Wilderness Committee (WCWC) wished to curtail International Forest Products Ltd. (Interfor’s) interconnection exists, as it allows one to better comprehend how Squamish legal principles are brought to bear on contemporary legal processes.

104 Sierra Club backgrounder on Great Bear Rainforest online: <https://sierraclub.bc.ca/great-bear-rainforest-agreements>. Sierra Club describes the War in the Woods as follows: “Known as the “War in the Woods,” the conflict between First Nations concerned about the fate of their unceded traditional territories, environmental organizations and the forestry industry resulted in protests and international market campaigns. These resulted in major wood and paper buyers cancelling their contracts or steering clear of projects from the region. Customers of forest products demanded change. This created a willingness among the stakeholders to collaboratively work towards solutions with decision-makers, namely provincial and First Nations governments.”


industrial logging by proposing to establish the Randy Stoltman Wilderness Area.\textsuperscript{107} This area would encompass Sims Valley, Clendenning Valley, the Upper Elaho Valley and the Upper Lilooet Valley – all areas of great significance to Squamish Nation.\textsuperscript{108} Both Interfor and WCWC sought the support of Squamish Nation, but Squamish realized it was a crucial time for the Nation to determine for itself the land use objectives for its territory. Interfor, which held TFL 38\textsuperscript{109} covering a vast area of forest lands in Squamish Territory, agreed to cease logging in the area until Squamish Nation could complete its own land use plan.\textsuperscript{110}

Chief Campbell discussed why it was important for Squamish Nation to define its own land use planning objectives for the territory, separate and distinct from environmental and industrial groups:

Particularly at this time, one of the catalysts was the War the Woods, where we had NGO environmental groups pitted against forestry companies, at that time Interfor, and they were fighting over what they coined the Stoltman Valley, which is the Upper Elaho part of the northern part of our Squamish territory. Both of those parties came to the Nation to ask us to side with them. It increased with civil disobedience from the NGOs out on the land blockading. You had the forestry workers blockading and you had this conflict that was really percolating and again people kept looking to the Nation saying, “What is your position? Where do you stand?”

And we said we stand for both. We’ve always utilized the forests and the resources and we also want to see our cultural spiritual practices and places protected. It was a non-starter to name the area Stoltman. We didn’t know who Randy Stoltman was at that time, or the rationale to name a huge part of our sacred territory after this settler,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{108} Ibid.
\item \textsuperscript{109} A TFL, tree farm license, is an area-based tenure that grants exclusive rights to harvest timer and manage and conserve forest resources through defined areas of land. For more information on the historical tenure of TFL 38 see: <https://www2.gov.bc.ca/gov/content/industry/forestry/forest-tenures/timber-harvesting-rights/tfl/tfl-38>.
\item \textsuperscript{110} Andrew Mitchell, “Province, Squamish Nation reach land use agreement” Pique Newsmagazine (3 August, 2007) online: <https://www.piquenewsmagazine.com/whistler-news/province-squamish-nation-reach-land-use-agreement-2476669>.
\end{itemize}
\end{footnotesize}
so we said we’re going to take a unique stand from the Squamish Nation point of view and engage in our own land use planning.111

Squamish Nation lawyer, Aaron Bruce, explained Squamish Nation’s motivations as follows:

Xay Temíxw was an assertion by Squamish Nation of its governance over the land. It wasn’t an agreement at that time. It was a plan so Squamish could sit down with logging companies and the province and say, “This is the way that we see the land being used and we need to figure out how to work with you on this type of activity on the Squamish land base.”112

Squamish Nation community members felt strongly that the Nation needed to take a stand against expropriation of Squamish Territory by third parties, and that a land use plan was a means of doing this. As Clogg points out, land use plans are not only a powerful way for Indigenous nations to exercise Aboriginal title, but they also enable Indigenous nations to translate laws and wisdom of Elders into “maps and written rules that communicate its choices about land and water use to the Crown and third parties.”113 In the Xay Temíxw Documentary Chief Williams stated:

If we, as Squamish people, don’t stand up right now and define what our interest is in our territory, all of the other competing interests will feel that they have primary jurisdiction over our land which is unceded, which is still part of the treaty process.114

Former Squamish Nation Councillor Harold Calla commented:

You have to assert your aboriginal rights and title. You can't wait for others to do it. And it's absolutely critical for the Squamish Nation and the Squamish people to identify what their traditional land use was. From a political and legal perspective, it's absolutely

111 Interview of Squamish Nation Hereditary Chief and Councillor Ian Campbell/Xalek Sekyu Siyam (19 August 2019) [Interview of Chief Campbell].
112 Interview of Aaron Bruce/ Kelts'-tkinem (13 May 2019) [Interview of Aaron Bruce].
114 Xay Temíxw Documentary, supra note 67.
critical because the Supreme Court decision in *Delgamuukw* identifies that we have an aboriginal interest in the land that was not extinguished by Crown title.\textsuperscript{115}

Land use planning was a way by which Squamish Nation could strengthen its jurisdiction (outside the treaty process) by providing a clear indication on how Squamish Nation wanted its land to be used. It was an important and proactive way Squamish Nation could assert its inherent jurisdiction (and Aboriginal title and rights) by describing how the land in Squamish Territory should be managed based on the community’s values and laws.

### 3.4.2 Building Xay Temíxw – A Community-Based Process

The Squamish Nation developed Xay Temíxw between 2000-2001. The process was overseen by the Nation’s Land and Resource Committee (the “Committee”), which consisted of five Squamish Nation Councillors and was assisted by a Project Team.\textsuperscript{116} The central purpose of the Xay Temíxw process was to “determine and describe the community’s vision for the future of the forests and wilderness of the traditional territory,” and in so doing, establish a set of land use management objectives.\textsuperscript{117} As a community-based process, the aim was to hear from as many Squamish members as possible regarding how they wanted “the Nation’s land and resources to be protected, managed and utilized for the benefit of present and future generations.”\textsuperscript{118} The

\begin{flushleft}
\textsuperscript{115} Ibid.
\textsuperscript{116} Xay Temíxw, supra note 2 at 1. The Committee consisted of the following Squamish Nation Councillors: Chief Ian Campbell, Chief Gibby Jacob, Randy Lewis, Anne Whonnock/Syexwáliya, and Chief Bill Williams. The Committee was assisted by a Project Team which included, community outreach workers, an archeologist, lawyers, foresters, a mapping and GIS technician, and project management consultants.
\textsuperscript{117} Ibid at 2.
\textsuperscript{118} Ibid at 1.
\end{flushleft}
challenge was to capture the diverse interests of the community within the plan itself. Chief Campbell stated at the time: “There are many diverse interests in the land and we have to try to put everybody’s voice into the plan.”  

In terms of its scope, Xay Temíxw is a phase-one plan that addresses “broad land allocation and resource management direction,” as opposed to landscape level and site-specific concerns. It focuses on the forested and wilderness areas of Squamish Territory, excluding territory that is in the Sechelt and Chilliwack Forest Districts. It does not include urban developed areas, coastal and marine environments, or areas designated as provincial parks. In his interview, Chief Campbell explained that the Nation chose to scope the plan this way because it would be impossible to address all aspects at one time, and the forest and wilderness areas were a priority. Squamish thus adopted an incremental approach; it began with a broad phase-one land use plan that would lead to future phases of land use planning to identify objectives for specific land-level sites and a marine use plan for the waters of Squamish Territory.  

The process for gathering information to develop Xay Temixw began at the community level. The Committee sought to develop a consultation approach that would resonate with the community, generate discussion, and obtain diverse knowledge from the Squamish Nation membership. To this end, information gathering took place without participation by government or outside interests. The Xay Temíxw Documentary explains:

119 Ibid at 8.
120 Ibid at 3.
121 Ibid.
122 Ibid.
123 Interview of Chief Campbell, supra note 111.
124 Interview with Aaron Bruce, supra note 112.
Our first step was to provide opportunities for people to express their vision. We held community feasts, individual interviews, and workshops with groups such as elders and youth so we could listen to the concerns and recommendations people had for the forest and wilderness areas of the traditional territory. People addressed many different aspects of land use.\textsuperscript{125}

Two large community gatherings were held to collect information.\textsuperscript{126} These began with feasts and included witness ceremonies.\textsuperscript{127} Personal interviews with knowledge holders were also conducted and people were encouraged to continue to engage in dialogue amongst themselves and to share their knowledge with the Project Team. Chief Campbell encouraged members to:

\begin{quote}
Talk among yourselves and share your knowledge with us all over the next weeks and months. It has taken a long time to get where we are today. This is a process, a journey. It won’t end at the end of six months. Let us continue travelling in the canoe together.\textsuperscript{128}
\end{quote}

In his interview, Chief Williams explained how important trust was in the consultations with the community:

\begin{quote}
It took two years because the members had to trust myself and other members, Chief Ian, to be able to take information and have this information be held private, because they didn’t want to talk publicly or have the information given publicly, of sacred places that their families used in our traditional territory. At the end of the two years, we had people coming up finally talking about sacred caves, other sacred locations where it was very important for the Nation to have the land set aside, not to specifically identify the exact location where these cultural and spiritual places are, but a general idea of what is important in this area. This area might be two hundred acres in size, but the spot that is really sacred might be an acre in size.\textsuperscript{129}
\end{quote}

\textsuperscript{125} Xay Temixw Documentary, \textit{supra} note 67.
\textsuperscript{126} Xay Temixw, \textit{supra} note 2 at 8.
\textsuperscript{127} Witness ceremonies are a cultural practice of the Squamish Nation (and other Coast Salish Nations), whereby members are asked to remember the events that occurred at a particular time. For more information on the Squamish Nation Call to Witness Project see Nancy Bleck, Katherine Dodds, & Chief Bill Williams, \textit{Picturing Transformation: Nexw-ayantsut} (Vancouver: Figure Publishing, 2013).
\textsuperscript{128} Xay Temixw, \textit{supra} note 2 at 8.
\textsuperscript{129} Interview of Chief Williams, \textit{supra} note 48.
Recognition of the role of trust and the responsibility of the Nation to protect family knowledge, is expressly set out in Xay Temixw where it states:

It is important that the knowledge of the lands and resources of the traditional territory that reside within family lineages within the Nation be brought forward and treated with respect, sensitivity, and confidentiality. Access to this family information is earned over time through the building of trust. Squamish Nation will uphold chiyax in collecting and sharing the collective knowledge of the Nation.¹³⁰

These statements reveal a recognition that time and trust are needed to create a dynamic for dialogue and sharing of information at the community level. A relationship of trust needs to be built over time for the process to bear fruit. Following chiyax (protocols),¹³¹ around the sharing of information was an important element of the Xay Temixw process. The approach to obtaining information also needed to resonate with the cultural expectations of the community. Holding feasts and witness ceremonies in conjunction with community dialogue grounded the process in a culturally appropriate way and distinguished it from the heavily bureaucratic nature that is typical of Crown information-seeking processes. The Xay Temixw process also recognized the need to engage in outreach to access information from different types of knowledge-holders in the community. In other words, in the Xay Temixw process, the Project Team recognized a reciprocal responsibility to obtain and share information. This is different from many Crown models which require information be submitted to a central repository within a specific timeframe.

¹³⁰ Xay Temixw, supra note 2 at 3.
¹³¹ Squamish Nation explains the meaning of chiyax as follows: “Pre-contact, a complex set of rules and practices, called chiyax and snewayelh, applied within the Chieftainship areas – these rules and practices are inseparable from the lands and waters, and inform Squamish governance of our Territory today;” see Squamish Nation - Westridge Written Evidence, supra note 2.
3.4.3 Community Values and Land Use Priorities

Information gathered through community meetings and interviews formed the knowledge base for Xay Temíxw. The written document sets out the community’s vision for its territory. It articulates numerous values Squamish people hold in connection with the land and the land uses they wish to preserve and protect through the plan. These include:

- heritage and sacred sites for the cultural meaning they hold (e.g., burial sites, culturally modified trees, rock shelters);
- features of the territory, with their traditional names, for their knowledge and the learning opportunities they provide;
- secluded places for traditional cultural practices (e.g., storing regalia, vision quests);
- old growth cedar trees – both red and yellow – for their many uses;
- medicinal plants, traditional foods, and plants use for cultural purposes;
- places for wildlife to life, and the animals themselves, especially mountain goats, grizzly bears, and animals for food such as moose and deer;
- fish for fishing, and healthy rivers and streams;
- clean air, and clean water for drinking, for the ecosystem and for ritual bathing;
- resources from which Squamish members can earn a living; and
- places to heal, recover and re-connect with the land.\(^{132}\)

Xay Temíxw acknowledges that “[t]hese values, while deeply embedded in the past history of the nation, are vibrantly alive today,”\(^{133}\) and they form “the foundation and guiding force for the future of the forest and wilderness lands.”\(^{134}\) Accordingly, the community wanted these values to guide the Nation’s future land use planning negotiations with governments and third parties. The community prioritized the following land uses:

- protecting the rights and interests of the Squamish people, with certainty;

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\(^{132}\) Xay Temíxw, supra note 2 at 10.

\(^{133}\) Ibid.

\(^{134}\) Ibid.
• sustaining the traditional territory for our children’s children – seven generations;
• planning ahead instead of always reacting to problems and conflicts;
• looking at the whole picture and the way that everything is connected;
• protecting heritage, traditional use, sacred and cultural sites;
• protecting old growth forests;
• ensuring that cultural and traditional connections with the territory continue (e.g. burial places for the future, ongoing education that depends on the land);
• providing opportunities for hunting, fishing and gathering;
• controlling floods and erosion, with minimal impact on habitat;
• repairing damage to the land and water, and reducing soil, water and air pollution;
• monitoring change and developing a knowledge for the Squamish of the land, its vast habitat, and cultural history, and impacts of development on it;
• getting Squamish members into the traditional territory for health, education, recreation, spiritual and cultural purposes, including camps for children and youth; regulating tourism, and minimizing impacts of tourism and recreation, while increasing benefits to Squamish members (e.g., as guides in ecotourism);
• developing resources (e.g. silviculture, selective logging, cultivating plants) to provide jobs for Squamish benefit, without damaging the environment; and,
• getting Squamish members more involved in resource management, as employees and decision-makers.  

After hearing from the community, the Committee set to work to develop a method to reflect the community’s values and land use priorities. The method involved using a typical Western land zone framework, which permits different uses according to the land zone designations. In Xay Temíxw, however, Squamish Nation identified its own types of land zones and set out specific resource management objectives and implementation strategies associated with each zone. In other words, based on the values and land use priorities determined by the community, a contemporary incarnation of Squamish land use law was created using a land zone and mapping framework that is readily understood in a wider Canadian context. This framework is articulated in words in the Xay Temíxw land use plan document and visually represented in the Xay Temíxw – Sacred Lands Land Use Map (First Draft). The Xay Temíxw

\[\text{\textsuperscript{135} Ibid.}\]
land use framework divides the forests and wilderness areas of the Squamish Territory into two distinct land zones: the Forest Stewardship Zone, which contains two sub-zones called Sensitive Areas and Restoration Areas, and the Wild Spirit Places/Kwa Kawy̓x Welh-aynexw̓s Ts Squaremú7mesh Temixw (Wild Spirit Places).\textsuperscript{136}

\textbf{3.4.4 \textit{The \textit{Xay Temíxw} Forest Stewardship Zone}}

The Forest Stewardship Zone encompasses “all forested areas within the traditional territory, outside of settlement areas, existing Parks and proposed Wild Spirit Places.”\textsuperscript{137} The resource management objectives and strategies of the Forest Stewardship Zone are based on a wide range of Squamish Nation values and land uses, which include: cultural and heritage values; plants for food, medicine, spiritual and cultural uses; wildlife; timber; fish, aquatic habitat and fishing; hunting, trapping and guide outfitting; recreation and tourism; water, air and soil; access management; outdoor education and land-based knowledge.\textsuperscript{138} For each of these values/uses, \textit{Xay Temíxw} sets out background on why the value or use is important to Squamish Nation members. It lists numerous community members’ specific perspectives relating to each value, and from there, establishes overall management objectives. It also sets out the implementation strategies for the management objectives.

Within the Forest Stewardship Zone there are two subzones: Sensitive Areas and Restoration Areas. These are the specific areas that the Squamish community identified as

\textsuperscript{136} For a map of these areas see: <https://native-land.ca/maps/territories/squaremú7mesh-uxwumixw/>.

\textsuperscript{137} \textit{Xay Temíxw}, supra note 2 at 12.

\textsuperscript{138} \textit{Ibid.}
needing special protections. Sensitive Areas are areas where “old-growth forest remain and important biodiversity and cultural/heritage values are found.” These areas include the Lower Elaho River Sensitive Area and the Callaghan Lake/Upper Soo River Sensitive Area. In his interview, Chief Williams explained how and why protecting this old growth forest was a central objective under Xay Temixw:

We wanted to have old growth set aside in certain ways . . . Some of it we wanted set aside for 100 years so our great grandchildren will be able to walk into a pristine area and it will be just as pristine as it was in the year 1900 . . . so they have a better understanding of our ways.

The community’s desire to protect remaining old growth forest reflects the importance of connecting past, present, and future generations of Squamish people, a principle repeated in many sources of Squamish law. Adopting measures to protect old growth areas is driven by a desire to enable younger generations of Squamish people to connect with the past so they can learn how their identity is sustained through various cultural, land use practices. Xay Temixw acknowledges that “[i]n Squamish culture there is a responsibility to pass down and bestow knowledge from one generation to the next.” Establishing Sensitive Areas in the land use plan is a way of expressing this legal principle.

Similarly, Restoration Areas are the areas of Squamish Territory where intensive logging or other development has occurred. They are the areas that are now second growth forests and require special efforts to restore the “natural values that have been heavily compromised through

139 Ibid. at 43.
140 Ibid.
141 Interview of Chief Williams, supra note 48.
142 Xay Temixw, supra note 2 at 39.
past logging, mining, and road building.”¹⁴³ These areas include the Mamquam River Restoration Area and the Ashlu River Restoration Area.¹⁴⁴ In its deliberations, the community expressed a deep desire to limit clear-cut logging practices. In the Xay Temíxw Documentary Squamish Nation Elder, Mabel Lewis, explained how, when she went out to pick mushrooms in the Squamish Valley, she saw large logs chopped down and left for waste due to clear-cut logging practices. She expressed dissatisfaction with the wasting of the trees and a strong preference for selective logging that involves less waste.¹⁴⁵ Squamish Nation Elder, Bob Baker, expressed similar sentiment explaining how the world needs to start listening to Indigenous people on how to log properly because, he explained, “it is ok to log, but not the way they’re [large forest companies] logging.”¹⁴⁶ Limiting logging practices that are antithetical to Squamish Nation values and laws was a repeated theme in community deliberations of Xay Temíxw and drove the community’s desire to establish the Restoration Areas to repair the damage that has occurred to the forest area, as well as to protect pristine areas through the Wild Spirit Places.

3.4.5 The Xay Temíxw Wild Spirit Places

A central component of Xay Temíxw is the Wild Spirit Places. These are the relatively untouched wilderness areas of Squamish Territory.¹⁴⁷ The community wanted to protect these

¹⁴³ Ibid. at 43.
¹⁴⁴ Ibid.
¹⁴⁵ Xay Temíxw Documentary, supra note 67.
¹⁴⁶ Ibid.
¹⁴⁷ Xay Temíxw captures community members’ perspectives as follows:
areas from any form of commercial development so future Squamish Nation people could experience their natural state.\(^{148}\) This is consistent with Squamish legal principles concerning preservation of ancestral territory and the responsibility to transmit land use knowledge to future generations. Xay Temíxw explains:

The majority of the Nation’s traditional territory has been developed over a relatively short period of time. Only a few areas remain as wilderness. These areas are especially important as natural and cultural sanctuaries for the Nation, and as places to sustain and nurture the Nation’s special relationship to the land.

In this land use plan, five Kwa kwayx welh-aynexws ta skwxwú7mesh temíxw (Wild Spirit Places of the Squamish Nation’s Land, or WSPs) have been identified. These important areas should be managed to retain their wilderness attributes, to provide places for spiritual and cultural renewal for the Squamish Nation, and for compatible uses.\(^{149}\)

The five Wild Spirit Places include:

- Nsíiwx-nitem tl’a sutch (Upper Elaho Valley);
- Nexw-áyantsut (Sims Creek);
- Esté-tiwilh (West Side Squamish River);
- Payakéntsut (West Callaghan); and
- There is widespread concern about the extensive logging and tourism development that has already occurred, and the pace at which remaining wild spirit places are being lost.
- Remaining natural areas are important and increasingly scarce. Protecting old growth areas and sacred sites is especially important, for carrying on family traditions and sustaining Squamish culture.
- Remaining natural areas need to be protected to keep options open for the Nation, until the Nation has a better understanding of what is left and can decide for itself how those areas are used.
- WSPs [Wild Spirit Places] should not be made into parks that exclude traditional uses. The Nation will be responsible for the management of these areas to ensure that their primary use is for cultural, traditional and other compatible uses for and by the Nation (Xay Temíxw, supra note 2 at 45)

\(^{148}\) Interview of Bill Williams, supra note 48.

\(^{149}\) Xay Temíxw, supra note 2 at 45.
• Kwáyatsut (Upper Cheakamus – largely within Garibaldi Provincial Park).

The broad land use objectives for the Wild Spirit Places are set out as follows:

Industrial uses, such as logging, mining and hydroelectric development will be excluded from WSPs. WSPs will be maintained in their natural state while allowing for a full range of traditional cultural, spiritual and other compatible uses. Through the establishment of WSPs, the Nation will provide for the continuity of the community’s cultural connection to the land, while allowing for their use and enjoyment by visitors who respect and honor these areas.

The specific objectives for the WSPs are:

• To maintain them for the benefit, education and enjoyment of present and future generations, and more specifically, to provide for the protection and preservation of the environment and Squamish culture.

• To exclude extraction or harvesting by anyone of the resources of the lands in support of a commercial enterprise, while allowing for the Squamish cultural and traditional uses noted below.

• To provide for the continuation of Squamish cultural activities and traditional renewable resource harvesting activities, including:
  • gathering traditional Squamish foods;
  • gathering plants used for medicinal and ceremonial purposes;
  • hunting, trapping, and fishing;
  • cutting selected trees for ceremonial or artistic purposes;
  • conducting, teaching or demonstrating ceremonies of traditional, spiritual or religious significance;
  • seeking cultural or spiritual inspiration; and,
  • construction and use of shelters (such as camps and longhouses) essential to the pursuit of the above activities.

Chief Campbell explained the community’s motivation for establishing the WSPs in his oral testimony at the NEB hearing for Trans Mountain Pipeline Expansion Project:

150 Ibid at 48.
151 Ibid.
152 Ibid at 47.
We wanted to ensure that our young people were afforded the opportunity to go here [to the Wild Spirit Places] and be immersed for weeks at a time in our traditional training techniques of bathing, of swimming in the waters, of carrying rocks under the lakes, of really pushing them to do fasting and solos and whatnot, and teaching them a lot of the techniques of our traditional training.\textsuperscript{153}

Through \textit{Xay Temíxw}, the community chose to define and name its own land use zones for purposes that reflect Squamish laws and values. Designating areas as Wild Spirit Places reflects a translation of Squamish legal principles regarding the need to maintain connections to land through specific forms of land use, and the responsibility to bestow knowledge to future generations of Squamish people. Embedded in that responsibility is the need to protect and maintain the environment in its natural state. To this end, these areas are designed as being off limits for resource development. The Wild Spirit Places “provide for the continuity of the community’s cultural connection to the land,”\textsuperscript{154} while other areas in Squamish Territory are designated to allow for resource development.

\subsection*{3.4.6 Community Perspectives on Economic Development}

In addition to identifying lands for protection, \textit{Xay Temíxw} articulates the community’s perspectives on economic development. Members are not opposed to development, but resoundingly feel that Squamish Nation needs to be more involved in determining how development will occur in Squamish Territory, and to participate in economic development projects in more meaningful ways. \textit{Xay Temíxw} states:

\begin{quote}
Jobs and economic development opportunities are fundamentally important to the Squamish people. For too long, the Nation has been denied fair and equitable access to
\end{quote}

\textsuperscript{153} Squamish Nation Oral Presentation Trans Mountain NEB Hearing \textit{supra} note 2 para 5386.

\textsuperscript{154} \textit{Xay Temíxw}, \textit{supra} note 2 at 47.
opportunities while others have profited from the Nation’s land.\textsuperscript{155}

Members expressed different views concerning the level of participation Squamish Nation should have in joint ventures and corporate partnerships. They articulated concerns about power imbalances and Squamish Nation voices not being heard when partnering with large companies.\textsuperscript{156} They also viewed joint ventures and partnerships as a starting point for the Nation to get involved in development and to build positive relationships with neighbours (including municipalities and corporate entities). The overall sentiment was that education, training, and employment were important goals and that economic development would foster these types of opportunities. The consensus was that Squamish Nation should be co-managing the land and resources of Squamish Territory with other levels of government, but some members felt that this should be pursued through a formal treaty settlement or an arrangement where Squamish Nation has full control over Squamish Territory.\textsuperscript{157}

### 3.5 Finalizing and Implementing Xay Temíxw

After two years of community consultation and deliberation, the Committee produced a written document articulating Squamish Nation values and laws concerning land use, and the objectives and strategies it wanted to implement to manage Squamish Nation forest and wilderness lands. The Committee distilled the central values and concerns of the community and translated them into a land zone framework which could be readily understood by wider

\textsuperscript{155} Ibid at 55.
\textsuperscript{156} Ibid.
\textsuperscript{157} Ibid.
Canadian audiences. In creating Xay Temíxw, the Squamish Nation determined its own process for community engagement, deliberation, and decision-making in establishing its vision for land use in Squamish Territory. The Xay Temíxw land use plan represents a contemporary articulation of Squamish Nation land use law. It makes clear to governments and third parties Squamish Nation principles for the use and management of the forests and wilderness in its territory. In this way, it reflects Squamish Nation’s assertion of its jurisdiction over its territory according to its own land use process.

Once the land use objectives were established through Xay Temíxw, the next challenge was implementing it. Indeed, within the context of competing claims of jurisdiction over territory between Indigenous nations and the province, implementation requires the proactive adoption of strategic measures by Indigenous nations. The lawyers representing the Lil’wat First Nation in the development of its land use plan explain that “[i]mplementing a First Nations land use plan comes with a number of challenges,” the biggest being the “Province’s assertion of jurisdiction over the First Nation’s territory, and the Province’s legislative authority that results from this assertion.”\textsuperscript{158} Implementation thus requires making the land use plan public, particularly to industry and environmental groups, and using and promoting the plan as much as possible.\textsuperscript{159} Negotiating an agreement with BC to recognize the land use plan is also crucial. The next part of this chapter focuses on the ways Squamish Nation has implemented Xay Temíxw. This has occurred primarily through its negotiation of the SFN-BC

\textsuperscript{158} Donovan and Company Barristers and Solicitors, “Implementing First Nation Land Use Plans Challenges and Results” (2008).
\textsuperscript{159} Ibid.

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3.6 Implementing Xay Temíxw - Acquisition of Tree Farm License 38

In 2005, Squamish Nation acquired TFL 38 from the large industrial logging company, Interfor. This provided the Nation with the “exclusive rights to harvest timber over an area of land totaling 218,000 hectares north of Squamish, in the Squamish, Elaho, Sims and Ashlu River drainages.” In other words, it provided the Nation with significant control over the logging practices in a large part of Squamish Territory, consistent with its Xay Temíxw land use objectives. The Squamish Nation press release on TFL 38 states:

Ever since our Xay Temíxw Land Use Plan in 2001, the Squamish Nation has identified ownership of an area-based forest tenure in this area as a high priority, and this completes that objective.

According to Squamish, the annual allowable cut for TFL 38 is 109,000 cubic metres, which, when combined with an earlier 98,000 cubic meters that Squamish Nation obtained under a

\[SFN-BC LUP Agreement\].

\[SN TFL 38 Acquisition Press Release\].

\[Ibid\].
Forest Range Agreement with the Province of BC,\textsuperscript{163} makes Squamish Nation the largest forest licensee in the Squamish Forest District.\textsuperscript{164}

Acquiring TFL 38 was a strategic way the Nation could ensure its forest management objectives for the Wild Spirit Places were implemented outside of a land use planning agreement with the province. Indeed, three of the areas identified as Wild Sprit Places in Xay Temíxw are found within the TFL 38 area and acquiring the TFL was means of enhancing Squamish control. The acquisition has enabled the Nation to determine sustainable development approaches to forest practices over a substantial area of its territory and build employment and training opportunities for Squamish Nation members in the forest sector. TFL 38 is an important part of Squamish Nation’s strategic path to implementing Xay Temíxw.

3.7 Implementing Xay Temíxw – The SFN-BC LUP Agreement

3.7.1 Land Use Planning in BC

BC’s land use planning processes have historically failed to address the interests of Indigenous nations.\textsuperscript{165} Before 1992, land use decision-making rested primarily with the Crown and corporate tenure holders.\textsuperscript{166} Policy shifted in 1992, to address the “War in the Woods,” and

\textsuperscript{163} Interim Measures Agreement Between Squamish Nation and Her Majesty the Queen in the Right of the Province of British Columbia As represented by the Minister of Forests, 31 March 2004; Squamish First Nation Interim Agreement on Forest & Range Opportunities Between Squamish First Nations And Her Majesty the Queen in the Right of the Province of British Columbia, (25 July 2006).

\textsuperscript{164} SN TFL 38 Acquisition Press Release, supra note 161.


\textsuperscript{166} Ibid.
BC established the Commission on Resources and the Environment (CORE) to oversee regional land use planning in several areas of the province.\textsuperscript{167} The provincial government tasked CORE with developing an overall Provincial Land Use Strategy which would begin by creating regional consensus-building models in key regions and spread out from there.\textsuperscript{168} The evolution of CORE was slow and eventually the pre-existing sub-regional Land and Resource Management Plans (LRMP) became the preferred means of land use planning.\textsuperscript{169} The aim of LRMPs was “an integrated, sub-regional, consensus building process” which would produce land use plans (made by a variety of stakeholders) for review and approval by the BC government.\textsuperscript{170} Roshan Danesh and Robert McPhee explain that the approach did not sit well with many BC Indigenous nations as it did not recognize their jurisdiction or unique, constitutional rights to the land and resources:

Indigenous participation and involvement in CORE and LRMP processes varied. Although there were some instances where deep collaborative relationships between government officials, First Nations and other stakeholders resulted in significant success, First Nations involvement was for the most part quite limited. In many instances, the processes themselves were developed without systematic or appropriate consultation or agreement with First Nations. Similarly, they were not designed with clear roles for, or recognition of, Indigenous governments, laws, title or rights.\textsuperscript{171}


\textsuperscript{168} \textit{Ibid.}

\textsuperscript{169} \textit{Ibid.} CORE was eventually replaced by the Land Use Coordination Office (LUCO).


Tim Thielmann and Chris Tollefson indicate that provincial land use planning processes failed, in particular, as the SCC strengthened recognition of Aboriginal rights and title:

The LRMP process during the late 1990s failed, as CORE had before it, to entice First Nations to its planning tables. The reasons were the same: the provincial government clung to its role as the ultimate arbiter of land use decisions, inviting local First Nations to participate alongside regional stakeholders and interest groups. These offers rang hollow, especially after a series of court cases during the 1990s began to elaborate, in unexpectedly robust terms, the meaning of constitutionally protected Aboriginal rights and title.\(^{172}\)

The failure of government land use planning processes to address Indigenous jurisdiction caused various nations, including Squamish Nation, to pressure government to negotiate separate land use plans outside the wider land use planning processes that engage various stakeholders.

### 3.7.2 Stepping Outside the Sea to Sky Land Use Planning Process

BC began the Sea to Sky Land and Resource Management Plan (Sea to Sky LRMP) in 2001 to address land use planning in the Howe Sound area with the aim of providing “greater certainty for local economic development and the long-term sustainability of ecological, social and cultural values in the Sea to Sky plan area.”\(^{173}\) Under the Sea to Sky LRMP process, BC received recommendations from a multi-sector forum and local governments, but did not recognize the unique position of affected Indigenous nations who had jurisdictional claims in the area. Bruce explained that Squamish Nation had several concerns about participating in the Sea to Sky LRMP:

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\(^{172}\) Tim Thielmann & Chris Tollefson, “Tears from an onion: Layering, exhaustion and conversion in British Columbia land use planning policy” (2009) 28 Policy and Society 111 at 117.

\(^{173}\) Province of BC, Sea to Sky Land and Resource Management Plan (Sea to Sky LRMP) online: <https://www2.gov.bc.ca/gov/content/industry/crown-land-water/land-use-planning/regions/south-coast-region-plans/seatosky-lrmp>.
The Sea to Sky LRMP process was a bit of a slap in the face from the provincial government because they [BC] were aware of the Xay Temíxw land use plan, and they entered into what they call the LRMP, land resource management planning process with industry and other stakeholders in the Sea to Sky corridor, but did not initially invite any of the First Nations in, including Squamish, who had developed its own land use plan and wanted to engage with the provincial government on that plan and work out some land use zones.\textsuperscript{174}

Chief Campbell further explains:

We went to the LRMP meetings and quickly learned that in the terms of reference they would not entertain any new protected areas. They said 12\% of the province is protected by provincial park and we said: “That’s fantastic that you would protect 12\%, but you never once consulted with First Nations, or Squamish Nation on any of the provincial parks within our territory, or any co-management, and how that impedes Aboriginal rights and title, by removing those land bases from potential treaty land settlements” . . . So we said we can't agree to your terms – we are not going to walk in already handcuffed by the Crown’s terms of reference.

We opted to go with our own Squamish land use planning process parallel to the provincial process, which we felt was an important exercise of our authority and our jurisdiction over our territories. We needed to move beyond the parameters of the reserves. If you look at the Squamish reserves, they comprise .3\% of our territory. There is no way we can sustain ourselves for perpetuity on such a small pittance of land. We needed to look territorial.\textsuperscript{175}

Rather than participating in the Sea to Sky LRMP process, Squamish chose to negotiate a separate agreement to implement its land use priorities established by the community in its Xay Temíxw.\textsuperscript{176} The timing of negotiations in the mid-2000s coincided with preparations for the 2010

\textsuperscript{174} Interview of Aaron Bruce, \textit{supra} note 112.
\textsuperscript{175} Interview of Chief Campbell, \textit{supra} note 111.
\textsuperscript{176} The principles from the SFN-BC LUP Agreement would later be harmonized in the Sea to Sky LRMP. BC explains that “government-to-government land use agreements were negotiated with several local First Nations” and that later, the Sea to Sky LRMP consultation draft and final document were harmonized to “incorporate the land use zoning and management direction specified in these agreements,” online: \texttt{<https://www2.gov.bc.ca/gov/content/industry/crown-land-water/land-use-planning/regions/south-coast-region-plans/seatosky-lrmp>}.
Olympics and gave Squamish Nation more leverage to convince the province to recognize Squamish Nation’s unique interests. Bruce explains:

So the synergies that were happening at that point were that the government got the provincial land use planning process going and the Olympics were becoming a reality, so a number of things were hitting this area all at once in terms of provincial decision-making. . . Squamish Nation basically said, “You are not going to complete this land use planning process without us, you aren’t doing any upgrades to the highway, and you are not having these Olympics in our territory until we resolve a bunch of our land use planning interests.” . . . The province ended up going down the road of a Land Use Resource Management Plan without Squamish, but in the end, we created our own separate process.  

From 2005-2007, Squamish Nation and BC engaged in government-to-government negotiations to address Squamish Nation’s specific interests in land use planning in the Howe Sound area and the northern forested region of Squamish Territory. In 2007, Squamish Nation and BC completed an agreement on land use planning (the SFN-BC LUP Agreement) outside the broader provincial land use planning process for the Sea to Sky LRMP. Figure 1 outlines Squamish Nation Traditional Territory in purple in relation to the Sea-to-Sky LRMP Boundary outlined in red. The area encompassed by the dotted black line is the area negotiated pursuant to the SFN-BC LUP Agreement.

177 Interview of Aaron Bruce, supra note 112.
178 Province of BC, Sea to Sky Land and Resource Management Plan (Sea to Sky LRMP) online: <https://www2.gov.bc.ca/gov/content/industry/crown-land-water/land-use-planning/regions/south-coast-region-plans/seatosky-lrmp>.
The protections afforded to areas of Squamish Territory by the SFN-BC LUP Agreement are significant. Notably, 3 of the 5 Wild Spirit Places identified in Xay Temíxw are protected from development. As well, 22 Cultural Sites and 3 Village Sites are recognized and protected from future development. To this end, the SFN-BC LUP Agreement has strengthened Squamish Nation’s negotiation position when development is proposed in Squamish Territory.

\[179\] SFN-BC LUP Agreement, supra note 160. Copyright © Province of British Columbia. All rights reserved. Reproduced with permission of the Province of British Columbia.

\[180\] Wildlife Focus Areas for protecting specific wildlife species such as grizzly, moose, goat, elk, and deer were also set out in the SFN-BC LUP Agreement.
because proponents can readily see what Squamish Nation’s land use objectives are, and what areas must be avoided when they make development proposals. Furthermore, the SFN-BC LUP Agreement requires proponents to negotiate with Squamish Nation when it wants to pursue certain development objectives that may interfere with Squamish Nation protected areas. The next section discusses these protections.

3.7.3 Recognition of Wild Spirit Places under the SFN-BC LUP Agreement

The 3 Wild Spirit Places recognized in the SFN-BC LUP Agreement include: a) Nsiiyxnitem sütich (Upper Elaho Valley); b) Nexw Áyantsut (Sims Creek Watershed); and c) Estétiwilh (West Side Squamish River). These areas are highlighted in red in Figure 2.

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181 SFN-BC LUP Agreement, supra note 160 at 3.
The SFN-BC LUP divides each Wild Spirit Place into three different land use zones, and each zone provides a different level of ecological protection. These zones include Conservancies, Wildland Zones, and Special Cultural Management Areas. The land zone divisions for each Wild Spirit Place are depicted in Figures 3, 4, and 5 below.

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182 SFN-BC LUP Agreement, supra note 160. Copyright © Province of British Columbia. All rights reserved. Reproduced with permission of the Province of British Columbia.
Figure 3: Nsiiyxnitem sútich/Upper Elaho Valley Wild Spirit Place Land Use Zone Divisions\textsuperscript{183}

\textsuperscript{183}SFN-BC LUP Agreement, supra note 160. Copyright © Province of British Columbia. All rights reserved. Reproduced with permission of the Province of British Columbia.
Figure 4: Nexw Áyantsut/Sims Creek Watershed Wild Spirit Place Land Use Zone Divisions\textsuperscript{184}

\textsuperscript{184} SFN-BC LUP Agreement, supra note 160. Copyright © Province of British Columbia. All rights reserved. Reproduced with permission of the Province of British Columbia.
As shown in Figures 3 and 5, the Upper Elaho Valley and West Side Squamish River Wild Spirit Places contain Conservancies. The central management objectives for these Conservancies are:

Protection and maintenance of the biological diversity and natural environments, including wildlife habitat values, the preservation and maintenance of social, ceremonial and cultural uses by the Squamish Nation, and the protection and

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185 SFN-BC LUP Agreement, supra note 160. Copyright © Province of British Columbia. All rights reserved. Reproduced with permission of the Province of British Columbia.
enhancement of any cultural and heritage resources.\textsuperscript{186} Development is significantly restricted in the Conservancies: “[i]ndustrial logging, mining, hydro-electric development, new roads, and commercial development in the Conservancy zone are prohibited.”\textsuperscript{187} The SFN-BC LUP Agreement provides that the Conservancies will be designated pursuant to the \textit{Protected Areas of British Columbia Act}\textsuperscript{188} (\textit{PABCA}) (in consultation with Squamish Nation to ensure the designations are consistent with the Agreement).\textsuperscript{189} This increases their protective status through statutory recognition.\textsuperscript{190}

The Conservancies of the Wild Spirit Places are to be collaboratively managed by BC and Squamish Nation through shared decision-making and joint development of management

\begin{flushleft}
\textsuperscript{186} SFN-BC LUP Agreement, \textit{supra} note 160 at 3. \\
\textsuperscript{187} \textit{Ibid.} at 4. The Agreement does state: “The Parties, may, by mutual agreement, identify additional development activities that they will recommend are acceptable uses within a Conservancy that would otherwise contravene this Agreement.” For more discussion on the development of BC’s conservancy policy, see Jessica Stronghill, Murray B. Rutherford, & Wolfgang Haiter, “Conservancies in Coastal British Columbia: A New Approach to Protected Areas in the Traditional Territories of First Nations” (2015) 13:1 Conservation and Society 39. \\
\textsuperscript{188} \textit{Protected Areas of British Columbia Act}, SBC 2000, c 17. \\
\textsuperscript{189} SFN-BC LUP Agreement, \textit{supra} note 160 at 7. \\
\textsuperscript{190} For more discussion on the development of BC’s conservancy policy see Jessica Stronghill, Murray B. Rutherford, & Wolfgang Haiter, “Conservancies in Coastal British Columbia: A New Approach to Protected Areas in the Traditional Territories of First Nations” (2015) 13:1 Conservation and Society 39. Stronghill explains that the \textit{PABCA} was enacted by BC in 2006, “not only to achieve conservation goals, but also to accommodate social, ceremonial, and cultural uses of First Nations, and sustainably small-scale resource development” (40). Deborah Curran explains that government-to-government negotiations between BC and the Coastal First Nation in the Great Bear Rainforest Agreement drove the province to legislate ecosystem-based management commitments. This has been done in various ways including Conservancy recognition under the \textit{Protected Areas of British Columbia Act} and the \textit{Park Act}. For more discussion see Curran, “‘Legalizing’ the Great Bear Rainforest Agreement” \textit{supra} note 106.
\end{flushleft}
The management objectives set out in the SFN-BC LUP Agreement incorporate the values and legal principles identified by the community in Xay Temíxw. Specifically, the SFN-BC LUP Agreement recognizes the need to manage the land considering connections between past and future generations of people. In 2012, Squamish Nation and the Province signed a collaborate management plan for the Estétiwilh/West Side Squamish River Conservancy.\(^{192}\) They are still finalizing the Upper Elaho Valley collaborative management plan which includes the Lil’wat Nation.\(^{193}\)

The Upper Elaho Valley and Sims Creek Watershed Wild Spirit Places also contain Wildland Zones. The central management objective of Wildland Zones “is to protect wildlife habitat, remote wilderness characteristics, and their cultural and spiritual importance to the Squamish Nation.”\(^{194}\) Wildland Zones are not as strict as Conservancies – they restrict certain development activities but allow others: “the commercial harvesting of timber and hydro-electric development are not permitted in this zone, but other types of development activity, including mineral exploration and development, are permitted if consistent with the protection of wildlife habitat values.”\(^{195}\) In addition, “[c]ommercial and non-commercial
recreation and tourism development are permitted in the Wildland Zone if consistent with the protection of wildlife habitat values.**196 The management objectives set out in the SFN-BC LUP Agreement state that development activities must be carried out “in a manner that is compatible with the cultural interests and values of the Squamish Nation.”**197 These Wildland Zones are further protected under the Sea-to-Sky Wildland Area Order198 issued pursuant to the Environmental and Land Use Act.199

Finally, each Wild Spirit Place contains areas designated as Special Cultural Management Areas (SCMAs). These “are proposed sub zones within Wild Spirit Places where some forestry activity will be permitted subject to strict forest management practice guidelines that fully protect the Squamish Nation cultural values and ecological integrity of these areas.”200 The forest management guidelines for these areas commit BC to harmonizing its laws with the guidelines set out in the SFN-BC LUP Agreement. The guidelines contain various principles that accord with the laws and values of Xay Temíxw, including treating all SCMA’s as “High Conservation Value Forest,” which require “full assessment of the values undertaken prior to forest development activity” consistent with provincial forestry laws.201 Additionally, the guidelines require limiting new road construction, protection of wildlife, protection of riparian zones, establishment of visual quality objectives, and silvicultural systems and old growth protection.202

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196 Ibid.
197 Ibid at Schedule E.
198 Ibid.
199 Environmental and Land Use Act, RSBC 1996, c 117.
200 SFN-BC LUP Agreement, supra note 160 at 11.
201 Ibid.
3.7.4 Recognition of Cultural and Village Sites under the SFN-BC LUP Agreement

In Xay Temíxw, the community noted that a Phase 2 land use planning process would be required to “identify the full range of important sites” to Squamish Nation and to “determine the levels of protection needed.” The Phase 2 process took place through the SFN-BC LUP Agreement that provides protections for 22 Squamish Nation Cultural Sites, 3 Villages Sites, as well as 2 Cultural Training Areas and Wildlife Focus Areas. Figure 6 depicts these 4 types of designations and shows how they are spread throughout Squamish Territory. Negotiation between the Province and Squamish Nation for recognition of more Squamish Nation Cultural and Village Sites are ongoing.

203 Xay Temíxw, supra note 2 at 5.
204 SFN-BC LUP Agreement, supra note 160.
205 It states that Squamish Nation identified 109 candidate Cultural Sites and 32 Village sites that need protection. 22 Cultural Sites and 3 Village Sites were recognized in this agreement and negotiations for the others have continued outside of the agreement: SFN-BC LUP Agreement, supra note 160 at 5.
The management objectives for the Cultural and Village Sites recognize the need to maintain the cultural and spiritual integrity of these places. In terms of implementing the

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206 SFN-BC LUP Agreement, supra note 160. Copyright © Province of British Columbia. All rights reserved. Reproduced with permission of the Province of British Columbia.

207 The specific objectives are to: “maintain natural and aesthetic conditions within the cultural sites that are conducive to spiritual inspiration; maintain resources that provide for the continuation of Squamish cultural
management objectives, the SFN-BC LUP Agreement provides that “[c]ommercial logging will not be permitted in the cultural sites, save and except for the harvest of existing planned blocks and for forest health.”\textsuperscript{208} Furthermore, for both the Cultural and Village Sites, “no new Crown land tenures will be allocated.”\textsuperscript{209} If \textit{Land Act}\textsuperscript{210} “dispositions arise in areas adjacent to cultural sites, the Province and the applicants will consult with Squamish Nation to discuss and assess potential impacts of the application on the cultural sites in order to avoid any negative impacts.”\textsuperscript{211} Existing \textit{Land Act} tenures are grand-parented in, but must “mitigate impact to the cultural sites.”\textsuperscript{212} Restrictions are also placed on road construction and subsurface resource exploration in the Cultural and Village Sites. The protections for Cultural and Village Sites are implemented statutorily by virtue of sections 16 and 17 of the \textit{Land Act}, which enable the Minister to withdraw Crown land from disposition.

\footnotesize{activities and traditional renewable resource harvesting activities, including: gathering traditional Squamish foods; gathering planes used for medicinal and ceremonial purposes; hunting, trapping, and fishing; cutting selected trees for ceremonial or artistic purposes; conducting, teaching or demonstrating ceremonies of traditional, spiritual or religious significance; seeking cultural or spiritual inspiration; and, construction and use of shelters (such as camps and longhouses) essential to the pursuit of the above activities; and enable other compatible uses, as appropriate to the social, cultural and ceremonial values of the sites,” see SFN-BC LUP Agreement, \textit{supra} note 160 at 15-16.}

\textsuperscript{208} \textit{Ibid.}

\textsuperscript{209} \textit{Ibid.}

\textsuperscript{210} \textit{Land Act}, RSBC 1996, c 245.

\textsuperscript{211} SFN-BC LUP Agreement, \textit{supra} note 160.

\textsuperscript{212} \textit{Ibid} at 15-16.
3.7.5 Impacts of SFN-BC LUP Agreement

When I asked Bruce what the major accomplishments of the SFN-BC LUP Agreement were, he explained:

We were able to get a majority of what was in our Xay Temíxw under this agreement, so protected contractually, and then later under legislation. We were also able to add a bunch of new areas. We had a phase two process that spurred off of the original Xay Temíxw, and we were able to get those areas included in the Land Use Planning Agreement. We are still adding to the land use plan and the provincial database of protected areas.\(^{213}\)

Through the SFN-BC LUP Agreement, the province recognized numerous sites of cultural importance to the Squamish Nation and agreed to meet Squamish Nations’ interests in the collective management of those areas. This limited the Crown’s capacity to grant land tenures and it designated significant portions of Squamish Nation’s Wild Spirit Places as Conservancies, which led to statutory protection under the \textit{PABCA}. Other areas of the Wild Spirit Places are protected through the \textit{Environmental and Land Use Act}.

By way of land use protections, the SFN-BC LUP Agreement has enhanced the capacity of Squamish Nation to make decisions in its territory. The Agreement alerts proponents to Squamish Nation’s authority and impacts how consultation and accommodation between Squamish Nation and the Crown, and proponents are carried out. Councillor Lewis explained that the SFN-BC LUP Agreement has strengthened recognition of Squamish Nation jurisdiction during the consultation referrals process with industry and the province because many proponents now recognize the resource development vision and objectives of Squamish Nation and seek to build positive working relationships rather than adopt adversarial positions with the

\(^{213}\) Interview of Aaron Bruce, \textit{supra} note 112.
Councillor Lewis explained that it is common for proponents to recognize Squamish Nation authority through the SFN-BC LUP Agreement and to begin the consultation process early by exploring mitigation options rather than requiring Squamish Nation to provide a strong argument to prove its jurisdictional rights. Indeed, as will be discussed in the following chapters, this was the case with the Woodfibre LNG Projects where the proponents worked with Squamish Nation to design their projects to meet Squamish Nation interests.

When I asked Chief Campbell if having the SFN-BC LUP Agreement in place demonstrates Squamish governance to the wider community, he explained:

It definitely signals immediately to business and to government that the Squamish Nation has conducted a process to remove ambiguity on where we see appropriate development taking place within the territory. We then need to engage and drill deeper into actual negotiation. This was the first signal that the proponent [Woodfibre] looked to, to help their analysis - to gauge their approach to the Nation.

Chief Campbell explained why Xay Temíxw and the SFN-BC LUP Agreement helped to frame negotiations between Squamish Nation and the proponents in the Woodfibre LNG Projects:

The land use plan was instrumental in Woodfibre, because the proponent, taking an initial analysis of the territory, could see potential resistance, or create a path for their project. They particularly looked at the southern part of the map where it comes across from Coquitlam into the Indian River drainage. If you come up the Indian River drainage on the right, from Tsleil-Waututh, you will see Kiyí7ch. That was right in the path of the Fortis pipeline and that holds significant cultural and historic values for the Squamish. So when the proponent was looking at the map, they had to contemplate, “can we resolve or mitigate impacts to that particular Cultural area?”

We continue up the line and you basically see up behind the Chief here and the Mamquam, there is another area that is important for spiritual bathing and proximity to the villages. It’s a nice easy one to get to. So these created a bit of a problem [for the proponent FortisBC]. As well, we have a co-management agreement with BC in the

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214 Interview of Squamish Nation Councillor and Spokesperson, Chris Lewis/Syeta’xtn, (Councillor Lewis) (25 September 2019) [Interview of Councillor Lewis].

215 Interview of Chief Campbell, supra note 111.
Skwelwil’em Squamish Estuary which was acquired in the BC Rail Agreement. We wanted to mitigate any impacts to the estuary. Going over to Swiýát, which is an old former village site, there is significant archeology and history there as well.

So it wasn’t a clear path for Fortis to expand its pipeline. Although there is an existing pipeline and right of way, the Nation was never consulted or compensated for that. No consent was garnered to put in the previous infrastructure. So our land use plan was important because it demonstrated to the proponents that they need to approach the Nation and resolve some of these issues if they want to see their project come to fruition.216

The SFN-BC LUP Agreement does not provide any grant of land to Squamish Nation. Rather, it creates a web of statutory protections over areas of Squamish Territory, preventing development from occurring in certain areas and/or recognizing an enhanced need for industry and government to consult and accommodate Squamish Nation when development is proposed in certain ways. As Chief Campbell explains, the various protections afforded under the SFN-BC LUP Agreement make it difficult for a proponent to propose a project without seeking various approvals from Squamish Nation. In this way, the Agreement has served as a powerful tool to enhance Squamish Nation jurisdiction.

3.8 Conclusion

The SFN-BC LUP Agreement is one means of implementing Xay Temíxw, the document through which the Squamish Nation community communicates its vision, values, and land use laws concerning Squamish forests and wilderness areas. Squamish Nation has used Xay Temíxw as its directive to pursue various implementation strategies with BC and industry proponents. In other words, Squamish Nation has refused to relinquish any claims of jurisdiction over Squamish

216 Ibid.
Territory, as would be required under the BCTP, and instead is strengthening its jurisdiction through a web of plans, agreements, purchases and statutory protections.

_Xay Temíxw and the SFN-BC LUP Agreement have fostered Squamish Nation’s ability to build relationships and negotiate with industry on its own terms. Chapter 5 and 6 examine how this occurred in the context of proposals made by Woodfibre LNG and FortisBC to construct an LNG facility and expand a pipeline in the Howe Sound area. Squamish Nation again decided to step away from a government-created process and build its own process to better attain its goals. The Squamish Nation’s environmental assessment of the Woodfibre LNG Project was a response to the SCC’s narrow interpretation of the meaning of the duty to consult and the failure of the BC governments to adequately account for the role of Indigenous decision-making within its administrative processes. Dissatisfaction with the way in which the Crown seeks to discharge the duty to consult through the processes and procedural frameworks established under EA law has led several BC Nations to put forth their own visions and models. Before moving to a deep analysis of the Squamish Process in Chapters 5 and 6, the next chapter reviews the judicial interpretation of the duty to consult. It also describes two recent Indigenous-led EA processes in BC to reveal how Indigenous nations are building their own processes for achieving Indigenous consent. Chapter 4 sets a context to better understand Squamish Nation’s motivations for developing the Squamish Process.
Chapter 4: The Duty to Consult, Indigenous Consent, and Achieving Reconciliation through Indigenous Legal Processes

4.1 Introduction

In the seminal *Haida*\(^1\) case the SCC ruled that there is a constitutional obligation on the Crown to consult with Indigenous nations when their Aboriginal or treaty rights could be adversely affected by Crown-authorized activities. The decision appeared to have the potential to encourage more honourable negotiations between Indigenous nations and the Crown; however, numerous issues have arisen which have limited the doctrine’s reconciliatory potential. Since *Haida*, and its companion decision *Taku*\(^2\), questions have surfaced concerning how the duty to consult is integrated into administrative law frameworks and how the principle of FPIC fits with the duty to consult. Ambiguity surrounding these questions has led to much conflict in the environmental assessment arena.\(^3\) It has led many Indigenous nations to seek judicial reviews of resource development projects and has placed Canadian environmental assessment law in a state

\(^{1}\) *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*].

\(^{2}\) *Taku River Tlinget First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 [*Taku*].

\(^{3}\) In BC, while there has been an increase in shared decision-making between the province and Indigenous nations, these have not resolved the issues because, as Griggs explains, “applications for an environmental assessment certificate under the Environmental Assessment Act are explicitly excluded from SDM Agreements.” Griggs notes that the exclusion of EA from SDM Agreements has caused many First Nations to express “frustration and concern that the issuance of an EA certificate – a decision that they suggest may have some of the greatest potential impacts on aboriginal rights and title – is not considered under the umbrella of the same government-to-government relationships that both BC and First Nations have worked so hard to establish.” See Julian Griggs, “Discussion Paper: Understanding the Sharing of Decision-making in BC” (2014) SFU Centre for Dialogue at 10.
of turmoil, sparking protests and blockades across the country and generating a climate of
political unrest, particularly in regard to mining and oil and gas development.

I begin this chapter by describing the rationale put forth by the Canadian courts and
scholars concerning integration of the duty to consult within Canadian administrative law
processes. Second, I explain three central problems with this integration: 1) the ability of the
Crown to delegate the duty to consult to administrative tribunals; 2) the ability of the Crown to
utilize existing decision-making processes, such as EA, to discharge the duty; and 3) the
narrowing of the duty to consult to a primarily procedural obligation. Third, I examine the
relationship between the duty to consult, FPIC, and meaningful dialogue between the Crown and
Indigenous peoples. To elucidate this relationship, I rely on the *Gitxaala* and *Tsleil-Waututh* decisions,
which articulate a robust approach to the duty to consult. What I demonstrate through
an analysis of these cases is that even the robust approach to the duty to consult laid out by the
judiciary does not fully embrace the principles of FPIC. Fourth, once I have set out the
limitations of the judicial interpretation of the duty, I address the specific ways that Crown EA is
problematic for Indigenous nations. I explain how Crown EA has failed Indigenous communities
on procedural, relational, and philosophical levels. I then show how paying careful attention to
how Indigenous nations themselves are developing legal processes for EA and FPIC
implementation may clarify how to reform Canadian EA practice and allow for the revitalization
of Indigenous legal orders. I conclude by setting out two examples of Indigenous-led EAs in BC,
the Tsleil-Waututh Nation (Tsleil-Waututh) assessment of the Trans Mountain Pipeline and

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4 *Gitxaala Nation v Canada*, 2016 FCA 187 [*Gitxaala*].
5 *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*].
Tanker Expansion Proposal (TMEX), and the Stk’emlúpsemc te Secwepemc Nation (SSN) Assessment of the Ajax-Abacus Mine Project. These two examples provide context for the detailed discussion of the Squamish-led EA process for the Woodfibre LNG Projects which follows in Chapter 5 and 6.

4.2 **Rationale for Integrating the Duty to Consult with Administrative Law Processes**

Administrative law scholars suggest that it is both practical and efficient to integrate the duty to consult within administrative law, particularly EA decision-making frameworks. They recognize both EA and the duty to consult as processes that inform and constrain Crown decision-making and see the procedural safeguards inherent in administrative contexts as setting an appropriate model to carry out Indigenous consultation. This is reflected in *Haida* where McLachlin C.J. says: “In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.”9 Binnie J. reiterated this point in *Little Salmon*, stating: “There is no need to invent a new constitutional remedy. Administrative law is

9 *Haida, supra* note 1 at para 41.
flexible enough to give full weight to the constitutional interests of the First Nation.” 10 Kirk Lambrecht argues that integration of the processes of EA, regulatory review and the duty to consult, all of which impact one another, “allows for more fully informed decision-making,” which is more effective, efficient, and less costly. 11 Neil Craik agrees stating that “much of the information and analysis of the environmental effects of a proposed activity will be required to assess the impacts of that same activity on Aboriginal right and interests.” 12 Matthew Hodgson notes that “efficiency and the reduction of duplicative regulatory processes provide a good rationale for integration.” 13

Lambrecht and Hodgson emphasize that contextual analysis drives both the duty to consult and EA “to ensure fair procedure and the exercise of reasonable discretion when such discretion affects the rights of those impacted by Crown actions.” 14 In their view, integration fosters the administrative decision-maker’s ability to consider each case based on its unique facts and the level of consultation required. Lambrecht states that contextual analysis “allows the law to be sufficiently flexible to fit the circumstances of each particular case.” 15 In a similar vein, Jocelyn Stacey observes that “information collected through the EA informs the Crown’s determination of the scope of the duty, forms the basis for discussions with Aboriginal groups during consultation and suggests possibilities for accommodation (usually in the form of

10 Beckman v Little Salmon/Carmacks First Nation, 2010 SCC 53 at para 47 [Little Salmon].
11 Lambrecht, supra note 8 at 3.
12 Craik, supra note 8 at 633.
13 Hodgson, supra note 8 at 146.
14 Ibid at 135.
15 Lambrecht, supra note 8 at 113.
mitigation measures).”\textsuperscript{16} Furthermore, she contends that “the sharing of Indigenous knowledge and expertise through consultation should inform the Crown’s understanding of the environmental and social impacts of the proposed project and the application of the legal tests required under EA legislation.”\textsuperscript{17} Indeed, it would be difficult to conceive of EA being carried out without consideration for Aboriginal interests.

Scholars who endorse integration of the duty to consult with EA acknowledge, however, that the current integration of processes is not achieving the reconciliatory objective that underpins the duty to consult. The way in which the duty to consult has been operationalized in EA has become highly contentious, in part because judicial interpretations concerning how integration can be carried out have limited its reconciliatory potential. Indeed, while there are good reasons for integration, Stacey points out that “the apparent complementarity between EA and the duty to consult often breaks down in practice.”\textsuperscript{18} Craik argues that to reach its reconciliatory goals, certain elements should be incorporated into EA to enable more opportunities for the Crown and Indigenous groups to “deliberate over a shared development vision” rather than seeing Aboriginal interests as something to be balanced against the public interest.\textsuperscript{19} He suggests incorporating elements such as: sustainability assessments, consideration of project alternatives, cumulative impact assessments, and Indigenous participation in strategic


\textsuperscript{17} \textit{Ibid}.

\textsuperscript{18} Stacey, \textit{supra} note 16 at 891.

\textsuperscript{19} Craik, \textit{supra} note 8 at 678 – 679.
EA (at the early planning stage) to enable the inclusion of Indigenous laws and values at the outset.\textsuperscript{20}

4.3 Judicial Interpretation of the Duty to Consult within EA Frameworks

Jurisprudence addressing the integration of the duty to consult with EA has evolved in a manner that limits the reconciliatory potential of the Crown’s consultation duty. In other words, it is not setting a strong foundation for the building of strong, nation-to-nation relationships between Canadian governments and Indigenous peoples. The problems center on three key elements: 1) the ability of the Crown to delegate the duty to consult to administrative tribunals; 2) the ability of the Crown to utilize existing decision-making processes to discharge the duty to consult; and 3) the narrowing of the duty to consult to a primarily procedural right. These three problems are discussed in the sections below.

4.3.1 Delegation of the Duty to Consult to Administrative Tribunals

In \textit{Haida} and \textit{Taku}, the SCC established that the Crown may delegate its duty to consult to administrative tribunals ruling that governments could “set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages.”\textsuperscript{21} Since then, the Court has continued to emphasize the role administrative tribunals play in carrying out the Crown’s consultation duty. In \textit{Carrier Sekani}\textsuperscript{22} it ruled:

\begin{quote}
\end{quote}

\textsuperscript{20} Hodgson, \textit{supra} note 8 at 146 (quoting Craik, \textit{supra} note 8).

\textsuperscript{21} \textit{Haida}, \textit{supra} note 1 at para 51.

\textsuperscript{22} \textit{Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council}, 2010 SCC 43 [\textit{Carrier Sekani}].
The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation . . .

The legislature may choose to delegate to a tribunal the Crown’s duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.

Alternatively, the legislature may choose to confine a tribunal’s power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.\(^\text{23}\)

Indigenous nations have continued to argue that a fulsome interpretation of the duty to consult means the Crown cannot completely delegate the duty to administrative tribunals, and that there must be some Crown engagement with the Indigenous nation in the consultation process. In the *Clyde*\(^\text{24}\) case, the Clyde River Inuit argued that “a regulatory process alone cannot fulfill the duty to consult because at least some direct engagement between ‘the Crown’ and the affected Indigenous community is necessary.”\(^\text{25}\) They argued that “the NEB is not the Crown or its agent” and that if the NEB process alone was able to discharge the duty to consult, the NEB would be put in the “conflicted position of wearing two hats.”\(^\text{26}\) In other words, it would be acting as both

\[^{23}\text{Ibid at para 55.}\]
\[^{24}\text{Clyde River (Hamlet) v. Petroleum Geo-Services Inc., 2017 SCC 40 [Clyde]. In this case the proponents applied to the NEB to conduct offshore seismic testing for oil and gas in Nunavut in an area where the Clyde River Inuit held treaty rights.}\]
\[^{25}\text{Ibid at para 21.}\]
“Crown agent responsible for discharging the Crown’s duty to consult and that of the tribunal responsible for evaluating whether the Crown agent (ie., the NEB itself) has discharged the duty to consult.”

Reiterating its position in *Haida, Taku* and *Carrier Sekani*, the SCC in *Clyde* found that whether the regulatory body’s process is sufficient to meet the duty to consult depends on whether that body has sufficient statutory powers to discharge the obligation. In other words, it is possible for the Crown to completely delegate the duty to consult, if the statute permits. Further, the Crown holds the ultimate responsibility for ensuring consultation is adequate, but it can rely on a regulatory process to fulfill this duty if this is made clear to Indigenous nations. When a regulatory process falls short of meeting the duty to consult, the Crown must supplement the regulatory process to ensure the constitutional obligation is fulfilled. The Court in *Clyde* ruled that the NEB had the requisite power to both implement consultation and determine whether the Crown’s duty to consult had been fulfilled, but the NEB’s process did not adequately assess the impacts of the project on the Clyde River Inuit’s treaty rights. The Court reasoned that it was not made clear to the Inuit that the NEB would be fulfilling the Crown’s duty to consult, and given the deep level of consultation required in this case, procedural safeguards were lacking due to limited opportunity for participation, no oral hearings, and no participant funding. The Court has continued to rule that the Crown may delegate its duty to administrative tribunals as long as the statutory authority allows, clear notice is given to the Indigenous group, and procedural

27 *Ibid* at 24-25.
28 *Clyde*, supra note 24 at para 5.
29 *Ibid*. 
safeguards are built into the processes.

4.3.2 Use of Existing Administrative Law Frameworks

Reliance on existing administrative processes is another key issue for Indigenous nations who argue that processes established for “other” purposes, often technical in nature, are not well equipped to discharge the duty to consult, which involves assessing impacts to constitutionally protected Aboriginal rights. In Taku the Court found that the existing regulatory framework could be relied on so long as its statutory mandate provided for consultation. The Court stated: “[t]he Province was not required to develop special consultation measures to address the TRTFN [Taku River Tlingit First Nation] concerns, outside of the process provided for by the Environmental Assessment Act, which specifically set out a scheme that required consultation with affected Aboriginal peoples.”30 While the TRTFN objected to the building of a mining road through their territory, and claimed their concerns had not been adequately considered under the EA process, the SCC ruled that the process carried out under EA was sufficient. It reviewed the specific elements of the EA scheme, found those elements satisfied the duty, and ruled that the BC government was not required to reach an agreement with the TRTFN:

In this case, the process engaged in by the Province under the Environmental Assessment Act fulfilled the requirements of its duty to consult and accommodate. The TRTFN was part of the Project Committee, participating fully in the environmental review process. Its views were put before the decision makers, and the final project approval contained measures designed to address both its immediate and its long-term concerns. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN. Finally, it is expected that, throughout the permitting, approval and licensing process, as well as in the development

30 Taku, supra note 2 at para 40. It should be noted here that in this case the legislation provided for robust participation by all parties.
of a land use strategy, the Crown will continue to fulfil its honourable duty to consult and, if appropriate, accommodate the TRTFN.\textsuperscript{31}

The Court further stated:

The Act permitted the Committee to set its own procedure, which in this case involved the formation of working groups and subcommittees, the commissioning of studies, and the preparation of a written recommendations report. The TRTFN was at the heart of decisions to set up a steering group to deal with Aboriginal issues and a subcommittee on the road access proposal. The information and analysis required of Redfern were clearly shaped by TRTFN’s concerns.\textsuperscript{32}

In \textit{Little Salmon}, the Court reiterated that existing administrative frameworks created for other purposes could be sufficient arenas to carry out the duty to consult. The Court found that despite the Yukon government’s claim that there was no consultation duty outside of what was set out in the treaty:

Nevertheless, consultation \textit{was} made available and \textit{did} take place through the LARC [Land Application Review Committee] process under the 1991 Agriculture Policy, and the ultimate question is whether what happened in this case (even though it was mischaracterized by the territorial government as a courtesy rather than as the fulfilment of a legal obligation) was sufficient. In \textit{Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)}, 2004 SCC 74, [2004] 3 S.C.R. 550, the Court held that participation in a forum created for other purposes may nevertheless satisfy the duty to consult if \textit{in substance} an appropriate level of consultation is provided.\textsuperscript{33}

Support for the use of existing procedural frameworks was also evident in the \textit{Chippewas}\textsuperscript{34} decision which dealt with an NEB application by Enbridge Pipelines Inc. for a modification to a pipeline. The Court found that the process carried out by the NEB fully met the Crown’s duty to consult. Although the First Nations involved, like the Clyde River Inuit, had

\begin{footnotes}
\item[31] \textit{Ibid.}
\item[32] \textit{Ibid} at 41.
\item[33] \textit{Little Salmon}, supra note 10 at para 39.
\item[34] \textit{Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.}, 2017 SCC 41 [\textit{Chippewas}].
\end{footnotes}
requested direct Crown consultation, the Court was satisfied that the NEB process sufficed. The Court based its findings on the following grounds: the NEB had issued the appropriate notice to all Indigenous nations, including the Chippewas of the Thames First Nation (Chippewas), the Chippewas had been granted funding to participate in the process, and the Chippewas had filed evidence and delivered oral argument delineating their concerns. Furthermore, the Court found that the project’s potential impacts on the rights and interests of the First Nations would likely be minimal and would be appropriately mitigated.\textsuperscript{35}

Through Clyde and Chippewas the SCC established that the Crown can delegate the duty to consult to the NEB and rely on existing NEB processes to discharge the duty to consult. If there is timely notice, sufficient collection and weighing of information, and opportunities for Indigenous nations to participate, the duty to consult will be discharged, even though the forum or process for consultation is not acceptable to the Indigenous nation. The decisions make no mention of the need to collaborate on the type of process, laws, or the arena in which the duty to consult is engaged. Indeed, the Court is content to endorse an approach that involves unilateral design of the process by the Crown. It rules that the Crown can put a meaningful and good faith process in place so long as the Crown “makes it clear” to the affected Indigenous nations that the regulatory body will be fulfilling the duty in whole or in part.\textsuperscript{36} While this may be viewed as an attempt to bringing appropriate notice or clarity to the process, it clearly does not consider what model the Indigenous nations would prefer. This does not bode well for reconciliation, nor does

\textsuperscript{35} Ibid at para 51.

\textsuperscript{36} Clyde, supra note 24 at para 23 (emphasis added).
it sit well with Canada’s commitments to support the implementation of the UNDRIP, which acknowledges:

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.\(^{37}\)

And:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.\(^{38}\)

As Coyle points out, the “Court seems to take for granted that a process unilaterally designed by the state to address general regulatory disputes can provide an adequate forum for managing inter-societal conflicts with Indigenous peoples over the use of their traditional lands.”\(^{39}\)

Furthermore, the “failure of the Court to recognize the relevance of Indigenous process norms during consultations, a failure paralleled by the policies of the federal and most provincial governments, implicitly privileges state norms and undermines the capacity of the consultation process to bridge normative differences.”\(^{40}\) Despite these flaws, judicial consensus has emerged


\(^{38}\) Ibid at Article 27.

\(^{39}\) Michael Coyle, “Shifting the Focus, Viewing Indigenous Consent Not as a Snapshot But As a Feature Film” (2020) 27 Int’l J on Minority and Group Rights 357 at 367.

\(^{40}\) Ibid.
which finds statutory processes designed to satisfy other regulatory requirements, such as EA, can satisfy the duty to consult, so long as the consultation itself is appropriate.\footnote{\textit{Janna Promislow, “Irreconcilable? The Duty to Consult and Administrative Decision Makers” (2013) 26 CJALP 251; Craik, \textit{supra} note 8.}}

It should also be noted that in \textit{Clyde} and \textit{Chippewas} the Indigenous nations raised concerns that the NEB’s mandate to make its decisions in the “public interest” conflicted with its ability to carry out the duty to consult.\footnote{For more discussion see Robert Freedman & Sarah Hansen, “Aboriginal Rights vs. The Public Interest” Pacific Business & Law Institute Conference held Feb. 26-27, 2009.} They argued that the NEB has been established for accomplishing different objectives, rendering it ill-equipped to carry out the duty to consult. The Chippewas argued that the “putative consultation” that occurred in its case was inadequate because the NEB “focused on balancing multiple interests” which resulted in the Chippewas “Aboriginal and treaty rights being weighed by the Board against a number of economic and public interest factors.”\footnote{\textit{Chippewas, supra} note 34 at para 59.} It argued that this is an inadequate way of assessing Aboriginal and treaty rights that are constitutionally protected.\footnote{\textit{Ibid.}} The Court disagreed, reiterating its position from \textit{Carrier Sekani} that the duty to consult gives rise to a special public interest which supersedes other public interest concerns but that balancing of interests is appropriate:

\textit{[T]his does not mean that the interests of Indigenous groups cannot be balanced with other interests at the accommodation stage. Indeed, it is for this reason that the duty to consult does not provide Indigenous groups with a ‘veto’ over the final Crown decisions.}\footnote{\textit{Ibid.}}
This “balancing of interests” approach which occurs in most regulatory contexts is another reason why Indigenous nations’ argue that integrating the duty to consult within in existing administrative processes is problematic. They assert that tribunal processes cannot adequately consider Aboriginal and treaty rights because Indigenous peoples’ unique interests are aligned alongside many others which are not constitutionally protected rights. Indigenous concerns tend to get lost in the macro processes of EA, which have been developed for the purpose of assessing technical aspects of proposed projects and providing third parties with the requisite permission needed to carry out resource development. Administrative frameworks that have been created for “other” purposes have not allowed for a robust appreciation of Indigenous peoples’ constitutional rights.

According to Promislow, relying on existing administrative law frameworks “plays into the tension that commentators have noted in the duty to consult jurisprudence regarding the limited potential of these frameworks to promote a more fundamental restructuring of legal, political, and economic relationships that the reconciliation objectives of s.35 arguably require.” Indeed, given the duty to consult flows from the honour of the Crown entrenched within s. 35 of the Constitution, it follows that the doctrine should facilitate nation-to-nation negotiation between the Crown and Indigenous peoples in a path toward resolving jurisdictional

46 Thomas McIlwraith & Raymond Cormier, “Making Place for Space: Land Use and Occupancy Studies, Counter-Mapping, and the Supreme Court of Canada’s Tsilhqot’in Decision,” (2016) 188 BC Studies 35. Councillor Lewis noted that this has been Squamish Nation’s experience with consultations occurring under EA law in BC.

47 Promislow, supra note 41 at 253-4.
uncertainty in the spirit of reconciliation. If its full potential were to be met, the duty to consult could form the platform for judicially mandated jurisdictional negotiation between Indigenous peoples and Canadian governments with a focus on collaborative decision-making and consent. By ruling that existing administrative processes are sufficient, and that the Crown does not have to establish separate processes, the SCC has narrowed the duty to consult’s transformative potential. If carried out with a broader objective, the processes themselves would be collaboratively negotiated and the laws applied could reflect both Indigenous and Canadian legal orders.

4.3.3 **Duty to Consult as a Right to a Process**

Finally, the SCC has continued to limit the reconciliatory potential of the duty to consult by interpreting it predominantly as a procedural right. In *Haida*, the SCC stated that consultation will not always lead to accommodation, and accommodation may or may not result in an agreement. This position was repeated in *Mikisew Cree* and more recently in *Ktunaxa*:

> The s. 35 obligation to consult and accommodate regarding unproven claims is a right to a process, not to a particular outcome. The question is not whether the Ktunaxa obtained the outcome they sought, but whether the process is consistent with the honour of the Crown. While the hope is always that s. 35 consultation will lead to agreement and reconciliation of Aboriginal and non-Aboriginal interests, *Haida Nation* makes clear that in some situations this may not occur, and that s. 35 does not give unsatisfied claimants a veto over development. Where adequate consultation has occurred, a development may

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49 Craik, *supra* note 8. Craik discusses elements of transformative EA which will be discussed in more detail later.


51 *Ktunaxa Nation v. British Columbia (Forest Lands and Natural Resource Operations)* 2017 SCC 54 [Ktunaxa].
proceed without the consent of an Indigenous group.\textsuperscript{52} The idea that the duty to consult is a right to process, not outcome, significantly limits the potential for robust negotiation between the parties. Indeed, Indigenous nations, including Squamish Nation, argue that their constitutional right to be consulted and accommodated effectively becomes a procedural “box-checking” exercise rather than a dialogical exchange aimed at reconciliation.\textsuperscript{53} Referencing the work of Thomas McIlraith and Raymond Cormier, Erin Hanson explains that consultation practices have tended to adopt an “inventory-oriented” approach to assessing impacts to Aboriginal rights and title which distorts Indigenous jurisdiction.\textsuperscript{54} She states:

Indigenous information gets subsumed as data-points, and the vitality and dynamism of active land use planning for the future becomes flattened. This limiting view of Aboriginal rights in Canadian law simply does not match how Indigenous groups understand and experience their own obligations or rights to territory (McIlwraith and Cormier 2016).\textsuperscript{55}

Indigenous nations often state that they are viewed as stakeholders in EA processes, rather than governing partners with legitimate jurisdictional claims.\textsuperscript{56} The “informational” model upon which existing regulatory frameworks are built means that the Crown is set up as the so-called expert from the outset and the process that follows involves the Crown deciding what

\textsuperscript{52} Ibid at para 83.
\textsuperscript{53} Interview of Councillor Lewis \textit{supra} note 46; Interview of Squamish Nation legal counsel Aaron Bruce/ Kelts’-tkinem (13 May 2019) [Interview of Aaron Bruce].
\textsuperscript{54} Erin Hanson, \textit{Coast Salish Law and Jurisdiction over Natural Resources: A Case Study of Tsleil Waututh First Nation}, (MA Thesis, University of British Columbia, 2008) at 28.
\textsuperscript{55} Ibid.
\textsuperscript{56} Interview of Councillor Lewis, \textit{supra} note 46; Interview of Aaron Bruce, \textit{supra} note 53.
information is relevant to make the “best” final decision. Crown EA processes have not embraced partnership with Indigenous nations in decision-making. Rather, Indigenous nations’ roles have typically been reduced to providing information to proponents who then interpret the information from a corporate lens, and submit it as part of an application package to the Crown. Indigenous nations, such as Squamish Nation, have taken issue with the fact that the process itself does not incorporate their Indigenous interpretation of the data, nor does it provide space for their Indigenous laws and legal processes of deliberation, decision-making, and consent. Indeed, many Indigenous nations take issue with the fact that Canadian EA does not enable co-authorship in the decision-making that affects their Aboriginal rights and title.

In describing the narrowness of judicial interpretation of the duty to consult, Hamilton asserts that “the judicial conception of reconciliation does not require Indigenous consent,” but rather “establishes a framework through which the assertion of Crown sovereignty is reconciled with the fact of Indigenous prior occupancy by placing procedural limitations on the discretionary authority of the Crown.” The consultative framework is narrowly conceived as a right to a “fair process,” with the process being structured by the Crown and governed by Western legal principles of procedural fairness. According to Hamilton, “a project approval

57 Craik, supra note 8.
58 Interview of Aaron Bruce supra note 53. Squamish Nation’s dissatisfaction with the Crown model is discussed in greater detail in Chapter 5.
59 Craik, supra note 8 at 636.
process that allows the Crown to act without Indigenous consent will always be subject to subsequent litigation, the outcome of which will be uncertain.”

In relation to the endless litigation surrounding the Trans Mountain Pipeline Expansion Project, Hamilton surmises that “[o]ne of the ironies of this situation is that it is the court’s own doctrine that has pushed the parties to rely on endless litigation” because “the s.35 framework, including the duty to consult, allows the Crown to proceed unilaterally subject to procedural requirements and a proportionality analysis.” He contends that “the Crown has an incentive in negotiations, then, to accommodate Indigenous concerns only to the extent it believes it is legally bound to. Once the Crown believes its actions satisfy the duty to consult and the proportionality test for infringement, it can proceed regardless of outstanding Indigenous concerns.” In other words, the jurisprudence provides little incentive for the Crown to approach consultation as a creative and collaborative negotiation, which would better enshrine the spirit of reconciliation.

Hamilton and Nichols argue further that the reconciliatory potential of the duty to consult cannot be achieved based on current SCC jurisprudence because the underlying legal presumption of the duty to consult is one of sovereign-to-subject rather than nation-to-nation. They say this will never result in reconciliation for Indigenous peoples because it fails to recognize Indigenous jurisdictional authority. They contend that by operating as though the question of Crown sovereignty is settled, the Court can skip forward to an analysis of administrative law principles.

61 Ibid at 4.
62 Ibid at 5.
63 Ibid.
in making its decisions. The Court can rule that the duty to consult is a right to a process, not an outcome, and find that the Minister’s decision was reasonable, without ever questioning whether the Minister has the authority to make the decision in the first place. This interpretation inhibits the reconciliatory potential of the duty to consult because it fails to recognize the unsettled, competing claims of jurisdiction, and provides the Crown with unilateral authority to determine what the process of consultation will look like. In Hamilton and Nichols’ words:

While the Supreme Court has emphasized that the duty to consult is a right to a process, not a particular outcome, it has always already chosen an outcome on crucial constitutional questions of Crown legitimacy by stacking the deck, thereby undermining judicial legitimacy. In other words, the current section 35 framework, including the duty to consult, undermines the possibility for a nation-to-nation relationship grounded on the negotiation of areas of shared and exclusive jurisdiction. The reason it does this should be clear from the forgoing: by promulgating constitutional interpretations that entrench unilateral Crown authority, the courts have maintained a hierarchical ordering of legal systems and peoples that have reduced Aboriginal claims to contingent, Charter-analogous rights.

What is clear is that the consultation jurisprudence is not evolving in a manner that sets a solid foundation for building true partnership and shared decision-making between the Crown and Indigenous nations at a government-to-government level. Judicial efforts to streamline the process and make it more efficient blunt the reconciliatory objective that underlies consultation doctrine. In Gordon Christie’s words, “[e]fforts by the Court to turn the Crown’s mind to the obligations to preserve Aboriginal interests in the interim through a process of consultation and accommodation have been balanced by a jurisprudence that preserves ultimate Crown power

65 Ibid.
66 Ibid at 751.
over decision-making (that furthers the old aim of assimilation).”67 And, while new federal legislation, namely the Impact Assessment Act 68 and the Canadian Energy Regulator Act 69, has created new administrative bodies 70 to carry out impact assessment inclusive of mechanisms aimed to create more robust deliberation between the Crown and Indigenous peoples, the narrow interpretations of the duty to consult from Clyde and Chippewas will likely remain as precedents when interpreting the roles of these new administrative bodies.

4.4 Uncertainty Surrounding the Duty to Consult and FPIC

Another source of uncertainty and frustration for Indigenous nations is the ambiguous relationship between the duty to consult and the principle of free, prior and informed consent (FPIC), entrenched within the UNDRIP. 71 Canadian consultation jurisprudence has done little to clarify how the duty to consult and FPIC relate to one another. Indeed, since Haida the Court has continued to address the concept of consent by re-iterating that Indigenous nations do not have a veto regarding resource development in their territories. In Haida, the Court stated:

This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal “consent” spoken of in Delgamuukw is appropriate only in cases of established rights, and then by no means in every case.

68 Impact Assessment Act, SC 2019, c 28, s 1 [IAA] came into force in 2019. The federal government has shifted its terminology and is using the term impact assessment rather than environmental assessment.
69 Canadian Energy Regulator Act, SC 2019, c 28, s 1 [CERA].
70 Pursuant to the IAA, the Impact Assessment Agency replaces the Canadian Environmental Assessment Agency. Pursuant to the CERA, the National Energy Regulator replaces the National Energy Board. It is too early to determine what the outcome of these changes will be for Indigenous peoples. It may be these changes are in name only.
71 UNDRIP, supra note 37. The principle of FPIC is found in six articles of the UNDRIP (10,11, 19, 28, 29, and 32).
Rather, what is required is a process of balancing interests, of give and take. The veto language has been a polarizing force in debates regarding the need to obtain Indigenous consent before resource development can proceed. It has complicated the pursuit of robust negotiation and led some to argue that Canadian law is not compatible with FPIC.

As FPIC gains normative significance, and as both federal and provincial legislatures adopt statutes embracing the principles of UNDRIP, concern about how FPIC operates on the ground has increased. Indigenous peoples consistently argue that they have a right to consent to projects that impact their Aboriginal rights and title, and there are varying opinions about what consent entails (which will be discussed later in the dissertation). This has played out in a very public way in two linear pipeline decisions, namely *Gitxaala* and *Tsleil-Waututh*. These decisions reveal that the Federal Court of Appeal (FCA) is moving toward a more robust interpretation of the Crown’s duty to consult, but they do not embrace FPIC principles outright. The cases are notable as they both resulted in the FCA quashing governmental approval for pipeline development on the basis that Crown consultation was not sufficient. Furthermore, the

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72 *Haida*, supra note 1.


74 UNDRIP was adopted by the UN General Assembly in 2007; however, the Harper Conservative government refused to sign on until 2010, and then did so with the qualification that UNDRIP was an aspirational document. The government did not think that FPIC was aligned with Canadian law, particularly the duty to consult. For more discussion on Canada’s approach to the UNDRIP see Yellowhead Institute, Hayden King, ed, “Special Report: the UN Declaration on the Rights of Indigenous Peoples in Canada: Lessons from BC (December 2020) online: <https://yellowheadinstitute.org/bc-undrip/>.

75 Supra note 4.

76 Supra note 5.
FCA made strong statements about what meaningful dialogue entails and how the Crown must carry out its duty to consult. They are thus worth briefly noting.

In *Gitxaala* and *Tsleil-Waututh*, the FCA found that when the NEB acts as advisor to Cabinet (as has been the case for major pipeline projects regulated under section 52 of the *National Board Energy Act*\(^{77}\) (*NEB Act*) or transmission lines regulated under section 58.16 of the *NEB Act*\(^{78}\), the Crown may be required to engage in direct consultation with Indigenous nations prior to issuing a final decision on a project. *Gitxaala* involved judicial review of approval for the Enbridge Northern Gateway Pipeline, a project to build a twin pipeline from Bruderheim, Alberta to Kitimat, BC. The eastbound pipeline would have imported natural gas condensate and the westbound pipeline would have exported diluted bitumen from the Athabasca oil sands to a marine terminal in Kitimat for transportation to Asian markets via oil tankers. The project would impact the Aboriginal rights and title of numerous Indigenous nations whose territories are near, or on, the pipeline and oil tanker routes. As is typical with major resource projects, this project was broken into a framework of consultation phases with the final phase, Phase 4, involving Canada’s direct engagement with the Indigenous nations affected. Phase 4 was the first and only time for Canada to engage in direct dialogue with the Indigenous nations prior to the Cabinet decision. The FCA found in *Gitxaala* that Canada failed to discharge its duty to consult at Phase 4 for a three key reasons: 1) Canada had given no thought to extending the timelines which Indigenous nations had argued were “arbitrarily short” and “insufficient to

\(^{77}\) *National Board Energy Act* RSC, 1985, c N-7 [repealed 2009, c 28, s 44].

provide meaningful consultation;” 79 2) inaccurate information had been given to Cabinet and Canada was not willing to hear Indigenous nations’ concerns or to take steps to correct the misinformation; and 3) Canada did not engage in good faith with the Indigenous nations on an individualized basis, choosing to “take notes” as opposed to engage in meaningful dialogue. 80

The FCA stated:

Based on our view of the totality of the evidence, we are satisfied that Canada failed in Phase IV to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the material concerns raised. Missing was a real and sustained effort to pursue meaningful two-way dialogue. Missing was someone from Canada’s side empowered to do more than take notes, someone able to respond meaningfully at some point. 81

After outlining where Canada went wrong in its consultation efforts, the FCA provided guidance with respect to how government can engage meaningfully with Indigenous nations during consultation:

In order to comply with the law, Canada’s officials needed to be empowered to dialogue on all subjects of genuine interest to affected First Nations, to exchange information freely and candidly, to provide explanations, and to complete their task to the level of reasonable fulfilment. Then recommendations, including any new proposed conditions, needed to be formulated and shared with Northern Gateway for input. And, finally, these recommendations and any necessary information needed to be placed before the Governor in Council for its consideration. In the end, it has not been demonstrated that any of these steps took place.

In our view, this problem likely would have been solved if the Governor in Council granted a short extension of time to allow these steps to be pursued. But in the face of the requests of affected First Nations for more time, there was silence. As best as we can tell from the record, these requests were never conveyed to the Governor in Council, let alone considered.

79 Gitxaala, supra note 4 at 246.
80 Ibid at 279.
81 Ibid.
Based on this record, we believe that an extension of time in the neighbourhood of four months—just a fraction of the time that has passed since the Project was first proposed—might have sufficed. Consultation to a level of reasonable fulfilment might have further reduced some of the detrimental effects of the Project identified by the Joint Review Panel. And it would have furthered the constitutionally-significant goals the Supreme Court has identified behind the duty to consult—the honourable treatment of Canada’s Aboriginal peoples and Canada’s reconciliation with them.\(^82\)

The FCA noted key flaws in the Crown’s approach to consultation including failure to divulge significant information such as the Crown’s strength of claim analysis, lack of evidence that the concerns of Indigenous nations had been considered, and lack of explanations from the Crown for its decisions. Furthermore, as Sharon Mascher indicates, given the Indigenous nations in this case were all from BC, with outstanding Aboriginal title claims, one might have thought the FCA would have focused on the utility of obtaining Indigenous consent prior to development, (consistent with its statements in *Tsilhqot’in*).\(^83\) However, the FCA’s decision did not reference principles of consent, or the justification requirements established by the SCC in *Tsilhqot’in*. In response to this omission, Mascher suggests that “government decision-makers need to pay attention to the *Tsilhqot’in* principles; merely satisfying the duty to consult is not enough.”\(^84\)

While *Gitxaala* was explicit in setting out a process for meaningful dialogue between the Crown and Indigenous nations in the context of pipeline development, the Crown again failed to achieve the standard required in the *Tsleil-Waututh* case. This high-profile case involved the FCA’s review of an application made by Trans Mountain Pipeline ULC (Trans Mountain) to

\(^{82}\) *Ibid* at paras 327-329.
\(^{83}\) Sharon Mascher, “Note to Canada on the Northern Gateway Project: This is NOT What Deep Consultation with Aboriginal People Looks Like” (12 August 2016) ABlawg.ca online: <https://ablawg.ca/2016/08/12/northern-gateway-deep-consultation-with-aboriginal-people/>.
\(^{84}\) *Ibid.*
twin an existing pipeline system with approximately 987 kilometres of new pipeline segments, including new pipeline corridors and rights-of-way for the purpose of transporting diluted bitumen from Edmonton, Alberta to Burnaby, BC (the TMEX Project). The TMEX Project would increase the number of tankers loaded at the Westridge Marine Terminal from approximately five Panamax and Aframax class tankers per month to approximately 34 Aframax class tankers per month. As well, it would increase the overall capacity of Trans Mountain’s existing pipeline system from 300,000 barrels per day to 890,000 barrels per day. Several of the Indigenous nations along the pipeline route actively oppose this project on the grounds that it will adversely impact their Aboriginal rights and title, while others have entered into IBAs with the proponent. The case illustrates the complexities involved in addressing Aboriginal rights and title in linear project development where multiple Indigenous nations are affected.

The NEB conducted the EA and made recommendations to Cabinet to approve the TMEX Project in May 2016. On an application for judicial review by various Indigenous nations, the cities of Vancouver and Burnaby, and various environmental NGOs, the FCA quashed Cabinet approval on the grounds that it failed to consider tanker traffic and because consultation and accommodation with several of the Indigenous nations was inadequate. The

85 Tsleil-Waututh, supra note 5.
86 Ibid.
87 Squamish Nation is one of the nations that opposed the TMEX Project and was an applicant in the judicial review proceedings at the FCA, as well as further appeals.
88 Ibid.
89 The National Energy Board Report recommended that Cabinet approve the expansion, based on the Board’s findings that the expansion is in Canada’s public interest, and that if certain environmental protection procedures and mitigation measures are implemented, and if the conditions the Board recommended are implemented, the expansion is not likely to cause significant adverse environmental effects.
FCA again provided guidance regarding how the Crown can engage in meaningful two-way dialogue in the consultation process.\(^9\) It noted some improvement from *Gitxaala*, but ultimately found that on the whole the record did “not disclose responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by the Indigenous applicants.”\(^1\) It also stated that Canada “must be prepared to make changes to its proposed

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\(^9\) *Tsleil-Waututh, supra* note 5. The FCA stated at paras 756-761:

[M]issing was a genuine and sustained effort to pursue meaningful, two-way dialogue. Very few responses were provided by Canada’s representatives in the consultation meetings. When a response was provided it was brief and did not further two-way dialogue. Too often the response was that the consultation team would put the concerns before the decision-makers for consideration.

Where responses were provided in writing, either in letters or in the Crown Consultation Report or its appendices, the responses were generic. There was no indication that serious consideration was given to whether any of the Board’s findings were unreasonable or wrong. Nor was there any indication that serious consideration was given to amending or supplementing the Board’s recommended conditions.

[M]issing was someone representing Canada who could engage interactively. Someone with the confidence of Cabinet who could discuss, at least in principle, required accommodation measures, possible flaws in the Board’s process, findings and recommendations and how those flaws could be addressed.

The inadequacies of the consultation process also flowed from Canada’s unwillingness to meaningfully discuss and consider possible flaws in the Board’s findings and recommendations and its erroneous view that it could not supplement or impose additional conditions on Trans Mountain.

These three systemic limitations were then exacerbated by Canada’s late disclosure of its assessment that the Project did not have a high level of impact on the exercise of the applicants’ “Aboriginal Interests” and its related failure to provide more time to respond so that all Indigenous groups could contribute detailed comments on the second draft of the Crown Consultation Report.

\(^1\) *Ibid* at 559.
actions based on information and insight obtained through consultation.” 92 The FCA was clear that “the duty to consult must be fulfilled before the Governor in Council gives its approval for the issuance of a certificate by the NEB.” 93 In doing so, it rejected the argument that the duty to consult can take place at later stages of project implementation.

In re-iterating the need for genuine two-way dialogue, Tsleil-Waututh illustrates a more robust interpretation of the duty to consult; however, as with Gitxaala, the FCA did not mention Indigenous consent. This has continued to perpetuate uncertainty surrounding how the duty to consult relates to FPIC. Given both federal and BC provincial governments have endorsed UNDRIP and its principles (and have both recently enacted or tabled bills for implementation), it would be beneficial to have these legal norms considered and reflected in judicial decisions. Furthermore, Tsilhqot’in advises government and industry to obtain Indigenous consent when there are outstanding Aboriginal title claims. Hamilton points out that despite being a “win” for Indigenous nations, Tsleil-Waututh “clearly retains the aspects of the doctrine that allow the Crown to act in the face of Indigenous opposition if certain procedural benchmarks are met, as indicated by the FCA’s concluding remarks that its decision would lead to only a delay in the project,” 94 and not the possibility of halting the project. In other words, the FCA attempted to solve the issues by simply adding more Crown-directed process.

Notably, in its reasons, the FCA referred to environmental assessments reports conducted and submitted by Tsleil-Waututh and Stó:lō Nations. These reports were created independently

92 Ibid at 564.
93 Wright, supra note 78 at 24.
94 Hamilton, supra note 60 at 6.
by the Indigenous nations and are examples of their attempts to bring Indigenous law to light in the NEB process.\textsuperscript{95} In making reference to the Tsleil-Waututh assessment, the FCA explained how Canada failed to adequately address the concerns outlined by Tsleil-Waututh, providing vague responses to its assessment and pushing off its concerns into future discussions, which would be outside the project approval process.\textsuperscript{96} Had Canada paid more attention to the content of the Indigenous assessments, it might not have neglected the issue of tanker traffic (an issue raised by the Tsleil-Waututh Nation assessment and an issue which the FCA later found to be missing from the NEB’s analysis). Furthermore, had Canada engaged more deeply with the Indigenous assessments, it would have demonstrated more of a willingness to integrate Indigenous law into its process setting a stronger foundation for partnership and consideration of the UNDRIP principles that recognize Indigenous peoples’ right to make land and resource

\begin{itemize}
\item The likelihood of oil spills in Burrard Inlet would increase if the Project is implemented, and because spilled oil cannot be cleaned up completely, the consequences in such circumstances would be dire for sensitive sites, habitat and species, and in turn for the Tsleil-Waututh’s subsistence economy, cultural activities and contemporary economy.
\item Any delay in spilled oil cleanup response would decrease significantly the total volume of oil which could be cleaned up, and in turn increase the negative effects and consequences of a spill.
\item The direct effects of marine shipping are likely to add to the effects and consequences of spilled oil, which in turn will further amplify the negative effects of the Project on Tsleil-Waututh’s title, rights and interests.
\item Tsleil-Waututh could not accept the increased risks, effects and consequences of even another small incident like the 2007 spill at the Westridge Marine Terminal or the 2015 MV Marathassa oil spill, let alone a worst-case spill.
\end{itemize}

\textsuperscript{95} Tsleil-Waututh, supra note 5 at 653. The FCA described Tsleil-Waututh’s submission as follows: Tsleil-Waututh had conducted its own assessment of the Project’s impact on Burrard Inlet and on Tsleil-Waututh’s title, rights and interests and traditional knowledge. This assessment, based on the findings of six independent experts and the traditional knowledge of Tsleil-Waututh members, concluded, among other things that:

\textsuperscript{96} Tsleil-Waututh, supra note 5 at 653.
decisions according to their own laws and processes. As Deborah Curran, Eugene Kung, and Ġáğvi Marilyn Slett note, “it is difficult to imagine a clearer application of the FPIC standard than the TWN’s [Tsleil-Waututh Nation’s] work on the Trans Mountain Expansion Project.”

Following the FCA’s quashing of the application, Canada retained retired SCC judge Frank Iacobucci to lead renewed Indigenous consultation in relation to the project. Despite this engagement, some Indigenous nations continued to vocalize opposition and to argue that the Crown had still not discharged its duty to consult and accommodate their Aboriginal interests. The TMEX Project was again approved by Cabinet in June 2019 and some of the Indigenous nations from Tsleil-Waututh once again appealed the decision on the basis that consultation was inadequate in the Coldwater case. In February 2020, the FCA in Coldwater dismissed the Indigenous nations’ appeal. The court reiterated the position of the SCC in earlier consultation cases, finding that despite the fact that an agreement had not been reached between the Crown and Indigenous nations, reconciliation had still been advanced:

97 UNDRIP, supra note 37, see Articles 18 and 19.
100 Coldwater First Nation v Canada (Attorney General), 2020 FCA 34 [Coldwater]. The Indigenous plaintiffs included: Coldwater Indian Band, Squamish Nation, Tsleil-Waututh Nation and Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Squiala First Nation, Tzeachten and Yakweakwoose (Ts’elxwéyeqw).
The fact that consultation has not led the four applicants to agree that the Project should go ahead does not mean that reconciliation has not been advanced. The goal is to reach an overall agreement, but that will not always be possible. The process of consultation based on a relationship of mutual respect advances reconciliation regardless of the outcome. Put another way, reconciliation does not dictate any particular substantive outcome. Were it otherwise, Indigenous peoples would effectively have a veto over projects such as this one. The law is clear that no such veto exists. At some juncture, a decision has to be made about a project and the adequacy of the consultation. Where there is genuine disagreement about whether a project is in the public interest, the law does not require that the interests of Indigenous peoples prevail.

The Coldwater Indian Band, Tsleil-Waututh Nation, and Squamish Nation applied for leave to appeal the FCA decision to the SCC, but in July 2020 the SCC refused the application. The judiciary has thus closed the door on review of these decisions, and though the FCA has ruled that reconciliation has been advanced, these Indigenous nations still oppose the project. The Court’s remarks regarding the need for process over substantive outcome, and the ability of the Crown to establish consultation frameworks that are largely contested by Indigenous nations, does not seem to align with the principles of FPIC. Moreover, it is not clear exactly how these processes “advance reconciliation” for the Indigenous nations that have unresolved Aboriginal title claims to the territory and still oppose the projects.

101 Ibid at paras 52 and 53.
103 Chantelle Bellrichard, “BC First Nations disappointed Supreme Court won’t hear their appeal of Trans Mountain project” CBC (2 July 2020). In this article, Chief Leah George Wilson of Tsleil-Waututh Nation states, “We see this as a major setback for reconciliation.”
4.5 Reforming Environmental Decision-making Processes to Advance Reconciliation

4.5.1 Inadequacies of Crown EA Processes

In considering how FPIC can inform EA to advance reconciliation, it is important to reflect on the specific shortfalls of current and past processes. The inability of state-constructed EA processes to adequately consider Indigenous interests has been well documented.\(^\text{104}\) Calling for EA reform in 2009, the BC First Nations Energy Mining Council (BCFNEMC)\(^\text{105}\) stated:

There is increasing evidence on all fronts, including new legal challenges, that the system of project review and Crown consultation being applied by the BC Environmental Assessment Office is seriously dysfunctional when it comes to ensuring that First Nations interests are effectively provided for in the assessment process, that the honour of the

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105 The BC First Nations Energy and Mining Council (BCFNEMC) is a provincial Indigenous NGO. Its mandate was established by the BC First Nations Leadership Council (comprised of political executives of the BC Assembly of First Nations, the First Nations Summit and the Union of BC Indian Chiefs) and the Chiefs of British Columbia. BCFNEMC supports and facilitates First Nation efforts to manage and develop energy and mineral resources in ways that protect and sustain the environment forever while enhancing the social, cultural, economic, and political well-being of First Nations in British Columbia. BCFNEMC’s work is guided by two Action Plans developed by British Columbia First Nations, online: <https://fnemc.ca/>.
Crown is properly preserved in the consultation process used by the agency and, in the final analysis, that meaningful accommodation to the potentially affected First Nations has been made.  

Annie Booth and Norm Skelton’s research on Indigenous experiences with Canadian EA dating back to 1995 reveals that EA legal frameworks have failed Indigenous communities on procedural, relational and philosophical levels. The procedural failures include: a lack of financial and workforce capacity in Indigenous communities to respond meaningfully to the requests for information made by governments and proponents in EA processes; a lack of knowledge and understanding of EA legislation and processes by community members; and a widely held belief that consultation conducted through EAs is not a meaningful dialogue. Some of the more specific procedural shortfalls of EA legislative frameworks include: late engagement with Indigenous nations (i.e. consultation is not mandated until after project siting and technical design have been determined leaving little room for Indigenous input on those matters); tight timelines which prevent Indigenous nations from responding meaningfully to inquiries about how their interests/rights/title will be affected by proposed development; poor methodologies for obtaining data (i.e. data for assessments is obtained by proponents who choose what to include and how to present the significance of environmental impacts and mitigative measures to the decision-maker); and lack of consideration of cumulative impacts on a spatial and temporal scale that resonates with Indigenous nations (i.e. many Indigenous nations

106 BC First Nations Energy & Mining Council, supra note 104.
107 Booth & Skelton, supra note 104. Booth & Skelton’s research stems from First Nations (and industry) perspectives on 1995 federal EA legislation. These concerns continued with CEAA 2012. New federal and provincial (BC) EA legislation makes improvements; however, decision-making still rests solely with the Minister.
108 Ibid.
are concerned with impacts to their territory as a whole, not just the project area, and typically over a much longer time horizon).\textsuperscript{109}

Booth and Skelton point out that in addition to procedural failures, the historic mistrust between Indigenous nations and government leads to relational failures within EA processes. Many Indigenous nations have serious concerns about the motivations of government officials, and some have felt that government tries to “downplay data that might not lead in the direction they wished in terms of impacts.”\textsuperscript{110} They have also felt that government is unfair in refusing to address certain issues such as climate change or spirituality that are important to many Indigenous nations.\textsuperscript{111} A history of broken promises between Indigenous nations and the Crown often clouds the consultation and negotiation process and leads to an overall dissatisfaction with the EA process for Indigenous peoples.\textsuperscript{112}

Crown EA law has also failed Indigenous communities at a philosophical level due to differences between the worldviews of many Indigenous nations and the Western worldview that informs EA law. Booth and Skelton explain:

All processes such as EA stem from what is categorized as a Western, scientific or techno-rational worldview. As such they have certain attributes at their core. Data are discrete measurable units. Knowledge is ahistorical and is not mediated by such subjective concerns as cultural or spirituality. Things must be broken down into discrete parts to be understood and that disassembly does no harm to understanding. Thus an EA

\textsuperscript{109} Ibid; See also, Aaron Bruce and Emma Hume, “The Squamish Nation Assessment Process: Getting to Consent” (November 2015) [unpublished].

\textsuperscript{10} Booth & Skelton “We are Fighting”, supra note 104 at 383.

\textsuperscript{11} Ibid.

\textsuperscript{111} This sentiment was expressed by Chief Campbell and Tyler Gray; Interview of Squamish Nation Hereditary Chief and Councillor Ian Campbell/Xalek Sekyu Siyam (19 August 2019) [Interview of Chief Campbell]; Interview of Tyler Gray, Senior Environmental Consultant at PGL Environmental Consultants (Gray) (22 August 2019) [Interview of Tyler Gray].
is structured into discrete units: wildlife, plants, economic development, First Nations etc. with only minimal integration across discrete categories.\textsuperscript{113}

While Indigenous worldviews are enormously diverse, there are distinct characteristics that tend to set these worldviews apart from predominant Western worldviews. These include “viewing life holistically, not seeing information as discrete data points but as interconnected, and understanding knowledge as being embedded in a culture, a history and a landscape.”\textsuperscript{114} As such, a central concern for many Indigenous communities facing resource extraction and/or development in their ancestral territories, is the extent to which their worldviews, values and laws are brought to bear on the proposed projects. Indigenous consent is inevitably tied to a community’s ability to receive culturally relevant information such that it can decide and assess the impacts of the project from its own unique perspective, and to have a voice and decision-making power in relation to how the project is designed, implemented, operated, and eventually decommissioned.\textsuperscript{115} O’Faircheallaigh’s studies of Indigenous negotiations with mining companies throughout Australia and the Canadian North suggest that many conflicts could be avoided if projects were designed and managed so as to minimize adverse impacts on local communities and to enable the people most affected by the projects to have a central role in shaping them.\textsuperscript{116} O’Faircheallaigh states:

\textsuperscript{113} Booth & Skelton “We are Fighting”, supra note 104 at 397.
\textsuperscript{114} Ibid.
\textsuperscript{115} Interview of Chief Campbell, supra note 112; Interview of Tyler Gray, supra note 112. See also, Jason MacLean, “Indigenizing Environmental Assessment” in Aimee Craft & Jill Blakley, eds, In Our Backyard- The Legacy of Hydroelectric Development in Northern Manitoba: The Keeyask Experience (Winnipeg: University of Manitoba Press, 2019).
\textsuperscript{116} Ciaran O’Faircheallaigh, “Shaping projects, shaping impacts: community-controlled impact assessments and negotiated agreements” (2017) 38:5 Third World Quarterly 1181.
The exclusion of communities from critical elements of the IA process means that their understandings of impact, of whether impacts can be avoided or mitigated, and what mitigation strategies can be effective, are not taken into account. The result is communities have to deal with projects they have no role in shaping, leading to conflict.\textsuperscript{117}

Different philosophical or epistemological approaches to the relationships between humans, animals, and the environment means that Indigenous peoples may interpret information about the environment in ways that are different from a Western scientific approach. To illustrate this point, I draw on a story told to me by Squamish Nation Hereditary Chief Williams during our interview in the summer of 2019.\textsuperscript{118} Over lunch we discussed what we had been doing over the summer and he mentioned that he had been involved in a film being produced in the Ashlu area of Squamish Territory. He explained how, when he arrived in the area, he heard the calls of a raven. Not too long later, the film crew explained that there had been a grizzly bear spotting nearby and they should all return to their vehicles for safety. Chief Williams explained to the crew that there was no danger; the grizzly had passed by already because Raven travels with Grizzly Bear and warns humans through its call when Grizzly is near. The raven had warned of the grizzly passing 20 minutes prior when he had arrived at the site. This story illuminated for me how different conclusions are drawn based on how one listens to their environment and how they interpret the interrelationships between the species in that environment.

\textsuperscript{117} Ibid.
\textsuperscript{118} Interview of Squamish Nation Hereditary Chief Bill Williams/Találsamkin Siyám (Chief Williams) (21 August 2019) [Interview of Chief Williams].
One can see similarities between the philosophy underlying Chief William’s story and principles of the WSÁNEĆ legal tradition articulated by Robert Clifford. In his article on the WSÁNEĆ legal approach to a fuel spill at SELEKTEL (Goldstream River), Clifford explains how WSÁNEĆ law is informed by “a deep relationship between WSÁNEĆ people, the Earth, and other elements of creation,” and that “the land is vested with much more being and agency within the WSÁNEĆ tradition,” than is typical of Western cultures. Because of this, WSÁNEĆ decision-making is informed by a concept that the land and people “have a series of mutual responsibilities in relation to one another.” Different conclusions are drawn based on how you listen to the environment and interpret that meaning, which translates into a different set of normative principles that guide human behaviour. When your worldview is premised on the privileging of human-centered interaction and human-to-human communication, then certain decisions will be deemed appropriate or permissible regarding the “right” or ability of humans to act in certain ways in or on their environment. If, however, your worldview recognizes more of an egalitarian or holistic relationship between humans, non-human species, and the land/environment, a different set of normative considerations are brought to light when making decisions about how humans can or should act. These examples illustrate why Indigenous communities need to decide for themselves the type of data that is relevant, and the methods and processes in which to interpret that data when conducting assessments of impacts to the environment in their territories.

120 Ibid at 785.
4.5.2 Indigenous Calls for EA Reform

Given the multi-layered failure of Crown EA law from Indigenous perspectives, it is not surprising that the EA arena has become a central site of tension and conflict between Indigenous nations and governments. It is why Indigenous nations were front and center in calling for recent reforms to EA legislation both federally and provincially (in BC). Indeed, when the Trudeau government established the Expert Panel for the Review of Environmental Assessment Processes (the “Panel”) to seek recommendations regarding how to rebuild trust in Canadian EA, the Panel’s terms of reference prioritized the improvement of Indigenous participation and consultation in EA.\(^{121}\) The Panel considered numerous submissions from Indigenous groups across Canada, which outlined Indigenous positions on how to reform Canadian EA law.\(^{122}\) A resounding consensus from Indigenous submissions was that EA needs to be conducted by an independent body, using new assessment methods which consider impacts to Indigenous rights,


and most importantly, governments need to engage with Indigenous peoples at a nation-to-nation level, and enable shared decision-making.\textsuperscript{123}

Indigenous nations have continually expressed desire for legislation that recognizes their shared decision-making power with the Crown,\textsuperscript{124} and/or legislation that creates space for separate Indigenous-led EA processes.\textsuperscript{125} Many Indigenous nations want to decide for themselves the type of data to be used and to rely on their own assessment methods to make a determination of consent (or not), based on their own environmental values, laws and legal processes. The BCFNEMC indicates that lack of decision-making power is the “crux of First Nations’ frustration and lack of trust in the process.”\textsuperscript{126} It has argued that moving forward requires EA legislation that recognizes Indigenous nations’ inherent jurisdiction; enables Indigenous nations to trigger higher level planning and assessment (to address cumulative effects to entire territory) in addition to project assessments; and provides the requisite government funding to enable Indigenous nations to carry this out.\textsuperscript{127} The BCFNEMC further contends that “flexibility to accommodate the laws and needs of individual nations in relation to EA process should be enabled through a requirement for up-front government agreements about the terms of

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item Ibid.
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reference of specific assessments.” From there, the EA may be carried out by the Indigenous nation, a jointly appointed panel, or another type of legal mechanism agreed upon by both government and the Indigenous nation(s) involved.

New EA legislative regimes at the federal and BC level retain Crown authority over decision-making; however, there are possibilities created by the legislative frameworks for Indigenous-led EAs to be carried out and recognized by Crown actors. According to the BCFNEMC, more work needs to be done “to develop an agreement or protocol that establishes a basis for Crown recognition of Indigenous assessments.” The BCFNEMC argues that “working to partner with and enable decision-making by directly affected Indigenous peoples is an important component of reconciliation,” and it points to Article 18 of the UNDRIP which specifies that “Indigenous peoples have the right to participate in decision-making matters which affect them; to develop their own indigenous decision-making institutions; and to do this through representatives chosen by themselves.”

Many Indigenous nations across Canada are resisting government-defined consultation processes and some have begun to adopt their own unilateral protocols and processes setting out

129 Ibid.
130 See Impact Assessment Act, SC 2019, c 28, s 114(1) and Environmental Assessment Act, SBC 2018, c 51, s 41.
131 Ibid at 4.
132 Ibid.
133 Ibid at 5.
their own laws for land use and development in their territories.\footnote{134} Leclair, Papillon, and Forget note that “Indigenous peoples are increasingly developing their own mechanisms to assert their rights and exercise greater control over consultation processes concerning development of their lands.”\footnote{135} Their research shows that while many of these Indigenous protocols are unilateral in nature, their purpose is ultimately “to bridge the gap between the communities’ customary law on the one side and Canadian and international law on consultation and consent on the other.”\footnote{136} Moreover, they argue that these Indigenous-led legal practices are giving consultation and consent concrete meaning where much ambiguity exists.\footnote{137} Similarly, Curran et al. note that “Indigenous-defined governance procedures that embody the place-based responsibility held by specific First Nations and Indigenous organizations such as hereditary leaders, and also model ongoing consent, are emerging.”\footnote{138} This dissertation argues that it important to pay close

\footnote{136}{\textit{Ibid.}}
\footnote{137}{\textit{Ibid.} See also: Martin Papillon, Jean LeClair & Dominique Leydet, “Free Prior and Informed Consent: Between Legal Ambiguity and Political Agency” (2020) 27 Int’l J on Minority and Group Rights” 223.}
\footnote{138}{Curran et al, \textit{supra} note 98 at 222.}
attention to the legal processes Indigenous nations are creating on the ground as these provide important guidance on how FPIC may be implemented through Crown processes.

Chapter 5 examines in detail the Squamish Nation Indigenous-led EA process (the Squamish Process) and Chapter 6 provides a thorough analysis of the impacts of that process. Before moving to this, however, it is worth briefly discussing two other notable Indigenous-led assessments conducted by BC Indigenous nations in recent years, the Tsleil-Waututh Nation assessment of the TMEX Project\(^\text{139}\) (which was submitted in the court proceedings of *Tsleil-Waututh*), and the Stk’emlúpsemc te Secwepemc Nation (SSN) Assessment of the Ajax-Abacus Mine Project.\(^\text{140}\) These examples demonstrate how Indigenous nations are building unique and different processes to address the concerns of their communities. They also illustrate how these communities have chosen to articulate their worldview, values and laws concerning project development in their territories to a wider Canadian audience. Notably, the methods used for assessing impacts to Indigenous lands and resources do not dismiss Western scientific worldviews, but rather develop creative ways to integrate Western technical information with Indigenous legal principles to formulate methods that enable the communities to confront current environmental issues.

\(^{139}\) TWN Assessment, *supra* note 6.

\(^{140}\) SSN Assessment, *supra* note 7.
4.5.3 Tsleil-Waututh Nation Assessment of Trans Mountain Pipeline and Tanker Expansion Project

In 2013, Kinder Morgan filed an application with the NEB for review of the TMEX Project, which as noted above, would significantly increase both the volume of crude oil moving through the pipeline, and the tanker traffic in waters that are central to Tsleil-Waututh territory. Tsleil-Waututh felt it necessary to conduct its own assessment of the TMEX Project as Tsleil-Waututh “has a scared legal obligation to protect, defend, and steward the water, land, air and resources” of its territory in accordance with its law, snəwayət. Tsleil-Waututh assessed the TMEX Project in accordance with the Tsleil-Waututh Stewardship Policy which is a written expression of Tsleil-Waututh inherent jurisdiction and snəwayət. Tsleil-Waututh’s Stewardship Policy embodies the legal principle that Tsleil-Waututh “has a responsibility to maintain or restore conditions that provide the environmental, cultural, spiritual and economic foundation” for the nation and community to thrive.

In terms of scope and process, the Tsleil-Waututh assessment adopted a holistic approach to considering the effects of the TMEX Project. This included assessing “effects not only on the biophysical environment but also on the interconnected cultural, spiritual, legal and governance

141 Canada purchased Trans Mountain from Kinder Morgan in 2018.
143 Ibid.
144 Ibid. For more discussion of Tsleil-Waututh and Coast Salish law see: Erin Hanson, Coast Salish Law and Jurisdiction over Natural Resources: A Case Study of Tsleil Waututh First Nation, (MA Thesis, University of British Columbia, 2008).
rights and responsibilities that are sustained by the environmental integrity and health of our [Tsleil-Waututh] waters and lands.” Its method involved engaging “five experts to provide technical analysis of the TMEX proposal” and then integrating the technical findings with the traditional knowledge of Tsleil-Waututh members. The method is labelled the “two lenses” approach. The first lens “looks at potential negative effects and the second lens assesses whether potential benefits outweigh those effects.”

In her study of Tsleil-Waututh governance, Erin Hanson explains that Tsleil-Waututh Nation makes project decisions based on an integration of “Coast Salish law” and Western technical information. She states that the Tsleil-Waututh’s decision-making structure is broadly based on three tiers:

At its base, Tsleil-Waututh’s decision-making process is founded on and guided by Coast Salish law. At a technical level, assessments are informed by scientific analyses using baseline data—the scientific and technical data Tsleil-Waututh holds spanning across disciplines such as geography, biology, archaeology and anthropology. These two levels – law and technical analysis – inform recommendations to elected leadership at a political and governance level.

In other words, Tsleil-Waututh has built a decision-making process rooted in Coast Salish law that integrates certain Western principles to enable its governing authority (Chief and Council), to make decisions using the best tools and information available to it. In this case, Chief and Council concluded that the risks of the TMEX Project were too great given Tsleil-Waututh’s obligation to protect its land, water, people, life pursuant to snəwayət. The Tsleil-Waututh thus

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145 TWN Assessment Executive Summary supra note 142.
146 TWN Assessment, supra note 6 at 51.
147 Ibid.
148 Hanson, supra note 144 at 29-30.
149 TWN Assessment Executive Summary, supra note 142 at 1.
declined to consent to the project and has been active in seeking to stop it with different strategies including litigation and direct action.\textsuperscript{150} As noted above, it submitted its independent assessment of the TMEX Project to the NEB and subsequent judicial reviews to demonstrate Tsleil-Waututh’s law and the Nation’s lack of consent for the TMEX Project.

\textbf{4.5.4 Stk’emlúpsemc te Secwepemc Nation (SSN) Assessment of Ajax Mine Project}

In 2015, KGHM Ajax Mining Inc. submitted an application to the BC EAO to build the Ajax-Abacus Mine Project (the “Ajax Project”), an open-pit copper and gold mine and enrichment plant.\textsuperscript{151} The Ajax Project site would be located at Pipsell (Jacko Lake and surrounding area), which is a sacred place for the SSN.\textsuperscript{152} SSN and BC had entered mining engagement agreements in the past and in regard to the Ajax Project, the province was willing to engage with the SSN in a governance partnership through the \textit{Ajax Mine Project Government to Government Framework Agreement} [the “Ajax G2G Agreement”].\textsuperscript{153} In the Ajax G2G Agreement, BC acknowledged that SSN would develop its own assessment process for the Ajax

\textsuperscript{150} See Laura Dhillon Kane, “We’ll do what we have to do: Trans Mountain Pipeline opponents to ramp up protests” \textit{CBC} (5 February, 2020) online: \textless https://www.cbc.ca/news/canada/british-columbia/bc-trans-mountain-pipeline-opponents-protests-1.5453606\textgreater. It should be noted that Squamish Nation is also one of the Indigenous nations that challenges the Crown’s contention that it discharged its duty to consult in the TMEX Project. Squamish Nation believed the NEB consultation process was flawed in how it approached Indigenous jurisdiction and obtaining Indigenous consent.

\textsuperscript{151} BC First Nations Energy and Mining Council, \textit{supra} note 128 at 5.

\textsuperscript{152} \textit{Ibid}.

\textsuperscript{153} \textit{Ajax Mine Project Government to Government Framework Agreement Between Stk’emlúpsemc te Secwepemc Nation and Her Majesty the Queen in Right of the Province of British Columbia} (6 September 2016), online: \textless eao-government-to-government-framework-for-ajax-mine.pdf\textgreater [Ajax G2G Agreement].
Project and the SSN designed its own assessment process which it intended to run in parallel with – and where appropriate, collaboratively – with the Crown EA.\textsuperscript{154} The SSN assessment sought to build on the Crown EA by incorporating “the intangible aspects of land use that are not adequately considered in Crown-led processes.”\textsuperscript{155}

The assessment process developed by the SSN was built upon the “Principle of Walking on Two Legs.”\textsuperscript{156} Sunny LeBourdais explains that the SSN view successful EA as requiring “equity between Indigenous and Western ways of knowing, describing and understanding the world,”\textsuperscript{157} which is reflected in the principle of “Walking on Two Legs.”\textsuperscript{158} This principle is derived from ancestral teachings and stories regarding the importance of remaining true to one’s being and the inherent risks involved in imitating others.\textsuperscript{159} LeBourdais explains:

Secwepemc Ancestors have told us the importance of remaining true to our ways of being, and the inherent risk of imitating others is the stspetékwl (oral tellings) of Coyote (Sk’élép) and his hosts. In this telling, the Ancestors warn of the bad things which may happen when Coyote attempts to copy his hosts, first with Skiat’uzkelesti’mt (Fat-man) Stiauzka’instint (Fish-Oil man) Skala’uztint (Beaver man) and finally with Tsalasti’mt (Kingfisher man). In each instance, Coyote falls into peril upon trying to imitate the other and that his attempt to steal these ways results in direct harm and is the reason Sk’élép to this day has shrunken and withered hands. These are the lessons from the Secwepemc Ancestors warning us of copying or imitating others’ ways.\textsuperscript{160}

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\textsuperscript{154} BC First Nations Energy and Mining Council, \textit{supra} note 128 at 5.
\textsuperscript{155} \textit{Ibid}.
\textsuperscript{157} BC First Nations Energy and Mining Council, \textit{supra} note 128 at 5.
\textsuperscript{158} Sunny LeBourdais, \textit{supra} note 156.
\textsuperscript{159} \textit{Ibid}.
\textsuperscript{160} \textit{Ibid} at 1.
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Based on the law reflected in this story, the SSN assert that they cannot simply follow Crown EA processes. They envision Crown and Indigenous processes operating independently, but also respecting the knowledge that each can unearth to create the best assessment possible:

Environmental assessment processes must be built on a principle whereby we do not attempt to imitate or emulate one another but rather respect each of our ways of being, our knowledge, our gifts and our responsibilities which have been bestowed upon us. These processes must respect each jurisdictional body with the rights and responsibilities instructed to us. Due recognition must be given to our Indigenous laws, traditions, customs and land tenure systems in order to obtain our free and informed consent and it is the integration of processes and decision form each of these jurisdictions which must be carefully and purposefully agreed upon before the Environmental Assessment Process.¹⁶¹

The principle of Walking on Two Legs “emphasizes Secwepemc knowledge and worldview while also considering ‘western’ knowledge that is developed through European-derived societies.”¹⁶² Thus the SNN assessment process is grounded in the following sources of both Indigenous and Western law: SSN Trout Children Sptekwle (oral history), the 1910 Memorial to Sir Wilfred Laurier, and Canadian and international laws such as the UNDRIP.¹⁶³

SSN’s objective was to build a process that allowed it to make an informed decision in a manner consistent with SSN laws, traditions, and customs. In terms of creating the decision-making structure, SNN was committed to community engagement and worked with the Nations’ communities to “appoint representatives from each family” who would be responsible for deliberating and making “the best decisions for the long-term well-being of our [SSN] people and land.”¹⁶⁴ The SSN Review Panel tasked with decision-making consisted of: elected Chiefs

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¹⁶¹ Ibid.
¹⁶² BC First Nations Energy and Mining Council, supra note 128 at 6.
¹⁶³ Ibid.
¹⁶⁴ SSN Assessment, supra note 7 at 2.
and Councillors, appointed representatives from 13 families in the communities, elders, and youth representatives (for a total of 42 people). In carrying out the decision-making, the SSN Review Panel held a 5-day hearing where it heard both Western and Indigenous experts’ submissions. The proponents participated in submitting information. The Review Panel also considered information from a Cultural Heritage Study and a Preliminary Mitigation Report on the Ajax Project. After nine months of deliberation, the Review Panel issued the Pipsell Report, which summarized the process and findings. Based on the findings of the Pipsell Report the SSN Joint Council rejected the Ajax Project. Following SSN’s decision, the Project was later rejected by both provincial and federal governments. While neither government stated that the SSN’s assessment and Pipsell Report were the basis for their rejection of the Ajax Project, both governments indicated that consultation with Indigenous peoples and current Indigenous uses of the land were significant factors its decisions not to proceed.

165 BC First Nations Energy and Mining Council, supra note 128 at 6.
166 Ibid.
167 BC Ministers “acknowledged the high importance of the area to the culture of SSN and agreed that the Ajax project would result in significant adverse effects to Indigenous heritage and to the current use of lands and resources for traditional purposes. Notwithstanding the mitigation measures and EA certificate conditions proposed by the EAO, the project would also have adverse impacts on SSN’s asserted Aboriginal rights and title, which in many cases, could not be avoided or minimized,” see British Columbia News, “Ajax open-pit copper and gold mine not granted an environmental assessment certificate,” (14 December 2017) online: <https://news.gov.bc.ca/releases/2017ENV0072-002055>. The Government of Canada stated: “Our Government has consistently said that decisions such as these must factor in both the economy and potential impacts to our environment. Our rigorous and cooperative environmental assessment process determined the environmental effects were simply too great, in particular, to the current use of lands and resources for traditional purposes by Indigenous peoples. This decision was made based on sound science, consultations with Indigenous peoples and engagement with Canadians;” see Government of Canada, News Release, “Government of Canada Announces Decision on Ajax
4.6 Conclusion

At the same time Canadian governments grapple with how to implement FPIC, Indigenous communities are strengthening their legal orders by revitalizing their laws concerning land and resource use in their territories.\(^{168}\) Thus, as Nosek argues, it makes sense for Canadian governments to acknowledge and support Indigenous communities’ use of their own legal orders as they figure out how to implement FPIC.\(^{169}\) In other words, FPIC implementation presents an ideal juncture to foster the revitalization of Indigenous legal orders, and to use information obtained in these contexts to move through some of the persistent uncertainties surrounding meaningful Indigenous consultation and consent.\(^{170}\) Indeed, as Curran et al. note, state processes alone will not achieve the FPIC goals.\(^{171}\)

The SSN and Tsleil-Waututh processes are two examples where Indigenous nations have built their own models of assessment to determine whether, or not, to consent to projects being proposed in their territories. The processes reflect unique integrations of both Indigenous and Western legal principles and provide valuable learning tools for state legislative reform, as SSN has stated:

> The grassroots work that we have undertaken by conducting our own project assessment process is an invaluable resource for the review of the Canadian Environmental


\(^{169}\) Ibid at 157.

\(^{170}\) Ibid.

\(^{171}\) Curran et al, supra note 98 at 234.
Assessment Process. In sharing about our process, it is our belief that much more common ground will be found between ourselves and our guests. 172

This speaks to the point made by Justice Finch that legal professionals have a duty to learn from Indigenous peoples how to make space for the operation of Indigenous legal orders within the Canadian legal framework. 173

The work of rebuilding Indigenous governance capacity through strengthening Indigenous legal orders involves developing practical methods to revitalize legal processes and institutions, so they may be more readily used to address modern-day problems, which are shared by both Indigenous and non-Indigenous communities. 174 Indigenous-led EA processes provide an opportunity to learn how Indigenous nations envision implementing FPIC, and moreover, strengthen Indigenous jurisdiction over the lands and resources of their territories in a contemporary Canadian context. It is to this end that the next chapters describe and analyze the process developed by Squamish Nation to assess the Woodfibre LNG Project proposed in Squamish Territory, and the ways in which the Canadian legal order responded.

172 SSN Assessment, supra note 7; see: “Honouring the Vision of Our Ancestors” at final page


Chapter 5: Squamish Nation’s Assessment of the Woodfibre LNG Projects
(the “Squamish Process”)

5.1 Introduction

Squamish Nation’s desire to build the Squamish Process to assess the Woodfibre LNG Project proposed in Squamish Territory came from its dissatisfaction with the manner in which Squamish Nation’s perspectives, values and laws are considered in Crown EA processes. It was a response to the Canadian judiciary’s narrow interpretation of the duty to consult, and it reflects the growing normative significance of FPIC principles in Canada. Since Xay Temíxw and the SFN-BC LUP Agreement, Squamish Nation has had a stronger role in making decisions regarding land and resource use in Squamish Territory, and given the significance of the LNG Projects to this territory, Squamish Nation expected to be recognized as a more robust decision-making partner than what was provided through Crown EA frameworks. Squamish Nation wished to engage in an assessment of the Woodfibre LNG Projects in partnership with the Crown, through a mutually agreed upon shared-decision-making process. When it became apparent to Squamish Nation that this would not transpire, the Nation decided to build its own assessment. This chapter describes Squamish Nation’s journey building the Squamish Process. It describes the two proposed Projects, explains why Squamish Nation felt compelled to build the Squamish Process, and details how the Squamish Process developed. The chapter provides a descriptive account of the Projects and the Squamish Process in order to move forward with deeper analysis of the outcomes, possibilities and limitations of the Squamish Process in Chapter 6.
5.2 Proposed Projects in Squamish Territory

5.2.1 The Woodfibre LNG Project

In 2013, Woodfibre LNG Limited (Woodfibre LNG), an entity wholly owned by Pacific Oil & Gas Limited (an energy company within the Royal Golden Eagle group of companies located in Singapore), submitted an application to the BC Environmental Assessment Office (EAO) proposing to construct and operate an LNG production, storage, and marine carrier transfer facility on the previous Woodfibre Pulp and Paper Mill site, formerly the site of the Squamish Nation Village of Swiýát. It is located approximately 7 kms from the District of Squamish and is a privately-owned, industrially zoned, brownfield site that includes a deep-water harbor. The history of Woodfibre as an industrial camp began in the early 1900s when a small sawmill was built, and the area became referred to as Mill Creek (Mill Creek empties into Howe Sound at this site). The site changed ownership several times before Woodfibre LNG purchased it from Western Forest Products Inc. on 6 February, 2015, and became the current owner. At no point before this had Squamish Nation been consulted or given its consent to the land’s use.

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3 Woodfibre Summary Assessment Report, supra note 1 at 1.
Woodfibre LNG’s proposal involved construction, operation, and eventual decommissioning of an LNG facility, as well as LNG transport (via shipping) within Howe Sound. The LNG facility would include the following infrastructure:

1) Two LNG processing or production units (trains), where natural gas is converted to liquid comprised of gas treatment and liquefaction facilities;
2) Floating storage and offloading unit (FSO), including mooring and marine terminal for carriers, consisting of two converted LNG carriers with a total capacity of 250,000 cubic meters;
3) A condensate storage tank with a volume of approximately 300 cubic meters;
4) A seawater cooling system;
5) Wastewater treatment facilities; and
6) Flare systems with a flare derrick of approximately 140m.6

The facility would operate for a minimum of 25 years, and produce 2.4 million tonnes of LNG per year.7 It would receive approximately 40 LNG carrier ships per year, with the ships using existing marine shipping lanes within Howe Sound where there is currently a high volume of large marine vessel traffic.8 Sweet natural gas9 would be supplied to the Woodfibre LNG facility from Western Market hubs through the expansion of an existing gas transmission system by

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6 Woodfibre Summary Assessment Report, supra note 1 at 2.
7 Ibid.
8 Ibid.
9 Sweet gas is natural gas that contains very little, or no, hydrogen sulfide. Hydrogen sulfide is “undesirable due to its toxicity in addition to being corrosive to all metals used in the equipment for gas processing, handling, and transportation. The absence of the corrosive H2S makes the sweet gas more environmentally friendly, in addition to lower manufacturing costs of pipelines and associated equipment as well as lower installation and maintenance costs;” Corrosionpedia, “Sweet Gas”, online: <https://www.corrosionpedia.com/definition/1968/sweet-gas-oil-and-gas>. 
FortisBC. BC Hydro would provide the electrical power through an existing BC Hydro transmission grid.

The Woodfibre LNG Project was subject to environmental assessments under both BC’s *Environmental Assessment Act* (BC EAA) and the *Canadian Environmental Assessment Act* 2012, (CEAA 2012). In March 2013, the EAO and the Canadian Environmental Assessment Agency (the “CEA Agency”) entered into a memorandum of understanding, whereby the EAO, in conducting a substituted EA, would consider the factors set out in subsection 19(1) of CEAA 2012 for the environmental effects of the Woodfibre Project, as described in subsections 5(1) and 5(2). The EAO would also carry out the procedural aspects of Aboriginal consultation and provide a report to the CEA Agency. Substitution results in one EA process designed to inform two separate decisions – one by BC and one by Canada. On 27 November 2013, the EAO determined that the proposed project was a reviewable project pursuant to Part 4 of the *Reviewable Projects Regulation* because it included a new energy storage facility with the capability to store an energy resource in a quantity that can yield by combustion greater than


11 Ibid.


14 Woodfibre LNG Updated Project Description Report, *supra* note 10 at 5.

15 On 19 February 2014, the federal Minister of the Environment approved the substitution of the federal environmental assessment process under CEAA 2012 which meant that Canada would rely on the assessment conducted under the BC EAA.

16 *Reviewable Projects Regulation*, BC Reg 370/02.
three petajoules of energy. The Project thus required an EAO Environmental Assessment Certificate (as well as federal approval) in order to proceed.\textsuperscript{17}

On 21 March 2014, the EAO issued an order under Section 11 of the BC EAA (Section 11 Order),\textsuperscript{18} setting out the scope, procedures, and methods for the EA. The Section 11 Order also set out the level of Aboriginal consultation for the potentially affected Indigenous nations. According to the Section 11 Order, Squamish Nation was to be consulted by Woodfibre LNG on all project components, Tsleil-Waututh Nation was to be consulted on all off-site components,\textsuperscript{19} and eight other Indigenous nations were to receive notification of aspects of the project, as well as to be given opportunity to comment at various stages of the process.\textsuperscript{20} Under the Crown EA, consultation with Aboriginal groups is undertaken by both the EAO and the proponents. In terms of the EAO’s role, Indigenous nations on the high end of the consultation spectrum are invited to participate in the advisory working group for the Project (the “Working Group”). The Working Group is comprised of federal, provincial, local government representations, and the potentially affected Indigenous nations. Squamish Nation and Tsleil-Waututh Nation were invited to

\textsuperscript{17} In the Matter of the Environmental Assessment Act SBC 2002, c 43 and An Environmental Assessment of the Proposed Woodfibre LNG, Order Under Section 10(1)(c), (27 November 27 2013).

\textsuperscript{18} In the Matter of the Environmental Assessment Act SBC 2002, c 43 and An Environmental Assessment of the Proposed Woodfibre LNG Project, Order Under Section 11, Schedule B-D, (21 March 2014) [Woodfibre LNG Section 11 Order].

\textsuperscript{19} Squamish Nation and Tsleil-Waututh Nation were able to participate in the Working Group because they fell on the high end of the consultation spectrum, but as will be discussed, SFN refused to participate in the Crown EA process other than by sending an environmental consultant to obtain technical data.

\textsuperscript{20} The following First Nations are listed in Schedule D of the Woodfibre LNG Section 11 Order: Musqueam First Nation, Cowichan Tribes First Nation, Halalt First Nation, Lake Cowichan First Nation, Lyackson First Nation, Penelakut Tribe, Stzuminus First Nation, Metis Nation of British Columbia. This dissertation only addresses the relationship between Woodfibre LNG and Squamish Nation.
participate in the EAO Working Group for the Woodfibre LNG Project, but as will be discussed, Squamish refused to participate other than by sending an environmental consultant to obtain technical information.\textsuperscript{21} Proponents must engage in Aboriginal consultation as outlined in the Section 11 Order and submit an Aboriginal Consultation Report to the EAO. In the \textit{Woodfibre LNG Updated Project Description Report} filed with EAO, Woodfibre LNG explained how it would meet its Aboriginal consultation requirements, including emphasis on building a relationship with Squamish Nation:

\begin{quote}
WLNG acknowledges the Section 35 and treaty rights of Aboriginal groups in Canada and will seek to ensure effective relationship building and engagement throughout the Project lifecycle. A particular emphasis will be placed on development of a multi-faceted relationship with Skwxwú7mesh (Squamish Nation) leadership and members, in whose territory the Project site is located. Squamish Nation has concluded Ḵ̓ay Ṭemixw (Sacred Land) Land Use Plan, which sets forth a vision for the many locations throughout their territory (Squamish Nation 2013). The Squamish Nation has advised that the Project area, known as Swiy’a’t to the Squamish peoples, was a former village site and once served as an access point for hunting and gathering.\textsuperscript{22}
\end{quote}

On 6 November 2014, the EAO issued a Section 13 Order\textsuperscript{23} amending the Section 11 Order procedural requirements for consultation between Woodfibre LNG and Squamish Nation to

\begin{list}{}{}
\item \textsuperscript{21} Tsleil-Waututh did participate in the Working Group. It concluded in the end that the EAO and Woodfibre did not properly assess the Project’s potential to cause adverse impacts to the Tsleil-Waututh title, rights and interests and that BC did not discharge its duty to consult through the Crown process. It was not opposed to the Woodfibre LNG Project but felt that certain conditions must be met to address Tsleiel Waututh concerns, and further consultation was needed to discharge the Crown’s duty to consult. For more information see 18 August 2015 letter from Tsleil-Waututh Nation to Minister of the Environment and BC Minister of Natural Gas Development available on BC EAO EPIC website online: <https://projects.eao.gov.bc.ca>.
\item \textsuperscript{22} Woodfibre LNG Updated Project Description Report, \textit{supra} note 10 at 27.
\item \textsuperscript{23} In the Matter of the Environmental Assessment Act SBC 2002, c 43 and An Environmental Assessment of the Woodfibre LNG Project, Order Under Section 13 Amending Section 11 Order, (6 November 2014).
\end{list}
account for the fact that Woodfibre LNG had entered a separate process with Squamish Nation, (the Squamish Process).

In its final Assessment Report (the “EAO Assessment Report”) prepared for the provincial and federal ministerial decision-makers, the EAO indicated that it “considered the potential environmental, economic, social, heritage and health effects of the proposed Project, including cumulative effects of other past, current or reasonably foreseeable projects or activities.”

In addition, “for the purposes of meeting the CEAA 2012 substitution requirements, EAO considered effects that the proposed project may have on environmental effects described in subsections 5(1) and 5(2) of CEAA 2012, as well as the Species at Risk Act, subsection 79(2).” The EAO conducted its assessment using its standard methodology which measures the significance of impacts of projects to a set of valued components:

The environmental assessment focused on the valued components related to air quality, greenhouse gas management, freshwater fish and fish habitat, marine water quality and benthic habitat, marine fish and mammals, vegetation communities, terrestrial wildlife and marine birds, economics, infrastructure and community services, land and resource use, marine transport, visual quality, community health and well-being, heritage resources, and human health risk assessment.

The EAO Assessment Report indicated that Woodfibre LNG proposed mitigation measures to avoid or minimize the adverse effects of the proposed project to the valued components, and the EAO recommended conditions, including mitigation measures, that the Minister could impose upon Woodfibre LNG should it decide to approve the Project by issuing an Environmental

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24 Woodfibre Summary Assessment Report, supra note 1 at 12.
25 Ibid.
26 Ibid. at 12.
Assessment Certificate (EA Certificate). The EAO concluded that the Project would result in a number of key residual adverse effects to aspects of the environment protected under both the BC EAA and CEAA 2012, but that the Project would not result in significant adverse effects.

On 26 October 2015, the BC Minister of the Environment and the BC Minister of Natural Gas Development, upon review of the EAO Assessment Report, issued an EA Certificate for the Woodfibre LNG Project, permitting it to proceed. Federal approval occurred on 16 May 2016.

5.2.2 The FortisBC Eagle Mountain Pipeline Project

In 2013, FortisBC Energy (Vancouver Island) Inc. (FortisBC) submitted an application to the EAO to construct and operate a natural gas pipeline parallel to an existing transmission pipeline from the area north of the Coquitlam Watershed in Metro Vancouver to the Woodfibre LNG facility. FortisBC sought to utilize an existing pipeline that cuts through various Indigenous nations’ territories, including Squamish Nation (no consultation occurred nor was consent ever given by Squamish Nation when the initial pipeline was put in place). The purpose

27 Ibid.
28 Ibid.
29 In the matter of the Environmental Assessment Act SBC 2002, c. 43 and In the matter of an Application for an Environmental Assessment Certificate by Woodfibre LNG Ltd. for the Woodfibre LNG Project (Project), “Reasons for Ministers’ Decision”, (26 October 2015) [Woodfibre LNG Provincial Approval].
of the Eagle Mountain Pipeline Project would be to provide sweet natural gas to the Woodfibre LNG facility. The proposed pipeline would “generally parallel (i.e. loop) the existing FortisBC pipeline that is part of the natural gas transmission system that services Squamish, the Resort Municipality of Whistler, the Sunshine Coast and Vancouver Island.” ⁴² The Project would increase the overall natural gas transmission capacity of the FortisBC pipeline so that it could provide natural gas to the new Woodfibre LNG facility and continue to provide natural gas to existing and future customers. ⁴³ The Eagle Mountain Pipeline Project would include the following:

1) Construction and operation of an approximately 47 km long, 24-inch diameter sweet natural gas pipeline from an area north of the Coquitlam Watershed in Metro Vancouver to the Woodfibre LNG facility;
2) Construction and operation of 10-inch lateral pipelines from the existing right of way to the Mt. Mulligan compressor station;
3) Abandonment and relocation of a short section of the existing 10-inch pipeline located near the Stawamus River;
4) Installation of electric-drive compression adjacent to the existing compressor station located at Eagle Mountain in Coquitlam, and of a new gas turbine-powered compressor station outside the District of Squamish, near Mt. Mulligan;
5) Development of supporting infrastructure, such as mainline block valves, a supervisory control and data acquisition system, in-line inspection facilities, cathodic protection measures, new electrical substations and transmission lines, new access roads and workspace, and a temporary worker construction camp that may be built west of the Squamish River; and
6) Use of two existing barge landing sites, one at Indian Arm to access portions of the proposed route in the Indian River Valley and the other at Woodfibre near the terminus of the proposed pipeline. ⁴⁴
On 1 August 2013, the EAO determined that the proposed project was a reviewable project pursuant to Part 4 of the *Reviewable Projects Regulation*\(^{35}\), because it included a new transmission pipeline facility with a diameter greater than 323.9 mm and a length greater than 40 km.\(^{36}\) The Project thus required an EAO Environmental Assessment Certificate in order to proceed, and on 5 November 2013, the EAO issued a Section 11 Order, setting out the scope, procedures, and methods for the EA, as well as the level of Aboriginal consultation for the potentially affected Indigenous nations.\(^{37}\) The EAO established a Working Group made up of provincial, federal, local government representatives and potentially affected Indigenous nations, including the Tsleil-Waututh Nation, Squamish Nation, and Kwikwetlem Nation, who were to be consulted on the high end of the consultation spectrum.\(^{38}\) The Musqueam Nation was entitled to be notified and consulted on the low end of the spectrum.\(^{39}\) On 10 November 2014, the EAO issued a Section 13 Order, amending the Section 11 Order procedural requirements for consultation between FortisBC and Squamish Nation to account for the fact that FortisBC had entered into the Squamish Process.\(^{40}\)

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\(^{35}\) *Reviewable Projects Regulation*, BC Reg 370/02.

\(^{36}\) In the Matter of The Environmental Assessment Act SBC 2002, c 43 and An Environmental Assessment of the Proposed Eagle Mountain Woodfibre Gas Pipeline, Order Under Section 10(1)(c), (1 August 2013).

\(^{37}\) In the Matter of The Environmental Assessment Act S.B.C. 2002, c.43 and An Environmental Assessment of the Proposed Eagle Mountain Woodfibre Gas Pipeline, Order Under Section 11, (5 November 2013) [FortisBC Section 11 Order].

\(^{38}\) Ibid.

\(^{39}\) Ibid.

\(^{40}\) In the Matter of The Environmental Assessment Act SBC 2002, c 43 and An Environmental Assessment of the Proposed Eagle Mountain Woodfibre Gas Pipeline, Order Under Section 13 Amending Section 11 Order, (10 November 2014).
In conducting its assessment, the EAO considered the potential adverse effects of the Project on the following environmental value components: acoustic environment, air quality, greenhouse gas emissions, surface water, groundwater, acid rock drainage, fish and fish habitat, soils capability and terrain integrity, wetland function, vegetation, wildlife and wildlife habitat. In addition to these factors, it also considered economic, social, heritage and human health effects. In its Assessment Report the EAO found:

- The EA process has adequately identified and assessed the potential adverse environmental, economic, social, heritage and health effects of the Eagle Mountain Project;
- Consultation with Aboriginal groups, federal, provincial and local government agencies, and the public have been adequately carried out and that efforts to consult with Aboriginal groups will continue on an ongoing basis;
- Issues identified by Aboriginal groups, federal, provincial and local government agencies, and the public, which were within the scope of the EA, were adequately and reasonably addressed during the review of the Application;
- Practical means have been identified to prevent or reduce any potential adverse environmental, social, economic, heritage or health effects of the Eagle Mountain Project such that no direct or indirect significant adverse effect is predicted or expected;
- The potential for adverse effects on the Aboriginal rights and title of Aboriginal groups has been avoided, minimized or otherwise accommodated to an acceptable level; and
- The provincial Crown has fulfilled its obligations for consultation and accommodation to Aboriginal groups relating to the issuance of an EA Certificate for the Eagle Mountain Project.

In light of these findings, the EAO Executive Director recommended that the BC Minister issue an EA Certificate for the Project and the Minister did so on 9 August 2016.

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41 Fortis Assessment Report, supra note 31 at 5.
42 Ibid. at 20.
5.3 Why the Squamish Process?

Squamish Nation was not satisfied with the Crown EA processes for the Woodfibre LNG Projects.\textsuperscript{44} Indeed, when I asked Aaron Bruce what a Crown EA process typically looks like for Squamish Nation, he explained:

The Crown makes a determination on how deep the consultation will be and so a First Nation may just be notified on the low end, right up to being a participant in what they call the Working Group (on the high end) . . . The process is driven by the proponent, so it brings all the information and puts together the package that will be assessed by the Crown. The First Nation’s role is really to add to the proponent’s information package and typically takes the form of a traditional use study and then some comments from the environmental technician that has been retained. From there, the proponent frames what that looks like, so the First Nation doesn't have the opportunity to actually make a real submission in the process. They are just basically providing information . . . and then you sit back and wait for a decision to be made. And, throughout the process, the Crown will ask the First Nation whether they have got enough information, whether they understand the information, and if they have any comments on the information, and that's the extent of the participation.\textsuperscript{45}

Squamish Nation has generally viewed federal and provincial EA processes as failing to fulfill the Crown’s constitutional obligations to it, and most certainly not providing a legal vehicle through which to obtain Squamish consent.\textsuperscript{46} Squamish Nation has always held that it has an inherent right to govern its lands, waters, and resources and has been clear about the need for EA legislation that obtains Indigenous consent through shared, government-to-government decision-

\textsuperscript{44} The Squamish Process dealt with both projects under one assessment process. Herein, I refer to the Woodfibre LNG Project and FortisBC Eagle Mountain Pipeline Project collectively as the Woodfibre LNG Projects or the Projects.

\textsuperscript{45} Interview of Squamish Nation legal counsel Aaron Bruce/ Kelts'-tkinem (May 13, 2019) [Interview of Aaron Bruce].

\textsuperscript{46} Aaron Bruce and Emma Hume, “The Squamish Nation Assessment Process: Getting to Consent” (November 2015) [unpublished].
making. This position was reflected in the submission Squamish Nation made to the CEAA Review Expert Panel\(^{47}\) concerning reform of CEAA:

> We want to make clear to the Expert Panel what this review of CEAA is about for the Squamish Nation, and we believe for all First Nations in Canada. It is about consent. Our submission is not to advocate for the tweaking of a flawed EA process to allow for the better inclusion of traditional knowledge. We know that the Expert Panel has heard many times already in this review process: Indigenous Consent. But what does that really mean? We have seen the case law – *Haida*, Williams [*Tsilhqot’in*] – and internationally with UNDRIP. Does consent mean that a First Nation has a veto? In some cases, maybe. In others maybe not. It has not been made clear in Canadian law yet.

But what is clear is that First Nations have a right, an inherent and constitutional right, to make a decision on a project. So we think what we are really talking about, when we look at consent in the context of reconciliation, is building a true government to government relationship where First Nations and other levels of government collaboratively develop governance structures and processes to make consensus based decisions on natural resource projects. This consensus-based decision-making must be built into the legislation. But before you can build such structures and processes you need to find out from First Nations what consent means to them. The federal government cannot make that determination unilaterally. We hope our submission helps you understand what consent means to the Squamish Nation in the context of environmental assessment.\(^{48}\)

When I asked Chief Campbell why Squamish Nation was motivated to engage in the complex work of developing its own EA process, as opposed to participating in the Crown EA, he explained:

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\(^{47}\) On August 15, 2016, the Canadian Minister of Environment and Climate Changed announced the establishment of our four-person Expert Panel (the Panel) to conduct a review of the *Canadian Environmental Assessment Act* with these objectives: to restore public trust in EA; to introduce new, fair processes; and to get resources to market. The Panel engaged broadly with Canadians, Indigenous Peoples, provinces and territories, and key stakeholders to develop recommendations to the Minister on how to improve federal EA processes. See: Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa, ON: Canadian Environmental Assessment Agency, 2017).

Our experience with environmental assessments in the past really didn't satisfy the Nation, being treated as a stakeholder within our own territory -- where you’re relying on other entities to garner and weigh our information and come up with a determination on how they best see mitigative approaches to impacts to the Squamish Nation. We are not satisfied with that process at all. Not at a time when we are talking nation to nation and reconciliation. We didn’t want to just go cap in hand to some other government and say, “please consider our interests” and then hope that they would understand what is important to us.

Our experience with colonial governments is that they don’t understand Indigenous values and our governance over our lands. So we wanted to be proactive, to recognize that we are in an era of reconciliation, and we have to ask ourselves what are the actions that go with that, the reconciliatory action, especially at a time when UNDRIP came out with free prior and informed consent. You also have the TRC recommendations on reconciliation. Those tools that Canada was resistant to around UNDRIP, around signing on, being one of the last signatories, as well as the fact that no one was really able to move beyond consultation to affect a process that would be true consent.

We wanted to be proactive. The Nation said we are going to do our own environmental assessment on this project because it is a major project, a major shift in Howe Sound to industrialize the Sound at a time when we are seeing revitalization of the environment after decades of absence of herring and cetaceans, due to the two pulp mills and the Britannia mine. We are now seeing a rebound, and so we said, “why should we support a project that could potentially be adversarial and harmful to the Sound?”

By doing our own EA process we felt we were in a better position to analyze the Canadian environmental assessment and comment on it, but also create a parallel process that would then fill in gaps around cultural and spiritual values because we’ve recognized that Western management has removed culture and spirituality from the vocabulary when it comes to management units, looking at landscape. We can’t simply do that. We have an intimate relationship with our territory. We can’t turn off cultural and spiritual to look at Western practices. We had to look at our values.49

According to Chief Campbell, EA legislation is structured in a way that does not adequately incorporate Indigenous concerns and knowledge, particularly in the areas of cultural impacts and spirituality. The Crown process is highly bureaucratic. It uses tight timelines to gather information and relies on a proponent-driven methodology. This approach does not fit

49 Interview of Squamish Nation Hereditary Chief and Councillor Ian Campbell/Xalek Sekyu Siyam (19 August 2019) [Interview of Chief Campbell].
well with how many Indigenous communities deliberate and make decisions, and thus does not allow for full consideration of Indigenous goals and priorities. Squamish Nation Councillor, Chris Lewis, explained how the procedural nature of Crown EA has inhibited meaningful dialogue regarding Squamish Nation concerns, and created much frustration:

> We were involved in many other EA processes at the time and we were very unhappy with how Squamish concerns, our voices, in the environmental assessment process, had been written down. We felt that it was very much a “check box” kind of process where the federal government or the provincial government would come to Squamish Nation and say, “What are your issues?” and they would write down notes, and our concerns would get lost in the macro EA process. But there would be a checked box saying, “We spoke to Squamish Nation and these are their concerns,” and maybe there would be mitigation – maybe there wouldn’t be.

The EA process was completely absent of Squamish Nation follow up in terms of what the environmental management plans would be. No recognition or implementation of our culture and our spirituality – there is no space in that EA process for it. So, at that time we were quite frustrated with the EA processes.50

When I asked Bruce why Squamish Nation did not want to participate in the Crown EA process he explained:

> For a project of this magnitude in Squamish territory, Squamish wanted to have more input than making recommendations . . . to actually be determining what information would be included to be assessed, and have a decision-making role in that process. . . the Squamish Nation has always felt that we have to be making an actual decision not just be part of a recommendation.

Squamish started to engage with the provincial and federal governments in the Crown EA process, trying to have our interests included, our decision-making included, and just continued to get push back. And so we just hit a point where the questions were, do we go to court and try to fight this, or do we create something ourselves where we get to make an informed decision? Those options were put before Council, and the Council

50 Interview of Squamish Nation Councillor and Spokesperson, Chris Lewis/ Syetáxt, (Councillor Lewis) (25 September 2019) [Interview of Councillor Lewis].
Lack of recognition of Squamish decision-making power under Crown EA processes was a significant concern for Squamish Nation and a key motivator in its decision to create its own process. From Squamish Nation’s perspective, Crown EA processes fail to adequately enshrine the principle of Indigenous consent, which includes a right to obtain the type of information Squamish Nation deems necessary to make decisions about resource activity in its territory, the capacity to decide where development can take place based on Squamish Nation perspectives of impacts to its Aboriginal rights and title; an oversight role in the implementation of resource projects such that Squamish Nation can ensure proponents are meeting the terms of the conditions placed upon them; and a share of the economic benefits that flow from the projects. For these reasons, Indigenous nations across BC have continually expressed desire for legislation that recognizes shared decision-making power with governments, and/or legislation that creates space for Indigenous-led EA processes. Many Indigenous nations want to decide for themselves the type of data to be used and to rely on their own assessment methods to make a determination of consent (or not), based on their own environmental values, laws and legal processes. The failure of Crown EA law to address Squamish Nation concerns in a manner that

51 Interview of Aaron Bruce, supra note 45. The Squamish Council voted unanimously in favour of developing the Squamish Process.

52 Ibid.


54 Ibid.

resonated with the community, or to recognize Squamish Nation at a government-to-government level, is what motivated Squamish Nation to build its own EA process.

5.4 Building the Squamish Process

5.4.1 Initial Considerations

According to Bruce, the provincial and federal governments, “were not open to developing a mutually agreeable EA process to review the Woodfibre proposal” outside of the governments’ established EA framework.\textsuperscript{56} Squamish Nation’s frustration with the inadequacy of Crown EA processes, coupled with enhanced recognition in Canadian law of Indigenous peoples’ right to consent to resource projects in their territories, compelled Squamish Nation to strike out on its own – to engage in the difficult and time-consuming task of building its own legal process that would enable it to make a decision about whether, or not, to consent to the Projects. It viewed the Projects as “having the potential to significantly impact a very important part of its Territory [Howe Sound] and the Squamish Nation’ way of life,” and thus, the Nation “made it clear to the EAO that the only way this Project was going to proceed was with Squamish consent and that this was not achievable in the current provincial and federal EA process.”\textsuperscript{57} Bruce explained the Squamish Nation position this way: “[I]n terms of Crown engagement at that point it wasn’t an ask, it was us saying, we're going to be conducting our own environmental assessment process. Stay tuned.”\textsuperscript{58}

\textsuperscript{56} Interview of Aaron Bruce, \textit{supra} note 45.

\textsuperscript{57} \textit{Ibid.}

\textsuperscript{58} \textit{Ibid.}
The Team tasked with developing the Squamish Process included Hereditary Chief and Squamish Nation Councillor, Ian Campbell; Hereditary Chief Bill Williams; Squamish Nation Councillor, Chris Lewis; Squamish Nation legal counsel and Squamish Nation member, Aaron Bruce; and Senior Environmental Consultant, Tyler Gray, of PGL Environmental Consultants (collectively the “Team”). The Team faced two central questions at the outset: 1) how to develop a method of assessment rooted in Squamish values and laws that would illicit the type of information needed to make an informed decision; and 2) how to bind the proponent to its assessment process, because unlike the provincial and federal governments, Squamish Nation lacks legislative authority to compel proponents to participate.\(^5\)

To begin, the Team developed a broad framework for the Squamish Process which was comprised of five main steps: 1) the Framework Agreement; 2) Coordinating the Squamish Process with the Crown Process; 3) the Squamish Assessment of the Project; 4) Squamish Decision-making; and 5) the development of Conditions and Environmental Assessment Agreements between Squamish Nation and the proponents.\(^6\) These steps will be described in detail below, but it is important to note at the outset that these steps emerged to fit the parameters of these specific Projects. Bruce emphasized that given that this was the first time the Squamish Process was used, it is necessarily iterative, and that the Squamish Process will continue to evolve and be refined with subsequent use.\(^7\)

\(^5\) Ibid.

\(^6\) SN CEAA Review Panel Submission, supra note 48 at 6.

\(^7\) Interview of Aaron Bruce, supra note 45.
5.4.2 Step 1 - The Framework Agreement with Proponents

Once Squamish Nation decided to create its own environmental assessment process independent of the Crown process, it had to find a way to bind the proponents, Woodfibre LNG and FortisBC, to its process. Woodfibre LNG and Squamish had been communicating since Spring of 2013.\footnote{Interview of Byng Giraud, former Woodfibre LNG Ltd. Vice President of Corporate Affairs (24 October 2019) [Interview of Byng Giraud].} According to Byng Giraud, former Vice President of Corporate Affairs for Woodfibre LNG, the company had reached out to Squamish Nation early on as it expected to enter into some sort of agreement (likely economic) with the Nation.\footnote{Ibid.} It had reviewed the Xay Temixw and the SFN-BC LUP Agreement and knew that the proposed facility would be operating in Squamish Territory. Giraud saw from the SFN-BC LUP Agreement, however, that the proposed site was not in a “no-go-zone” (i.e. in a Wild Spirit Place or a Cultural Site as identified by the SFN-BC LUP Agreement). He stated in his interview that if this had been the case, he would have likely stepped away from the Project or instructed the company to find another, more suitable location.\footnote{Ibid.}

Woodfibre LNG and FortisBC entered the standard referral process with Squamish Nation and later learned of Squamish Nation’s intent to establish its own assessment process. According to Bruce, once Squamish Nation decided to develop its own process, it provided notice to Woodfibre and FortisBC:

We gave the proponents a heads up to say we are developing our own process. We wanted to make it a very formal thing, so we sent a letter to them saying, basically, we are open to assessing your projects and you are going to have to meet this criteria in order for us to look at your applications to see whether we will move to the next stage, which

\footnote{Ibid.}
included making sure that we had an application fee, and that we had sufficient information, and if we didn't have the information, they would have to send it to us before we would even consider looking at their projects to see whether they qualified to be in our process.  

When I asked Bruce how the proponents responded, he explained:

It was easy to get buy in on the concept, but there was fear on what it would look like because we hadn’t developed it yet. I mean, we hadn’t done one of these before. There was some fear there and so after that initial letter it really was sitting down with the proponents to outline with them what it was going to look like and that we were going to need a contract in place around the process because we don’t have legislation. We needed to find some way to bind them to the process because we wanted to make sure that it worked. So we talked to them to make sure that they could really do a lot of the things that we were asking.

When I asked what that initial Framework Agreement covered, Bruce explained:

The most important thing was getting their agreement that this was an independent process from the federal and provincial processes, and that we were making a decision at the end of it, and it wasn't subject to any other level of governments’ decisions. So that was kind of the key and the starting point to it all. After that it was really laying out that because it's our own process, we are going to need information that will be different than what they’d submitted to the EAO. That may mean they have to do some new studies and that we will control all of our information.

That led to maybe the most important piece of it all which was confidentiality . . . there was a bit of an issue there because they had to engage under the Crown process where it was about consultation and accommodation and the Crown had a duty to meet, and would require the proponent to be part of meeting that duty.

Under our completely separate process we were saying, “well you can't share any of the information obtained here with the Crown because our concern is that you are just going to use the information here to discharge your duties over there; then our process is meaningless.”

And so we built confidentiality around that information. This is a separate process. If they had to work with the Crown on figuring out their consultation process, that’s fine, but that would have nothing to do with the Squamish Process.

65 Interview of Aaron Bruce, supra note 45.
66 Ibid.
And so we got their agreement on that. And after that, it was really just what we will do, and the timing of things, and what we needed. We wanted to line our process up as best as possible with the government process because well, it’s a bit of a fairness thing. I mean we couldn’t just say ours is going to be a five-year process and the government’s is a two-year process. 67

Squamish needed to build strict confidentiality into its process to prevent the proponent from sharing information and meeting the Crown’s duty to consult under the Crown EA process. This would effectively make the Squamish Process moot as it would eliminate the leverage Squamish Nation had to compel the proponents to participate. Giraud indicated that Woodfibre LNG was focused on building a relationship with Squamish Nation and he felt it was important to be open to the Squamish Process. 68 However, the confidentiality provision of the Squamish Framework Agreement did pose a risk, and this led to internal debate within the company. 69 The Woodfibre LNG legal department and the Crown were concerned that the confidentiality provision would interfere with Woodfibre LNG’s ability to establish the Aboriginal consultation record required under the Crown EA process. 70 This could be problematic in the future, should the Project be subject to a judicial review. Giraud indicated that the company weighed its options and ultimately decided that it was better to assume this risk than to jeopardize its relationship with Squamish Nation at an early stage. Giraud explained:

It came down to the relationship. It was a company that has operated all over the world, primarily in the developing world – relationship resonated with them, as opposed to our legal issues. So, in the debate, and it wasn't one big board meeting, it was over a period of time . . . in the internal debate, it was decided that we were better off to take this risk than to start off on the wrong foot right away. And through those conversations we sort of articulated to ourselves what that risk was. And the risk fundamentally was that the

67 Ibid.
68 Interview of Byng Giraud, supra note 62.
69 Ibid.
70 Ibid.
Squamish Nation Process had a confidential element to it that essentially meant that there was no consultation record.\textsuperscript{71}

By having the proponents agree to keep the information obtained under the Squamish Process confidential, Squamish Nation attempted to insulate its process from the consultation requirements that underpin the Crown process. In other words, it did not want the Squamish Process to be viewed by the Crown as a vehicle through which the proponents would fulfill the Crown’s consultation requirements, based on the Crown’s understanding of what discharge of the duty to consult requires. The Squamish Process was an assertion of Squamish jurisdiction, which would be driven by Squamish Nation’s interpretation of what Indigenous consent entailed.\textsuperscript{72} The friction caused by this intersection of legal orders is discussed in Chapter 6, but it is worth noting here that the confidentiality requirement of the Squamish Process was essential for the Process to work outside of the Crown’s EA process.

Woodfibre LNG and FortisBC agreed to participate in the Squamish Process. When I asked Councillor Lewis why he believed the proponents bought into the Squamish Process he explained:

\begin{quote}
I think Woodfibre realized just what was going on in the province and the resistance in First Nations communities to any pipeline. Enbridge was at the top of the media at that point. And they had clearly seen the resistance from First Nations communities as it related to oil and gas . . . and the resistance up in Treaty 8 territory as it related to natural gas and any extraction, and the fracking issues, and all those types of things. So they knew that they needed to do something different with First Nations, with Squamish. And I think they were open to it.\textsuperscript{73}
\end{quote}

\textsuperscript{71} Ibid.

\textsuperscript{72} In its reports to the Ministers, the Crown did draw the conclusion that the proponents’ participation in the Squamish Process demonstrated consultation, despite the fact that Squamish Nation contested this point and argued that only the issuance of a Squamish Nation EA Certificate is demonstrative of adequate consultation and consent under Squamish Nation law. This is further discussed in Chapter 6.

\textsuperscript{73} Interview of Councillor Lewis, \textit{supra} note 50.
Woodfibre LNG and FortisBC entered Framework Agreements with Squamish Nation in July 2014 agreeing to participate in, and to fund, the Squamish Process. The Framework Agreements were private contracts containing various terms including the following crucial elements:

- the Squamish will undertake their own, independent assessment and make their own determination on impacts to their Aboriginal right and title;
- the Squamish Process is confidential – the proponent cannot share the information they obtain with the Crown without the Nation’s consent;
- the Nation will not participate in the Crown EA process other than sending a technical environmental consultant to gather pertinent technical info;
- the Squamish Process will parallel the Crown process to the extent it is possible to provide some certainty to the proponent;
- the proponent agrees to provide supplemental information to the Squamish should it be requested;
- the proponent agrees to pay for the Squamish Process;
- the Squamish Nation will decide on whether to approve the project and if it does, will issue an Environmental Certificate subject to conditions to the proponent; and
- the issuing of an Environmental Certificate does not eliminate need for later negotiation of an Impacts Benefit Agreement between Squamish and the proponent.  

The proponents’ decisions to enter the Squamish Process (through signing the Framework Agreements) were voluntary; however, as Giraud indicated, relationship-building between proponents and Indigenous communities is a strong incentive. Proponents recognize that building relationships with Indigenous nations early on can mitigate future legal battles that can delay or derail projects from proceeding. It also helps garner support for projects from other segments of society that share the interests of Indigenous communities. Hence, while the Squamish Process currently rests on the willingness of proponents to recognize Squamish

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74 Bruce and Hume, supra note 46 at 9-10
75 Interview of Byng Giraud, supra note 62.
jurisdiction, Canadian law impacts the process. Proponent desire to prevent future legal battles caused by failure to engage in the type of consultation desirable to Indigenous nations is a compelling incentive. Moreover, uncertainty and ambiguity in Canadian law regarding how the duty to consult fits with Indigenous consent/FPIC is an incentive for proponents to turn to Indigenous nations for direction on what Indigenous consent means under their legal orders. 

5.4.3 Step 2 – Coordinating the Squamish Process with the Crown EA

At the outset, Squamish Nation envisioned the Squamish Process would run separate from (but roughly parallel to) the Crown EA. Squamish Nation would not participate in the Crown EA other than to allow PGL Environmental Consultant, Tyler Gray, to participate in the Crown EA Working Group to obtain technical data regarding the Projects. Squamish foresaw that after it had conducted its assessment at the community level, it would then engage in negotiations (at a government-to-government level) with the Crown, with the aim of harmonizing the results of the two separate processes. This did not transpire. Instead, the relationship between the two processes remained uncertain throughout the duration of the EA primarily because the Crown was resistant to depart from the framework for Aboriginal participation and consultation established through the BC EAA and CEAA. Councillor Lewis described the Crown’s response to Squamish Nation’s process:

The Province was unhappy. They said, “What about our process?” And we said, “You can keep on with your process and the proponents will still have to deal with your

77 For more discussion on this ambiguity, see Martin Papillon, Jean LeClair & Dominique Leydet, “Free Prior and Informed Consent: Between Legal Ambiguity and Political Agency” (2020) 27 Int’l Journal on Minority and Group Rights” 223.

78 Bruce and Hume, supra note 46.
process, it’s just that when it comes to Squamish interests . . . and we aren’t going to just duplicate everything in your process – we are going to vet everything – we are going to put a Squamish lens on culture and spirituality and have our own experts over here. 79

Bruce explained that the Crown recognized the Squamish Process was occurring but it continued to press Squamish Nation to adhere to the Crown’s consultation requirements established in the EAO Section 11 Orders:

They didn't like what we were doing. They were still trying to meet their obligations under the legislation and in the end, we didn't provide any information and never consented to the proponents admitting it. In the EAO’s actual Assessment Reports that they gave to the Ministers they said the Squamish Nation was adequately consulted and accommodated, but all they can really show is that Squamish worked with the proponents in a separate process. 80

Giraud explained that the Crown felt the proponents were taking a lot of risk by participating in a confidential process with Squamish Nation that prevented submission of a consultation record, as was required pursuant to the EAO Section 11 Order. 81 Giraud said that in terms of consultation with other First Nations, Woodfibre LNG complied with the Section 11 Order, but for Squamish Nation, all the company could do was submit one letter to the EAO explaining that Woodfibre was engaged with Squamish in an independent process. 82 In Woodfibre LNG’s Aboriginal Consultation Reports in both June 2015 and April 2017, the company stated:

Woodfibre LNG Limited and the Squamish Nation have entered into an agreement to conduct a separate Project review process (Squamish Nation Process) to discuss the potential effects of the Project on the Squamish Nation’s Aboriginal interests. Information shared and issues raised during that process were not reported in the

79 Interview of Councillor Lewis, supra note 50.
80 Interview of Aaron Bruce, supra note 45.
81 Interview of Byng Giraud, supra note 62.
82 Ibid.
Application.\textsuperscript{83}

FortisBC made similar statements in its consultation reports to the EAO.\textsuperscript{84} Thus, while Squamish Nation aimed to coordinate the two processes upfront, and have the Crown agree to engage with the Nation at a government-to-government level, this did not come to fruition upon completion of both assessments. The Crown remained reluctant to formally acknowledge Squamish Nation’s jurisdiction to conduct its own EA.\textsuperscript{85}

5.4.4 Step 3 - The Squamish Assessment

Once the Framework Agreements binding the proponents to the Squamish Process were in place, the Team began developing a method of assessment that would consider Squamish


\textsuperscript{84} On 3 May 2016, FortisBC filed its Squamish Nation Section 13 Order Report with the EAO stating:

- FortisBC has agreed to keep confidential any information provided to it by Squamish Nation relative to the Squamish Process, and to not use such information in the BC EAO process without the consent of the Squamish Nation. In addition, Squamish Nation has made it clear that it objects to the use of any information (regardless of source) to conduct an assessment of effects on Squamish Nation Aboriginal Interests without the consent of Squamish Nation. Squamish Nation has not provided its consent to use the effects assessment that was conducted by them as part of the Squamish Process, which resulted in the Squamish Nation’s conditions.

\textsuperscript{85} It should be noted that the relationship between the Crown and Squamish Nation in the context of the Woodfibre LNG Projects has begun to operate at more of a government-to-government level in recent years. In May 2020, Squamish Nation, the BC EAO and the Canadian Impact Assessment Agency entered a Memorandum of Understanding outlining how the three levels of government will work together in overseeing changes being proposed to the Woodfibre LNG Projects. This includes harmonization of timelines, coordination of conditions, information sharing and co-ordination in decision-making, see Memorandum of Understanding Between Squamish Nation And Environmental Assessment Office And Impact Agency of Canada (22 May 2020), online (pdf): online (pdf): <https://iaac-aeic.gc.ca/050/documents/p80060/138201E.pdf>. This is discussed more in Chapter 6.
laws, values, and worldviews, and provide the Squamish Nation decision-maker (the Squamish Council) with the information it needed to determine whether or not to give its consent. From the outset, the Team knew that community engagement would be central to its assessment methodology. As demonstrated through the process of building Xay Temíxw, community engagement is an important value of the Squamish Nation, and thus it was the appropriate point to start building the Squamish Process.86

Councillor Lewis indicated that in the past, the Council had generally only brought EA discussions to the community level when a project might impact a culturally sensitive site.87 In this case, the Team wanted deeper and fuller community involvement.88 The challenge were to: determine the best way to educate the community on the proposed Projects; learn the community’s concerns about the Projects; access Squamish knowledge-holders’ information about the land, resources and spiritual/cultural values; and conduct an independent review of the proponents’ information in order to assess the Projects from a distinctly Squamish lens, all within the timeframe dictated by provincial legislation.89 The Team decided that the method of assessment would be developed using information obtained through: 1) community engagement with Squamish Nation members; and 2) an independent technical review of the proponent’s

86 Interview of Aaron Bruce, supra note 45; Interview of Councillor Lewis, supra note 50; Interview of Chief Campbell, supra note 49.
87 Interview of Councillor Lewis, supra note 50.
88 Interview of Councillor Lewis, supra note 50; Interview of Aaron Bruce, supra note 45; Interview of Chief Campbell, supra note 49.
89 Interview of Aaron Bruce, supra note 45. Bruce explained that the initial objective was to complete the Squamish Process within the same timeframe as the province so that there could be collaboration between Squamish and the governments on the results of their separate processes.
information. That information would form the knowledge base for focusing on the core issues, measuring the Projects’ impacts on those core issues, as well as possible mitigation measures and conditions that could be placed on the proponents by Squamish Nation. The results of these analyses would be combined in an Assessment Report that would be presented to the Squamish Nation community, and then to the Council for a vote on whether to approve the Projects. The central objective of the Squamish Process was to provide the community and Squamish Nation decision-makers with a level of information, informed by Squamish values and concerns, from which it could make an informed decision on whether, or not, to give consent to the Projects.

5.4.4.1 Creating the Squamish Method of Assessment

Crown EA assessments involve measuring impacts on a selection of valued components, which are generally defined as:

Components of the natural and human environment that are considered by the proponent, public, Aboriginal groups, scientists, and other technical specialists, and government agencies involved in the assessment process to have scientific, ecological, social cultural, archeological, historical, or other importance.

Valued components form the foundation of the Crown assessment methodology. According to EAO Guidelines for Selection of Valued Components and Assessment of Potential Effects, “the selection of appropriate VCs [valued components] allows the assessment to be focused on those

90 Ibid.
91 Ibid.
92 Ibid.
aspects of the natural and human environment that are of greatest importance to society.” Using valued components “improves the effectiveness and efficiency of assessment, in part by facilitating the selection of appropriate study methods and focusing analysis on key project-environment interactions.”

Under the BC EAA process that governed the Woodfibre LNG Projects, proponents developed a draft Valued Components Selection Document (the “VC Document”) and then referred the VC Document to Aboriginal groups and the public for review and feedback. The proponent then determined how to incorporate the feedback into its Project application. That process was heavily proponent-driven, with the proponent deciding how to frame the information. It is for this reason that Indigenous nations have argued the Crown’s process does not adequately capture Indigenous values and interests. Indeed, Squamish Nation believes that its inherent jurisdiction over its territory gives it the right to determine what impacts to land and resources are acceptable from its community members’ perspectives. This was a key reason why Squamish Nation felt it necessary to develop a method of assessment for the Woodfibre

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94 Ibid.
95 Ibid.
96 BC Environmental Assessment Office, “Application Information Requirements Template” (August 2015) at 3-4. This was the standard methodology used pursuant to the 2002 BC EAA legislation which governed the Woodfibre LNG Projects. The 2018 BC EAA retains the valued component methodology, but changes have been made to the overall process which build in more opportunity to reach consensus with Indigenous nations along the path of the assessment. Furthermore, the new BC EAA provides for Indigenous-led assessments should an Indigenous nation wish to use their own assessment. Government-to-government agreements between the Crown and Indigenous nations will guide how Indigenous substituted processes work with the EAO process. For more discussion see: Jessica Clogg, “Why BC’s New Environmental Assessment Act is Worth Celebrating” (21 December, 2018), online: <http://www.slaw.ca/2018/12/21/why-bcs-new-environmental-assessment-act-is-worth-celebrating/>.
97 Bruce and Hume, supra note 46
Projects that was anchored in the Squamish community’s values and worldviews. Indeed, at the outset of community consultation on the Projects, Chief Campbell stated: “[f]or the Squamish Nation, the Woodfibre proposal assessment represents a real-world exercise of self-government. . . Our decision will reflect the interests, the will, and the beliefs of the members of the Squamish Nation. We won’t allow outsiders, whether they support the pipeline or oppose it, to decide for us.” 98

In creating a Squamish EA methodology, the Squamish Nation Team chose to use the “valued component” language found in Crown EAs, but to “define it in its own unique way.” 99 One of the central reasons the Team chose to adopt the “valued component” vernacular was that Squamish Nation contemplated a shared decision-making model with the Crown in the future, and felt it would help “to keep language consistent.” 100 Finding a way to use the “valued component” language to reflect Squamish Nation values was a compromise by Squamish Nation to assist potential communication between the two legal models in the future. It was an attempt by Squamish Nation to facilitate a harmonization of the methodological processes, which ultimately did not occur. 101

Rather than following the Crown method of selecting a list of discrete valued components and determining what biophysical indicators could be used to measure the significance of project impacts on each valued component, the Team developed a different model that did not involve

99 Bruce and Hume, supra note 46 at 12.
100 Ibid at 13.
101 Harmonization between the Crown and Squamish Process methodologies did not occur and ultimately, the Squamish developed its own methodology for internal decision-making purposes.
measuring impacts to discrete components. In consultation with Squamish Council and community members, the Team chose a list of topics that, when viewed together, reflect a single, interrelated valued component. This is called the “Squamish VC.” The reason for adopting this approach was because the Squamish Nation worldview does not categorize the natural environment according to discrete components. Squamish Nation chose to emphasize the interrelationship between all of the environmental components, and thus created one VC to reflect a number of concepts. To this end, the Team identified 6 Guiding Topics of central concern to the Squamish community, which would drive community discussion and elicit knowledge regarding Squamish laws and values. The Guiding Topics were:

1) Marine environment;
2) Terrestrial and freshwater environment;
3) Lands in which Squamish Nation has formal governance and/or defined management objectives;
4) Use and occupancy in the impacted region;
5) Transmission of culture and history; and
6) Growth and revitalization of Squamish language.

In its submission to the CEAA Expert Panel, Squamish explained the rationale behind the Squamish VC:

The focus of CEAA is overly narrow, favouring biophysical components that can be readily measured without input of the affected First Nation communities and often ignoring cultural values that are harder to measure. To address this, the Squamish Nation developed its own value component (Squamish VC) that focuses on the interconnectedness of Squamish Nation values. The Squamish VC includes as its component parts the interconnection among land, waters, governance, use, occupancy,

102 The Team initially planned to call it the Aboriginal Rights and Title VC but later changed it to simply, the Squamish VC, to better reflect the Squamish legal order and not Canadian jurisprudential language.
103 Interview of Aaron Bruce, supra note 45.
104 Bruce and Hume, supra note 46; Interview of Aaron Bruce, supra note 45.
105 Ibid. at 13
transmission of culture/history and growth/revitalization of language as one valued component to be assessed.\textsuperscript{106}

When I asked Bruce to explain why the Crown assessment methodology does not accord with how Squamish Nation sees environmental impacts, he answered:

> The Crown generally looks at a moose, or a deer, or a fish, and the effects that a project would have on that singular species, or it could be water or it could be a tree or trees or whatever.

> The Squamish worldview doesn’t see it as that – you can’t just see the impact on one thing. So it was new for the Nation to try to figure out how we can have our worldview reflected in terms of the values that are going be impacted by the project.

> We had to find a way to develop something that reflected the interconnectedness of the water, the fish, the land, governance . . all of those values that would be impacted from Squamish perspectives. It was a challenging process for sure to develop something that made sense to the community and could also be measured in some way in terms of an impact.

> So that's the key difference. Squamish was really measuring against, I guess, for lack of a better term, a ball of values, rather than one value and seeing it in isolation from a number of other things. \textsuperscript{107}

Bruce also discussed how the Squamish VC was a vehicle through which Squamish knowledge and law are integrated with a Western legal structure and he explained how for many Indigenous communities, you cannot simply ask, “what is your law” and get an answer that can be readily or easily incorporated into a Western legal process. He explained that you “really need to draw out what it is” through identifying concerns and values and that there is a translation process involved.\textsuperscript{108} The same can be said for Indigenous science. Bruce explained:

> We really had to be open and creative at this stage of the process. Again, I mean this is the first time we've done it, so now we have something, but going through this process

\textsuperscript{106} SN CEAA Review Panel Submission, \textit{supra} note at 48.
\textsuperscript{107} Interview of Aaron Bruce, \textit{supra} note 45.
\textsuperscript{108} \textit{Ibid.}
we had to figure it out as we went. So the community consultation was so key to it in understanding everything. Understanding what the community’s fears of industry coming into the territory are, do they see benefits of it happening, how can we measure impacts of a project on the community . . . and so we weren't looking at it like in an “already set up” process where you can start from a certain point. We were starting from scratch.

It was such a key to this process to get out there and speak to the people, to the community members, to figure it out because when we were putting it together, that was the only way we could see doing it . . . putting it into this sort of interconnected ball of values, using a lot of the EA vernacular, in order for the proponent to understand what we were getting at.

I worked very closely with the environmental consultant on this part of it, but Chief Ian Campbell and Chief Bill Williams were very key as resources going through it. We could kind of come up with the modelling of a lot of this stuff but for them to really input key information and cultural information really helped us frame it all.¹⁰⁹

In creating the Squamish method of assessment, Bruce explained that the Team needed a group of experts with different pieces of expertise to translate Squamish values and law into a model that could be understood by the proponent.¹¹⁰ Bruce continued:

If I, as a lawyer, together with an environmental consultant sat down with the proponent and we were talking through this stuff, it’s not going to have the same impact as when you have two Hereditary Chiefs who are on the land base all the time . . . who can really speak to what these things are and, if they are going to be impacted, what that is going to mean to Squamish laws and values. And so it really had to be a team thing because if they did just do that in a room, the proponent wouldn’t know what to do with that information. So yes, we were translators between the Squamish knowledge holders and the company who were trying to assess the project based on Western science.¹¹¹

In developing the Squamish method of assessment, the Team faced the real-life challenge of figuring out how to take the community’s perspectives, values and laws and build them into a contemporary Indigenous legal process that could be understood in a broader Canadian legal

context. As will be discussed in more detail below, the Team had to consider why community members held certain viewpoints in order to locate values and/or laws and then adapt or translate those into principles so that they could be incorporated into the assessment methodology and later into mitigative measures to be placed on the proponents through contractual conditions. As Bruce explains, this involved being creative and experimental. He points out that developing law is necessarily iterative and he believes the Squamish Process will continue to evolve and adapt as the community uses it for subsequent projects.\footnote{Ibid.}

5.4.4.2 Gathering Information

Community dialogue and input were central to how the Team built the Squamish Process. The Guiding Topics were developed to elicit discussions with Squamish community members to illuminate their values and how they viewed the potential impacts of the Projects on those values concerning uses of land and water.\footnote{Interview of Tyler Gray, Senior Environmental Consultant at PGL Environmental Consultants (22 August 2019) [Interview of Tyler Gray].} Through community dialogue, the Team aimed to distill the community’s central concerns which would then frame, and be incorporated into, the technical review of the project by PGL Environmental Consultants. Community engagement allowed for “a two-way flow of information between the community and the review team.”\footnote{Ibid.} It provided “focus to issue scoping,” as well as revealed “impact pathways.”\footnote{Ibid.} In its initial discussions, the Team considered the best methods to engage with the community and determined engagement would take the form of focus groups, larger community meetings, and

\footnotesize{\textsuperscript{112} Ibid.} \footnotesize{\textsuperscript{113} Interview of Tyler Gray, Senior Environmental Consultant at PGL Environmental Consultants (22 August 2019) [Interview of Tyler Gray].} \footnotesize{\textsuperscript{114} Ibid.} \footnotesize{\textsuperscript{115} Ibid.}
direct engagement with knowledge holders to complete a traditional use and occupancy study (TUOS). Community members would also be advised that they could submit comments or raise concerns with Team members through emails, telephone calls and one-on-one meetings.

Community engagement began with an “LNG 101” presentation for community members held in early November 2014. Bruce explained this as follows:

So what really separates the Squamish Process from the Crown process is, I think, how it starts ... we really wanted to get community perspectives. And so it was a tricky thing, because you know, an oil and gas project is a bit of a lightning rod in a First Nations’ community. Our first step was to bring in someone neutral, independent, just to say this is what an LNG project is. And not talk about the Woodfibre project in any way, not talk about the area. Just, this is an LNG project. What we were trying to accomplish was just to find out right off the top, what are the fears and what does the community see as benefits, without even really asking those questions. It was just sort of, “ok community, here is what an LNG project is, now let’s start talking.” And so we were able to pull out a lot of concerns or fears ... we thought it was important that we record everything ... we get those concerns down, and then we looked at it and said that’s going to be part of the process.

Educating the community on the nature of LNG was an important first step in the dialogue process. The Team felt the community needed education on the nature of LNG generally to be able to dig into the central issues. By providing community education the Team sought to enable more meaningful dialogue and to better identify the true concerns of community members.

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116 Interview of Aaron Bruce, supra note 45.
117 Ibid.
118 Ibid.
119 Ibid.
120 Ibid.
5.4.4.3 Focus Groups

Four focus group sessions took place in late November 2014. These were more intimate discussions with 6-10 community members including elders, youth, and different land and resource users such as hunters and fishers. The sessions were four hours and attendees were given information upfront, but were free to discuss their concerns about the Projects and have those concerns recorded (later to become part of the Assessment Report). Attendees were provided with a leaflet containing some quick facts on the Projects and asked to consider how the Projects would affect Squamish use and value of the land. Questions included:

1) Squamish has done land use planning in the past and identified many specific areas for protection. How would the project affect those lands?
2) What are the potential impacts on you or your family’s use and occupancy of the Northern Howe Sound region?
3) What are the potential impacts on you or your family’s practice and transmission of Squamish culture and ancestral history?
4) Will the project impact current use of language and/or impede further re-growth of language?
5) What will be the impacts to the marine environment?
6) What will be the impacts to the terrestrial and freshwater environment?

Gray, the lead PGL environmental consultant who participated in all the focus groups, explained that the focus groups were enormously helpful in revealing the core concerns of community members and the reasons for those concerns. He indicated that while the leaflet was distributed in advance, it was not a question-and-answer setting. It was a free-flowing dialogue that ended up covering a range of topics. In Gray’s words:

121 Interview of Tyler Gray, supra note 113.
122 Ibid.
124 Ibid.
These were discussions. And I found it just eye opening. And . . . I like to think it’s a means of learning about community values and interactions in what is meant to be a very holistic way and that it is in a way, a more culturally normal way, in that there are revealed preferences, revealed values . . . It’s not a question of what is your concern about this? Which is the type of question you get from government or proponents – “hey, we want to do this thing – what’s your concern about that (specifically)?”

We filled those focus groups with discussions and everyone got to talk. Not like in an open house where you have a grand stander taking up all the time. There is no intimidation. It’s calm. And there is just such a nice exchange of ideas.

They were set in small rooms that Squamish Nation has. Classroom type settings. Round tables. They were catered and there would be an opening prayer. And proponents were not allowed; government was not there. This was internal. Driving home that message. For me, I hadn’t met most of these people at this time and we wanted to convey that we are here for your interests. We won't share anything you don't want to share.

And there were themes that became and are still (because we are still working on this project) dominant themes of values that I carry forward now . . . I always say the facts are objective and the values are subjective . . . so everyone agrees on what the facts are, but how important are those facts? These focus group sessions helped me see.

A key theme that arose from those focus groups more than anywhere else was the history of broken promises of industry . . . and hearing an elder talk about how when she was younger, all of her rose gardens were dying from the chlor-alkali plant, the fallout from that. . . . “I can’t eat anything and my flowers are dead” . . . that’s the result of industrial projects . . . there was also Britannia Mine . . . and almost everything that has come to Howe Sound from industry has promised one thing and delivered another and it has devastated things and so why are we talking and believing anything we hear from anybody anymore? . . .

So that theme to me became one of accountability.125

Gray’s experience in the focus group emphasized Bruce’s point that direct questions such as, “what is your law on this?” or “what are your values on this particular topic?” do not tend to elicit useful answers. Instead, answers come through listening and dialogue. As Gray explained, values were revealed by people repeatedly explaining their history of land use and alienation

125 Ibid.
related to the resources of Howe Sound. This helped him come to see, for example, how accountability is a central value of the community and that that principle has become particularly significant because of the colonial experience. The principle of accountability became central later in the process when it came time to formulate conditions that Squamish Nation would impose on the proponents through contractual agreements. This will be discussed in more detail in Chapter 6.

5.4.4.4 Large Community Meetings

Squamish also held four larger community meetings in Squamish and North Vancouver to gather community input. Councillor Lewis explained:

We had town hall meetings at Totem Hall because we knew the largest amount of people that were interested and impacted were going to be in the Squamish Valley. So we knew that we needed to focus our engagement there. We had town hall meetings where we presented the project. Now the proponents weren’t there. We said, “You’re not coming. This is Squamish-driven.” So, our own Squamish Nation Team presented the project, presented the process, and presented the EA process and what it would be like doing our own process.

Councillor Lewis noted that in the meetings, the Squamish Nation community expressed numerous concerns:

There were huge concerns around fracking, pipelines, those types of things. And in our consultation with the community we asked, “What are your concerns with the project being in our homelands? What is it?”

126 Ibid.
127 Ibid.
128 Interview of Councillor Lewis, supra note 50.
“First of all,” they said, “There is going to be a compressor station in my backyard and those things blow up.” People said, “We don’t want these compressor stations anywhere near our community.”

And they had a huge concern about sea water cooling – “Why are we using our Sound to cool this stuff down and we are pumping hot water back into the Sound? That doesn’t make any sense on a cultural level, a spiritual level – we have a responsibility to take care of all the fish.”

There were other things too. “We need to protect the estuary. We’ve been fighting to protect it for a long time so why would we diverge from that?”

All the community input was documented and later incorporated into the Assessment Report. In focus groups and community meetings, notes were taken on all concerns raised. Community input was also gathered through comments received in comment boxes, through email submissions, phone calls and in-person meetings. The Team received volumes of feedback from membership, and Bruce pointed out that in the Assessment Report “seventy five percent of it is just the community’s comments.”

5.4.4.5 Traditional Use and Occupancy Study (TUOS)

A traditional use and occupancy study (TUOS) also informed the assessment process, to add “another layer of voices,” in Bruce’s words. The TUOS involved interviews with knowledge-holders such as hunters, fishers, and gatherers. Councillor Lewis explained how his family was interviewed for the TUOS:

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129 Ibid.
130 Ibid.
131 Ibid.
132 Ibid.
133 Ibid.
134 Ibid.
I was interviewed because I am an avid hunter and fisherman, but I was with hunters and fishermen from my family because we came as a family. And I remember the Traditions Consultant, Richard Ingliss, I think it was, he looks at the map and points, “Chris, why aren’t you talking about this area?” And I said, “We don’t go there. I’ve never gone there.” And he said, “Why?” And I said, “Because there was a pulp mill there.”

And we just never trusted getting stuff from there. Because in my grandfather’s day, the bottom of the ocean was black. And so maybe it was a hot spot before the pulp mill was there, but through industrialization, we have been alienated from the areas that we would harvest resources from.

And the Woodfibre site was no different. That’s a prime place to hunt deer and do a lot of things, but we never had access because the pulp mill was there. So, in the whole process they asked, “Well, why didn’t you go to Woodfibre?” We said, “We were alienated – there was a security guard there who would tell us to leave . . .” Even though it was our former village site.  

As with the focus groups, the TOUS revealed the extent to which Squamish Nation members have felt the impacts of the industrialization of Howe Sound. Over the past century, Squamish Nation members have been alienated from their lands and resources, and many regard industry as having brought nothing but pollution and environmental contamination to Squamish Territory. As Councillor Lewis indicated, his family’s ability to fish and hunt in the Howe Sound area has been negatively affected by industrialization. Fishers in his family are still not comfortable fishing in places near the former site of the pulp mill.

TUOS are common in Crown EAs. Their overall purpose is to demonstrate an Indigenous community’s past and present interconnection with a geographic area. However, the focus of many TOUS is narrow. According to Bruce and Hume, “[i]n a typical EA process a TUOS is

135 Interview of Councillor Lewis, supra note 50.
136 Interview of Tyler Gray, supra note 113.
137 Interview of Councillor Lewis, supra note 50.
used to list specific impacts and identify the ways those impacts can be mitigated.”

Conclusions and suggestions about mitigation are often made by the proponent based on assumptions rather than deep dialogue with the community. Proponents tend to focus on avoidance of specific sites rather than understanding the relevant Indigenous values and laws. In the Squamish Process, rather than using the TUOS as a means to determine how to mitigate specific impacts to specific sites, the Team used the TUOS to deepen its understanding of the Squamish members’ relationships with their territory. The Team used the TUOS to better understand the community’s values and laws about land use. According to Bruce and Hume, the TUOS demonstrates a “complex tapestry of uses in which the Squamish Nation members exist as part of the land base.” The principles articulated in the Squamish Process were similar to those articulated in the development of Xay Temíxw. In other words, Squamish Nation members’ interconnections with land and their responsibility to preserve land, water, and resources for future generations, dictates their level of tolerance for adverse impacts created by development projects. This must take priority and be balanced against the economic benefits that will flow to the community.

A significant Squamish value revealed through the Squamish Process was that Squamish members rely on their territory as a whole, not just specific sites. Members’ willingness to be on the land is impacted by their ability to move around their territory freely, to use available

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138 Bruce and Hume, supra note 46 at 13.
139 Ibid.
140 Interview of Tyler Gray, supra note 113.
141 Bruce and Hume, supra note 46 at 13; Interview of Tyler Gray, supra note 113.
142 Interview of Tyler Gray, supra note 113.
natural resources, and to know those resources are safe.\textsuperscript{143} Another significant point was that members’ current use of land and resources is not the desired use.\textsuperscript{144} Pollution and contamination have inhibited Squamish Nation members from using their land and resources fully, and they are working to re-generate areas to enable deeper engagement with the land and waters. Indeed, Gray pointed out that impacts to Indigenous communities can go well beyond the impact to a specific site.\textsuperscript{145} For example, visual impacts and peoples’ historic memory affect their sense of place and their willingness to be on the land.\textsuperscript{146} Members need to feel safe in order to engage in activities such as bathing and other spiritual cleansing practices that require a sense of privacy, and an ability to move without interference throughout the territory to access the places that have meaning.\textsuperscript{147} Language and knowledges systems are also intimately connected to this. Gray explained that during Team meetings, Chief Campbell (one of the few Squamish language speakers in the community) raised serious concern regarding members’ willingness to be on the land and the impact of this reluctance on language transmission. If people are not on the land, they do not learn the practices and place names associated with the land because these are learned through the physical and spiritual experience of being on the land.\textsuperscript{148} Language dies out because people are not learning the information and passing it on to future generations except

\textsuperscript{143} Ibid.
\textsuperscript{144} Ibid.
\textsuperscript{145} Ibid.
\textsuperscript{146} Ibid.
\textsuperscript{147} Ibid.
\textsuperscript{148} Ibid. For more discussion on the interconnections between Indigenous languages and the transmission of Indigenous law see Lindsay Borrows, \textit{Otters Journey: Through Indigenous Language and Law} (Vancouver: UBC Press, 2018).
through, perhaps, a “far away” retelling of stories. When people are actually on the land and engaged in the practices, language is enhanced because every aspect of the practice is captured in the language. Chief Campbell expressed this concept in relation to the need to establish Wild Spirit Places in Xay Temíxw when he stated:

Specific sites need to be preserved and protected as a way of teaching for our classroom, for our church, for our hospital, and government. Many things are associated with the land that cannot be replicated in a city setting.

Councillor Lewis also spoke about the interconnectedness of language and land use:

You’ll notice when Ian and I go to events we will always recognize the place we are at in our language, because it actually tells us . . . the place name will actually tell us in the language what it was used for. What we used to do.

As with the process of developing Xay Temixw, Squamish principles concerning the importance of continued land use, land teachings, and place names were part of the deliberations in the Squamish Process. The Team used the TUOS to gain a deeper understanding of how community members use the land and waters in and around the area of the Projects, but more importantly to deepen its understanding of Squamish members’ values about land and resource uses, and the interconnection of these values.

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149 Ibid.
150 Ibid.
152 Interview of Councillor Lewis, supra note 50.
Community Values as Context for Technical Review

Community engagement revealed many concerns about the Projects and brought to light repeating themes related to the values of the community and the legal principles that guide members in their relationship with their land and resources. Squamish members view the potential impacts of the Projects in unique ways. As discussed in Chapter 3, because the Squamish see themselves as part of the land – their identity is inscribed in the landscape and relies on their ability to continue to use the land and resources for cultural, spiritual, and economic purposes. The risks associated with environmental impact affect the Squamish people not only at a physical level, but also on cultural and spiritual levels. Thus, Squamish Nation’s willingness to accept potential impacts might be less than what is acceptable to provincial and federal regulators.

The Squamish Nation’s tolerance for risk is a product of their relationship with the land, but is also connected to the fact that Squamish people have not benefitted from earlier industrial projects in Howe Sound. Squamish people have experienced alienation caused by industrialization for over a century without any consultation or meaningful benefit flowing to their communities. As described in the introduction to this dissertation, extensive industrial development occurred in the Howe Sound area beginning in the 1900s. This included multiple mines and mills which polluted the ocean and surrounding lands. According to Chief

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153 Interview of Chief Campbell, supra note 49.
154 Ibid.
155 Ibid.
Campbell, while the non-indigenous population benefited from the wealth generated from industrialization, the Squamish people experienced pollution and contamination of their food sources.\textsuperscript{157} An example includes Canada’s closure of the crab and shellfish fishery in Howe Sound in the 1980s because of overwhelming contamination caused by the production of pulp and paper.\textsuperscript{158} In Chief Campbell’s words:

\begin{quote}
You have Confederation, you have the Indian Act, all the way to the 1900s. You then have just rampant exploitation of our resources where a number of settlers became very affluent while First Nations were really marginalized and pitted with abject poverty, alienated from every sector within our territory.\textsuperscript{159}
\end{quote}

Councillor Lewis explained the community’s perspective on the industrialization of Howe Sound as follows:

\begin{quote}
We got all the information . . . about industrialization, and the mistrust of industrialization throughout time . . . it told us a story about where the emotion and energy was coming from in our people. It wasn’t just pulp mills and logging camps . . . it was chlor-alkali plants that were just across from the village, where people were getting tested for mercury poisoning.

And then we had other people say, “I worked at the mill. I worked at Port Melon. I worked at Woodfibre. I was a cook or I worked in the pulp mill.” We got all that information to draw us a clearer picture.\textsuperscript{160}
\end{quote}

Councillor Lewis’ comments indicate the complexity of the issues. Community members fear industrial development, but at the same time seek employment opportunity and economic well-being for their community. The community, therefore, needs to decide about how to balance these interests according to its values.

\textsuperscript{157} Interview of Chief Campbell, \textit{supra} note 49.\textsuperscript{158} For more discussion see Hal Quinn, “Dangerous Waters: Pollution shuts down B.C. shellfish Areas”, \textit{Maclean’s} (4 December 1989) online: <https://archive.macleans.ca/article/1989/12/4/dangerous-waters>.\textsuperscript{159} Interview of Chief Campbell, \textit{supra} note 49.\textsuperscript{160} Interview of Councillor Lewis, \textit{supra} note 50.
Through the Squamish Process, the Squamish Nation community expressed concern about industrial pollution of Howe Sound and the need to continue to foster its health. Marine life has begun to recover in the area, including a return of herring which had been decimated from decades of habitat degradation. Indeed, a prominent problem in Howe Sound has been herring spawning on creosote piles.\textsuperscript{161} Squamish Nation members were also very concerned with impacts to the Squamish River estuary, and the health and safety of the community located near project infrastructure. Councillor Lewis explained how the Team drilled into the community’s concerns:

There was concern that if there was a catastrophe, our village would be destroyed . . . even though the science said if there was a big explosion the village is far enough away that it wouldn’t be impacted. Our people didn’t believe it. They said, “I don’t believe them. I don’t believe that guy.”

So later we ensured that the community was protected through insurance and that homes would be replaced and if people were impacted in other ways, that they would be protected and that would be a priority of the company. It wasn’t what we wanted – it was what the community was saying were its concerns, which is completely different. We’ve never gone to the community on an EA unless we knew it was in a cultural area.

So it’s drastically different already. . . but people would say, “I know you are trying to do a different process Chris, and we thank you for it, we think it’s great. But, not on this project. It just needs to go.”

So you needed to take that, but you needed to then ask them why. “What is it?”

And some people were just steadfast – they said, “I just don’t want the project in our territory.”

So for some, it was more of a principle thing, but other people had actual issues with the technology, with what the companies were doing, and we extracted all that through our consultation process.\textsuperscript{162}

\textsuperscript{161} Interview of Tyler Gray, supra note 113.

\textsuperscript{162} Interview of Councillor Lewis, supra note 50.
After gathering community feedback, it became evident to the Team that the concerns of the community would direct the areas of focus in the technical review, as well as provide a context for understanding the impacts to the areas covered by the technical review. Some of the broad themes the Team distilled from community input were:

- the desire of members to stay connected to their lands;
- the sacredness of Howe Sound and the need to rebuild its health;
- the duty of the Squamish people to protect their lands from industrialization; and
- an overall mistrust of industry and government due to the legacy of colonialism and pollution caused in historical industrialization of Howe Sound.\(^{163}\)

Specific concerns included:

- impacts to marine life caused by the seawater cooling technology proposed for the Woodfibre facility;
- impacts to Skwelwil’em Squamish River Estuary Wildlife Management Area caused by digging and placement of the pipeline;
- accidents caused by chemicals, fires or possible explosions that could harm local communities;
- the location of the compressor station;
- visual impacts of the projects;
- impingement on untouched areas of Squamish territory; and
- lack of benefits flowing to the Squamish community.\(^{164}\)

These concerns became the focal points in PGL’s technical review of the proponents’ material. In other words, a Squamish lens was placed on the material provided to the Crown by the proponents such that particular areas of concern for Squamish Nation could be explored and analyzed in further detail.

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\(^{163}\) Interview of Aaron Bruce, *supra* note 45; Interview of Chief Campbell, *supra* note 49; Interview of Councillor Lewis, *supra* note 50; Interview of Tyler Gray, *supra* note 113

\(^{164}\) *Ibid.*
5.4.4.7 Technical Review of Proponent Materials

The method used to review the technical data involved filtering through the proponent’s material to identify proponent bias, locate gaps in the information provided, and request follow-up information related to Squamish-specific concerns.\textsuperscript{165} The technical review prioritized the six Guiding Topics, as well as risk of accidents (because this was identified as a significant concern by the community).\textsuperscript{166} To this end, the technical review focused on the following:

1) Risk of accident or malfunction;
2) Impacts on the marine environment;
3) Impacts on the terrestrial and freshwater environment;
4) Impacts on lands where Squamish has formal governance or a defined management objective (lands recognized in the 2007 Agreement on Land Use Planning between Squamish Nation and BC, candidate sites not included in the 2007 LUP, the Skwelwil’em Wildlife Management Area, reserve lands, fee simple lands owned by Squamish Nation, lands recognized in Xay Temíxw but not represented in other agreements);
5) Impacts on the use and occupancy of Howe Sound; and
6) Impacts on transmission of culture, history and language.\textsuperscript{167}

In conducting the review, PGL utilized the data provided by the proponent. This decision was made due to time constraints and Squamish Nation’s desire to conduct its review in roughly the same time frame as the Crown EA.\textsuperscript{168} Squamish would have preferred to collect technical data independently, but this not possible in the timeframe provided.\textsuperscript{169} Gray explained the technical review process as follows:

What we would be doing is reviewing the proponent’s materials, filtering through them . . . and then through that could have a gap analysis where we would tell the proponents “we need more information on this or that.”

\textsuperscript{165} Interview of Tyler Gray, \textit{supra} note 113.
\textsuperscript{166} Ibid.
\textsuperscript{167} Bruce and Hume, \textit{supra} note 46 at 14.
\textsuperscript{168} Interview of Tyler Gray, \textit{supra} note 113.
\textsuperscript{169} Ibid. In the future, the Squamish may rely on its own technical data.
There is, in my view, a definite bias always with the environmental impact assessment having proponent-driven studies and so with all of them, you need to filter the bias. If they have decided to address questions in a certain way, they’ve scoped grizzly bear habitat in a certain way typically to be in their interests. . . for example, it's sometimes better for them to scope the project relative to a regional study area -- the bigger the regional study area the lower the impact of a project is. That's the proponent’s decision to frame it that way and so one of our jobs in reviewing material like that is to really drill into what is Squamish interested in? Are there people interested in certain areas? That kind of question is more addressed by filtering through the materials that are available.170

Gray further explained how Squamish Nation values shaped the content of the technical review and the subsequent conditions imposed on the proponents by way of the Environmental Assessment Agreement (discussed more in Chapter 6):

I can't stress enough how valuable I found the focus group discussion . . .. Everybody wanted to talk about sea water cooling. And that is a classic example of values differing; some extent of impact to Howe Sound might be acceptable to a federal regulator, but the tolerance for those same impacts according to Squamish Nation values is much lower . . . and you know if reconciliation in part is about no longer subjugating values, this was a perfect example because here you have a proponent saying we want to make a big industrial water intake to run a cooling system so we are going to run all this sea water through these pipes . . . it's probably going to suck in a bunch of smaller fish, it won’t suck in bigger fish because we can have screening. To keep algae from growing in the pipes, we need to put in chlorine and then we'll discharge chlorinated water back into Howe Sound. And in Canada and in BC, there are water quality guidelines that say up to this sort of concentration, chlorinated water is deemed environmentally safe. So you can discharge water with a certain concentration of chlorine into the marine environment, and if it's within these guideline values, DFO is not going to look at it very hard and you’re within guidelines.

To my knowledge, provincial and federal agencies have never consulted with First Nations on developing water quality guidelines like those. And, regardless of whether the technical accuracy of those guidelines is true, or the environmental safety . . . what the concern was really for Squamish members was Howe Sound is healing and you need to understand that Howe Sound was destroyed . . . We couldn’t eat the fish, we still can't eat the fish, we couldn’t eat shellfish, some of them are coming back, whales are coming back, herring are coming back, the herring were almost decimated, they were all spawning on creosote piles and the eggs died, and when you have all this metal effluent

170 Interview of Tyler Gray, supra note 113.
coming from the Britannia mine . . . The context of Howe Sound and the value of it . . . it’s not a toilet . . we don’t want any more pollution going into Howe Sound.

So, seawater cooling became a real flash point on that project and it’s strictly because the values differed . . . and the project ended up getting approved at the EA level by both levels of government with sea water cooling in place.\textsuperscript{171}

According to Gray, the proponent’s position on the seawater cooling technology was that it presents low impact to herring and salmon because it is deep enough to avoid the spawn which resides close to the surface, and larger fish can swim away from the suction intake.\textsuperscript{172} The proponent asserted that suction power is quite low and argued that discharged water met government guidelines that are based on precautionary measures to protect humans and aquatic life.\textsuperscript{173} The proponent, therefore, did not see seawater cooling as posing a risk of toxicity to marine life.\textsuperscript{174} The Squamish technical review delved into this assertion because it had learned from the values expressed by the Squamish community that that there was no tolerance for any impact to marine life in Howe Sound. It analyzed the proponent’s assertions and included additional data which demonstrated that there were a number of assumptions made by the proponent that required further proof.\textsuperscript{175} Squamish Nation later requested the proponent address these assumptions through a follow up study to establish that seawater cooling caused no impact

\textsuperscript{171} \textit{Ibid.}
\textsuperscript{172} \textit{Ibid.}
\textsuperscript{173} British Columbia Environmental Assessment Office, “Woodfibre LNG Project Assessment Report”, (19 August 2015) at 82 -83.
\textsuperscript{174} \textit{Ibid.}
\textsuperscript{175} Interview of Tyler Gray, \textit{supra} note 113.
to marine life.\textsuperscript{176} This is not something that can be proven definitively, and this eventually led to the adoption of a different cooling technology which Squamish Nation approved (this is discussed further in Chapter 6).\textsuperscript{177}

The technical review moved through all the Guiding Topics and the sub-topics that informed the Guiding Topics, focusing in on the areas of significant concern to Squamish Nation.\textsuperscript{178} The review identified gaps, such as a lack of herring studies, the absence of a plan for protection from aquatic invasive species, and no analysis of the impacts to the Squamish River estuary.\textsuperscript{179} The review condensed the data, and provided a less-biased view for the community and Council to base its decision on.\textsuperscript{180}

5.4.4.8 Measuring Impacts to the Squamish VC

An important aspect of the Squamish method of assessment that distinguishes it from the Crown process is its lack of “significance determination” made in measuring the impacts of the Projects to the Squamish VC. Bruce explained that engaging with the community led the Team to realize that the Crown’s significance determination measure did not fit with the Squamish worldview because you cannot just disconnect the ball of values to measure individual impacts without losing the meaning of the interrelated whole.\textsuperscript{181} Furthermore, any impact at any level to

\textsuperscript{176} Ibid. This request formed one of the conditions later imposed on Woodfibre by Squamish Nation in the Environmental Assessment Agreement.

\textsuperscript{177} This is discussed in Chapter 6.

\textsuperscript{178} Interview of Tyler Gray, supra note 113.

\textsuperscript{179} Ibid.

\textsuperscript{180} Interview of Tyler Gray, supra note 113.

\textsuperscript{181} Interview of Aaron Bruce, supra note 45.
any of the interconnected values was seen to be important and thus the Western science “significance determination” did not resonate with Squamish Nation.\textsuperscript{182}

Significance determinations are central to the Crown EA process. According to Gray, this involves defining indicators of impacts to a particular environmental component, and then measuring the significance of those impacts to the environmental component.\textsuperscript{183} If an impact is seen as not significant, then it receives little attention. If an impact is significant, then mitigation measures are explored.\textsuperscript{184} Gray points out, however, that while the impacts to an environmental component can be seen objectively, a significance determination is inevitably subjective.\textsuperscript{185} Ehrlich and Ross state that the “determination of significance depends on the subjective informed judgement of decision makers concerning the value component being considered” and that when an EA “significance determiner applies subjective informed judgement to make a significance determination, it reflects the significance determiner’s (and ideally, society’s) values.”\textsuperscript{186} While significance determinations are often characterized as objective measures, there is a subjective component to them. Ehrlich and Ross state:

In the case of co-management, and in other settings where the potentially affected public includes primarily Aboriginal communities, social values of the potentially affected community should be an important factor in determining significance. When these values conflict with those of non-Indigenous society, reaching significance determination can be much more difficult.\textsuperscript{187}

\textsuperscript{182} \textit{Ibid.}
\textsuperscript{183} Interview of Tyler Gray, \textit{supra} note 113.
\textsuperscript{184} Interview of Tyler Gray, \textit{supra} note 113.; Bruce and Hume, \textit{supra} note 46
\textsuperscript{185} Interview of Tyler Gray, \textit{supra} note 113.
\textsuperscript{187} \textit{Ibid.}
Ehrlich and Ross suggest that rather than using a significance determination it is better to pose the question, “Does the impact matter enough so that it should be reduced or prevented?” They indicate that “this wording clarifies the decision while emphasizing the subjective determination of acceptability based on social values.” In other words, it is a more accurate way of asking whether an impact should be considered, and it dispenses with the myth that significance determination is a purely objective question.

Squamish Nation, like many Indigenous nations, believes that it is in the best position to determine the acceptability of impacts to lands in which it holds Aboriginal rights and title. Indeed, the fact that significance determinations are informed, but subjective, decisions, is why Squamish believes Indigenous nations, not proponents and the Crown, should determine how projects impact their Aboriginal rights. The decision is not purely objective science – the extent of an impact is dependent on a value system and only Indigenous nations themselves can interpret that value system in relation to their rights and title. With this perspective in mind, the Team produced the Assessment Report with a philosophy that it would not “determine what constitutes a significant impact on Squamish Nation interests.” In other words, it would leave the conclusion regarding impacts to the Squamish VC to the Squamish decision-makers. Gray explained:

Our report, and the same information that we presented verbally, was quite careful to say that we understand this is an area of high concern, but we are not going to say this is acceptable or unacceptable. We want each of the decision-makers to individually make those determinations.

188 Ibid.
189 Bruce and Hume, supra note 46 at 15.
And that is a holistic way of doing EA. Here are a bunch of facts, and one of the reasons to take these six guiding topics, none of which is “what is the impact on Squamish Nation’s Aboriginal rights?” is because what we're trying to do is provide the information on what we believe to be, within the time we had, with the compromises we had to make, the necessary preconditions to support the on-going assertion and practice of rights and broader interests that are incidental to those rights.

So we're focused on the necessary preconditions, but individuals have to decide because it's different for each individual and their background and their families, where they live and what their values are.\textsuperscript{190}

The objective of the Assessment Report, therefore, was not to determine what impacts were acceptable or unacceptable based on a significance determination, but to “describe potential impacts, identify potential mitigation to make the project as ‘good’ as it could possibly be, and to summarize the Review conclusions.”\textsuperscript{191} The conclusion regarding what was acceptable was to be made by the Squamish Nation decision-makers, based on their considerations.

\subsection*{5.4.4.9 Preparing the Squamish Nation Assessment Report}

The Team prepared the Assessment Report as a confidential internal document specifically for the Squamish community and the Squamish Council. Its aim was to provide the community and Council with community-specific information on the environmental, cultural and safety aspects of the project so that the Council could make an informed decision on whether, or not, to provide consent to the Projects.\textsuperscript{192} Gray explained the preparation of the Assessment Report:

We were trying to create a structure of how we were going to write this up, while at the same time the content of a lot of it was being developed by our technical review gap

\begin{footnotesize}
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\item \textsuperscript{190} Interview of Tyler Gray, supra note 113.
\item \textsuperscript{191} Bruce and Hume, supra note 46 at 15.
\item \textsuperscript{192} Ibid.
\end{itemize}
\end{footnotesize}
analysis and to Woodfibre’s credit, direct bilateral consultation - they were willing to answer some questions through our channels that they were less willing to do in a public forum . . particularly things around risk and safety. We had much more candid information from Woodfibre through those channels to address some of these gaps through that. So that was the focus during those few months, and at the same time we were still getting a lot of community input, the seawater cooling issue continued . . .

We were trying to get some idea here on how to condense this information so that the decision-makers could make an informed decision and also figure out where we could push back and improve this project and eliminate some of these core concerns . . . sea water cooling is one, the estuary is one, the compressor station.

So we were merging it all together – what are the key issues, which ones do you think could be solved either in part or in whole through a condition of approval, and which ones simply can't? And then we condensed that down into the conclusions which ended up as a 1000-page report.193

Bruce explained the Assessment Report as follows:

Once we had all the information from the community, we also took a lot of information from the Crown process, and so although we weren't formally participating in the Crown process, we were sending our environmental consultant to the Working Group meetings in order to get information to bring to our process.

So, we had all the information, we've got our assessment tool now, this ball of values, and we just had to sit down in a room with our team and just start working through it. Some of it had to go and be assessed more in the Western scientific way and then other things would get raised in the room with the knowledge-holders on our Team.

And then we wrote the report up . . I mean we couldn’t assess the whole project, we just didn’t have the capacity to do that. So it was priority issues that were identified by the community and in the end we came up with twenty five conditions that were related to those priority issues.194

The Report included the material obtained through community engagement and the technical review of the proponents’ data prepared by PGL. It also included all notes from the focus groups and community meetings, reflecting a range of views expressed by Squamish Nation members.

193 Interview of Tyler Gray, supra note 113.
194 Interview of Aaron Bruce, supra note 45.
The Assessment Report made recommendations regarding the type of mitigation measures that could address the central concerns of the community, but also acknowledged that the mitigation measures could not guarantee zero impact on the environment.195

5.4.5 Step 4 - Squamish Nation Decision-making

The Team presented the Assessment Report to the Squamish community at a meeting held 11 June 2015.196 The community had the opportunity to consider and provide input in regard to the findings of the Assessment Report.197 The community was not united in its perspective regarding the Projects.198 Some members of the community voiced strong opposition to the Projects.199 However, of those opposed, most were pleased that the Squamish Nation had chosen to develop its own process for assessment.200 A 2015 article in the *Squamish Chief* cites Joyce Williams, organizer of the Skwomish Action anti-LNG rally stating, “I am grateful to our Squamish Nation council for taking the initiative to conduct their own review process . . . As First Nation people, we have different values and concerns regarding the Environmental

198 Interview of Aaron Bruce, *supra* note 45; Interview of Chief Campbell, *supra* note 49; Interview of Councillor Lewis, *supra* note 50; Interview of Tyler Gray, *supra* note 113.
200 Interview of Aaron Bruce, *supra* note 45.
Many community members supported the Squamish Process itself, but some did not support the Projects, because, as the Assessment Report indicated, there could be some negative impacts, despite the imposition of Squamish Nation conditions on the Projects. Some community members were of the view that there should be zero impact whatsoever, and thus the decision-makers, the Squamish Council, had to consider divergent community perspectives.

At the community and Council meetings, Bruce presented the legal position of the Squamish Nation and the result of opposing the Projects under current Canadian law. It was important to note that a vote by Council against the Projects would not guarantee that the Projects would not proceed. Trying to halt the Projects would mean a court battle, and given the Woodfibre facility was being proposed on a privately-owned, brownfield site, Squamish Nation’s legal position to argue adverse impacts to Aboriginal rights and title was very complicated and uncertain. Imposing legally binding conditions on the proponents through private contracts represented a way to apply Squamish law to the Projects, and to enable Squamish oversight and governance over the future development and implementation of the Projects, which would not be possible if the Nation only participated in the Crown EA process. As will be discussed in detail in the next chapter, the Squamish Process provided Squamish Nation with a means to create a new governance structure over the Projects through

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202 Interview of Aaron Bruce, supra note 45.
203 Interview of Tyler Gray, supra note 113.
204 Interview of Aaron Bruce, supra note 45.
205 Ibid.
206 Interview of Aaron Bruce, supra note 45.
the use of private contracts, but constraints still remained due to the concurrent operation of the Crown EA and limited recognition of Indigenous jurisdiction in Canadian law more generally.

The Team presented the Assessment Report to the Council on 25 June 2015, along with conditions that could be placed on the proponents (and BC). The Team distilled the central concerns from the community and drafted 25 Squamish Conditions (the “Conditions”) that could be placed on the proponents and the province, through contractual agreements, should the Council vote in favour of the Projects. On 26 June 2015, the Squamish Council voted on whether to consent to the Projects subject to the 25 Conditions. 12 Council members voted in favour, 2 opposed, and 2 abstained from voting. 207

5.4.6 Step 5 – Squamish Nation Conditions, Environmental Assessment Agreements and Certificates

Once the Squamish Nation Council voted to proceed with the Projects, the Team moved forward to establish agreements with Woodfibre LNG and FortisBC. 208 The Squamish Nation Environmental Agreements (“SN-EA Agreements”) are the means Squamish Nation used to legally bind the proponents to perform the Conditions and indicate Squamish consent (should the Conditions be met). Private contracts were used because Squamish Nation lacks the legislative


208 Squamish Nation Environmental Assessment Agreement Between Squamish Nation and Woodfibre LNG Limited, 14 October 2015, [unpublished] and Squamish Nation Environmental Assessment Agreement Between Squamish Nation and FortisBC Energy Inc. 22 June 2016 [unpublished] [these are referred to collectively as the SN EA Agreements].
authority the province and federal government have to compel proponents to comply with their laws. In other words, private contracts were a creative way to address the inadequacy of the Canadian legal system to recognize Indigenous jurisdiction. The Conditions placed on BC are found in the Squamish LNG Benefits Agreement between Squamish Nation, BC, and BC Hydro.209

Of the 25 Squamish Conditions, 13 apply to Woodfibre LNG, 9 apply to FortisBC, and 5 apply to the Province of BC.210 The Conditions are central to the Squamish Process, as it is through the Conditions that Squamish Nation applies its values and laws and ensures its continued governance over the Projects. Through the SN-EA Agreements, “Squamish Nation is able to make its conditions of approval legally binding and enforceable with legal and equitable remedies such as injunctions, specific performance, and damages.”211 The SN-EA Agreements are also advantageous to the proponents, as they set out a “clear and certain process for the proponents to follow in order to satisfy the conditions” and maintain Squamish Nation’s consent.212 Squamish Nation Environmental Certificates are contained within the agreements

209 Squamish Liquefied Natural Gas (LNG) Benefits Agreement Between Her Majesty in the Right of Province of British Columbia, British Columbia Hydro and Power Authority, and Squamish Nation, 7 March 2019, online: <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/squamish-nation>.
210 SN Bulletin-LNG 4, supra note 196. The Conditions placed on the province were negotiated through the Squamish Liquefied Natural Gas (LNG) Benefits Agreement Between Her Majesty in the Right of Province of British Columbia, British Columbia Hydro and Power Authority, and Squamish Nation, 7 March 2019, online: <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/squamish-nation>.
211 SN CEAA Review Panel Submission, supra note 197 at 8.
212 Ibid. The central content of the SN-EA Agreements are the Conditions imposed by Squamish Nation on the proponents. The main condition agreed to by Squamish Nation is its promise to issue the Environmental Assessment
indicating Squamish Nation’s approval of the Projects. The Certificates can be revoked by Squamish Nation if the proponents breach the Conditions of the SN-EA Agreements. If this were to occur, the Projects would be placed on tenuous grounds because Squamish Nation did not participate in the Crown’s EA and would have ground to argue that consultation did not take place (this is discussed more in Chapter 6).

On 24 July 2015, Woodfibre accepted all of the 13 Conditions and on 14 October 2015, Squamish Nation and Woodfibre executed the Squamish Nation Environmental Assessment Agreement. On 14 September 2015, FortisBC agreed to some of the Conditions. Negotiations continued and on 22 June 2016, Squamish Nation and FortisBC executed their SN EA Agreement with FortisBC agreeing to all 5 Conditions.\textsuperscript{213} Table 1 outlines the 25 Conditions and the corresponding contractual obligations found in the SN-EA Agreements with the proponents (as well as the LNG Benefits agreement between Squamish Nation and BC (and BC Hydro)).\textsuperscript{214} These Conditions are discussed in detail in Chapter 6.

<table>
<thead>
<tr>
<th>WOODFIBRE LNG PROJECT SQUAMISH NATION 25 CONDITIONS</th>
<th>CONTRACTUAL OBLIGATIONS</th>
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<tbody>
<tr>
<td>No.</td>
<td>Corresponding contractual provisions in Squamish Nation Environmental Agreement between Squamish Nation and Woodfibre LNG Limited</td>
</tr>
<tr>
<td>Conditions placed on Woodfibre LNG Limited:</td>
<td>Seawater Cooling Condition (section 4.1)</td>
</tr>
<tr>
<td>1. Conduct further studies on the proposed sea-water cooling method that will prove to the satisfaction of the Squamish Nation that the</td>
<td></td>
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Certificate should the proponents comply with the Conditions. Squamish Nation also agrees “not to amend or modify the Squamish Nation Environmental Certificate unless by agreement” with the proponents. Should Squamish Nation breach this condition, the matter would be addressed through the dispute resolution provision and arguably, contractual remedies would be available to the proponents.

\textsuperscript{213} SN EA Agreement (FortisBC), \textit{supra} note 208.

biological impacts on marine life are acceptable to it and also that the method has lower overall environmental impact than alternative technologies. If WLNG cannot provide conclusive evidence to demonstrate this, then WLNG will pursue an alternate method of cooling the natural gas that is acceptable to the Squamish Nation.

2. Restore Mill Creek and the adjacent area to a “green zone” designation. Formal recognition that the project is located on the former village of Swiy’a’at will also be located in the green zone.  
   Green Zone Condition (section 4.2)

3. Locate other water sources during critical stream flow periods if the necessary water flow amount is not met on Mill Creek.  
   Mill Creek Condition (section 4.3)

4. Fully fund a Squamish Nation marine use plan to help address cumulative impacts of industrial projects on the marine environment in Howe Sound.  
   Marine Use Plan Condition (section 4.4)

5. Provide access to Squamish Nation members through the Controlled Access Zone to allow Squamish Nation to practice Aboriginal rights.  
   Access Through Control Zone Condition (section 4.5)

6. Partner with the Squamish Nation to co-manage the environmental management programs and the monitoring of the programs (including the funding of Squamish Nation participation)  
   Environmental Management Condition (section 4.6)

7. Provide insurance coverage or from of bond to address personal loss and injury costs of members who may be impacted by an explosion caused by an accident or malfunction of project.  
   Insurance Coverage Condition (section 4.7)

8. No future expansion of the project without Squamish Nation approval.  
   Project Expansion Condition (section 4.8)

   Bunker Fueling in Howe Sound Condition (section 4.9)

10. Conduct further study on noise impacts of the Project on marine animals.  
    Marine Mammal Condition (section 4.10)

11. Only operate the facility for the liquefaction and export of natural gas.  
    Use of LNG Facility Condition (section 4.11)

12. Make certain mitigation measures proposed in Crown EA application (that are considered voluntary) legally binding under Squamish Nation Environmental Certificate.  
    Binding Mitigation Measures Condition (section 4.12)

**Conditions placed on FortisBC:**

13. Avoid any industrial impacts in the Skwelwil’em Wildlife Management Area (“WMA”) boundaries by constructing the new pipeline completely underneath or around the WMA so that the pipeline surfaces outside of the WMA boundaries.  
    No Pipeline Construction Impacts within the WMA Condition (section 4.1)

14. No barges in the WMA.  
    No Barges in WMA Condition (section 4.2)

15. Relocate the compressor station from the location proposed in its EA Application to a location that poses no risk to Squamish members residing on any Indian Reserve in Squamish territory.  
    Relocation of Compressor Station Condition (section 4.3)

16. Route the pipeline to avoid impacts within, and adjacent to, the following cultural sites that have been legally designated under the Land Use Agreement with BC: Monmouth Creek, Stawamus Creek and Indian River. For certainty, in order to minimize disturbance to the cultural sites FortisBC will come to agreement with Squamish  
    Avoid Impacts to Cultural Sites Condition (section 4.4)
Table 1: 25 Squamish Conditions and corresponding contractual obligations found in the SN-EA Agreements between Squamish Nation, Woodfibre LNG, and FortisBC, and in the Liquefied Natural Gas Benefits Agreement between Squamish Nation, BC, and BC Hydro

5.5 Conclusion

This chapter has provided a detailed description of what motivated Squamish Nation to part with the Crown EA process to develop its own EA. It has carefully examined the questions and issues Squamish Nation faced in developing an EA separate from the Crown’s and has described how Squamish values and laws were brought to bear on the development of the
Process, particularly the Squamish method of assessment. The Squamish Process provided Squamish Nation decision-makers with the type of information it needed to make an informed decision on whether to provide consent to the Projects. This information came from engagement and deliberation within the Squamish Nation community, as well as independent technical review of the proponents’ project data.

Upon providing consent and having the proponents enter the SN-EA Agreements, Squamish Nation could then move on to ensuring performance of the Conditions by the proponents. The next chapter discusses the impacts of the significant Conditions placed on the proponents through the SN-EA Agreements. It also examines the impact of the Squamish Process (as a whole) on the Crown EA. Indeed, the Squamish Process provides a concrete example to analyze the possibilities and limitations an Indigenous community faces in building its own legal process in the face of a competing state jurisdiction.
Chapter 6: Impacts of the Squamish Process

6.1 Introduction

The Squamish Process is an example of an Indigenous legal process that created a deliberate space for the Squamish Nation community to make decisions about an industrial project proposed in Squamish Territory. It is an example of how Squamish Nation has asserted its jurisdiction to make decisions concerning use of the land, water, and resources in its territory. By building an assessment process outside of the Crown’s process, Squamish Nation decided for itself whether or not to consent to the Projects based on its own methodology and the information it considered relevant. Following community deliberation and a decision to consent to the Projects, Squamish Nation asserted itself as a \textit{de facto} third regulator alongside the federal and provincial governments. It did this by entering private contracts with the proponents (the “SN-EA Agreements”), legally binding them to fulfill Conditions to maintain Squamish approval. The Conditions are separate from those placed on the proponents by provincial and federal governments through the Crown EA, and as such distinguish Squamish Nation as a separate governing body. This was recognized by the proponents and is shown both in the SN-EA Agreements and comments made by Giraud:

\begin{quote}
We now have to take all the conditions from the three environmental reviews and ensure they are all incorporated in the detailed design work and planning for construction and operation of the Woodfibre LNG project.\footnote{Christine Endicott, “Woodfibre LNG receives federal approval”, \textit{The Squamish Chief} (18 March 2016) online: \url{https://www.squamishchief.com/local-news/woodfibre-lng-receives-federal-approval-3344980}.}
\end{quote}

It is also evident on the Woodfibre LNG website which states:
On October 14, 2015, Sḵwx̱wú7mesh Úxwumixw Council voted to approve an Environmental Assessment Agreement for the proposed Woodfibre LNG project, and issued an Environmental Certificate to Woodfibre LNG.

The agreement comes from Sḵwx̱wú7mesh Úxwumixw independent assessment of the project; a process that began in May 2013 when Woodfibre LNG first applied to undergo a Squamish Nation environmental review.

Woodfibre LNG is responsible for 13 of the conditions identified in the agreement. The remaining conditions are the responsibility of FortisBC and the Province of British Columbia. We are actively working with the Sḵwx̱wú7mesh Úxwumixw technical and leadership teams to ensure that each of these conditions are fully met. We will continue to work with the Sḵwx̱wú7mesh Úxwumixw to ensure these conditions are met throughout the life of the project.

We are proud to recognize the Sḵwx̱wú7mesh Úxwumixw as a regulator of the Woodfibre project and we acknowledge that their role as a regulator continues to enhance the project for the benefit of the local environment, economy, and community.²

The Conditions imposed on the proponents are integral to the Squamish Process and represent Squamish Nation’s ability to provide ongoing governance over the Projects; Bruce explained:

Issuing these conditions is quite significant in that the Squamish Nation has been able to identify what environmental issues are important to them and determine how these issues should be addressed from its perspective. The provincial and federal EA processes simply don’t allow for that.³


The Conditions are the means through which Squamish values and laws are applied to the implementation, operation, and eventual decommissioning of the Projects. Through the Conditions, Squamish Nation has been able to: change technology used in the Projects; alter the design of the Projects; commit the proponents to actions aimed at promoting sustainability and redressing cumulative adverse impacts sustained by Howe Sound; and secure promises from the proponents intended to address the community’s historical mistrust of industry. The first part of this chapter discusses how the Conditions are impacting the Projects; the second part reflects on how the Squamish Process (as a whole) has impacted the Crown process. The second part considers the communication between Squamish and Crown legal orders and the tensions that emerged from having two EA processes operate in tandem. It discusses possibilities and limitations revealed by the Squamish Process by examining the role of Squamish Nation as a third regulatory body; considering how the Squamish Process can be viewed as transformational based on criteria delineated by Neil Craik;⁴ reflecting on the use of private contracts in governing public law matters; and discussing whether the Squamish Process reflects the principles of FPIC.

6.2 Impact of the Squamish Conditions on the Projects

6.2.1 The Seawater Cooling Technology Condition

One of the most significant Conditions placed on Woodfibre LNG by Squamish Nation relates to how the LNG is cooled during production. In the initial project design, Woodfibre LNG proposed using a seawater cooling technology, which would result in warm, chlorinated

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water being discharged into Howe Sound. The seawater cooling method presented concerns for Squamish Nation because the community felt strongly that there should be no impact to the Sound. The proposed seawater cooling technique conflicted with the Squamish Nation’s sense of its responsibility to prioritize the protection and healing of Howe Sound, especially its responsibility to enhance the re-emergence of herring and other marine species which were decimated due to decades of industrialization. Chief Campbell explained:

The concerns we were hearing from the community were around how the project was compatible with the revitalization of Howe Sound, particularly herring biomass, where we have seen herring finally return after decades of absence. The salmon are in peril. We used to have very solid runs up the Squamish and Cheakamus. Those have been collapsing over the last number of decades. So the project represented a significant challenge with sea water cooling, the technology that they initially approved. Sea water cooling would dump millions of gallons of water that had been heated and chlorinated back into Howe Sound right on a migratory path of the herring and salmon.

So we said that’s a non-starter, but we couldn’t just base it off our own opinion and say, “we don’t like seawater cooling.” We had to base it off of analysis and then give the recommendation to the proponent to say which technology the Squamish Nation approves and supports - “now you go and do your assessment to see if it’s feasible and you can actually move the project forward by using air cooling technology.”

Bruce discussed how community concerns over seawater cooling drove the drafting of the seawater Condition placed on the proponent:

Sea water cooling, in its most simplest description, sucks water up from the ocean and then is pressured through the project to cool the gas and then it gets sort of spit back out into the ocean at a warmer temperature and slightly chlorinated. There are projects all

5 Interview of Squamish Nation legal counsel Aaron Bruce/ Kelts’-tkinem (13 May 2019) [Interview of Aaron Bruce]; Interview of Tyler Gray, Senior Environmental Consultant at PGL Environmental Consultants (Gray) (22 August 2019) [Interview of Tyler Gray]; Interview of Squamish Nation Hereditary Chief and Councillor Ian Campbell/Xalek Sekyu Siyam (19 August 2019) [Interview of Chief Campbell]; Letter from Squamish Nation to Woodfibre LNG, “Squamish Nation Decision on Cooling Technology”, (19 October 2016) [Cooling Technology Letter].

6 Interview of Chief Campbell, supra note 5.
over the world that use this technology and it has been quite controversial, but it is one of the cheaper ones, and using the ocean is a big advantage for the project rather than using a bunch of the electricity or other things.

So, the community basically said, “there's no way we could support this project if there's any impacts on the herring in Howe Sound,” because if the herring are impacted then whales are impacted, dolphins are impacted and it keeps going down that chain.

In setting out our conditions for Woodfibre, we felt they hadn’t provided enough information to demonstrate that there wouldn’t be an adverse impact on the Squamish Nation, in terms of the impact on herring . . . If they could provide that information to rule that out for us, we would consider it, or, the other option they had, was to look at other technologies on how to cool the gas.7

The community’s concern regarding the impacts of seawater cooling on herring was translated into a Condition that Woodfibre LNG conduct further studies to validate its position that there would not be no impacts to marine life caused by the introduction of warm water to Howe Sound. Alternatively, Woodfibre LNG could select a different cooling technology that guaranteed less impact and met Squamish approval. The SN-EA Agreement with Woodfibre LNG provides Squamish Nation with the power to make the final decision regarding cooling technology. In terms of the process for getting to that decision, through their Agreement, Woodfibre LNG and Squamish Nation agreed to form a Working Group to coordinate all matters of the Agreement. With respect to selecting the cooling technology, they agreed to hire a neutral third-party specialist to conduct “a study to assess and compare the net environmental effects associated with three cooling technologies capable of achieving production of 2.1 million tonnes

7 Interview of Aaron Bruce, supra note 5.
of LNG per annum.” These technologies included: 1) seawater cooling, 2) air cooling, and 3) air cooling with trim water (the seawater cooling study).

The seawater cooling study was carried out in 2016, with discussions going back and forth between Woodfibre LNG and Squamish Nation. Woodfibre LNG and the Team kept the Squamish community informed of the types of technologies it was considering. Of the three possible technologies, the third-party specialist determined that seawater cooling had the highest environmental impact due to its discharge of warm chlorinated water into Howe Sound. Air cooling with trim water would involve cooling the gas using freshwater spray obtained from nearby Mill Creek; this could impact freshwater and anadromous (salmon) fish. Air cooling would have the lowest environmental impact (it would only result in some exhaust noise and heat), but it would result in approximately a 2% production decrease. The Squamish Council rejected Woodfibre’s preferred technology of seawater cooling in favour of a strictly air cooling method because it had the smallest potential to impact on marine life and was most consistent

8 Squamish Nation Environmental Assessment Agreement Between Squamish Nation and Woodfibre LNG Limited, 14 October 2015, [unpublished] at 7 [SN-EA Agreement Woodfibre].

9 Ibid. Trim water refers to the use of a water spray from a nearby creek.


11 Ibid.

12 Ibid.
with Squamish Nation values.\textsuperscript{13} Its rationale is set out in its 19 October, 2016 letter to Woodfibre LNG:

Squamish culture depends on an intact and healthy marine environment. Over the last century, industrialization of Howe Sound has contributed to marine degradation which has seriously impacted on Squamish Nation’s practice of its culture and aboriginal rights in Howe Sound. The Howe Sound marine environment has only recently shown signs of revitalization. This trend must be protected and fostered. Thus deterioration of the marine environment, or impeding additional revitalization of the marine environment, may lead to significant impacts on Squamish Nation’s culture and aboriginal rights and title.

Seawater cooling has the potential to adversely impact on these values. WLNG has not provided any further information satisfactory to the Squamish Nation to demonstrate seawater cooling will not adversely impact on these values. Therefore, the Squamish Nation rejects seawater cooling as an option for cooling the natural gas for the Project.

The Squamish Nation has concerns that air cooling with freshwater spray will result in mortality and/or injury to freshwater or anadromous fish or their freshwater ecosystem. There are only a small number of creeks that can support spawning of salmon. All freshwater ecosystems must be protected from incremental cumulative effects, particularly those that support salmon. The measurable residual effects on freshwater habitat will impact on our cultural and spiritual values as well as our exercise of aboriginal rights.

Air cooling appears to have the lowest net environmental effects and least likely to adversely impact on Squamish Nation cultural, spiritual and environmental values and Aboriginal rights. Therefore Squamish Nation has chosen air cooling as the cooling technology to be used for the Project.\textsuperscript{14}

Squamish Nation’s spiritual and cultural relationship with the marine environment of Howe Sound, in particular its values and laws relating to protecting the marine species, led to its decision to insist on a change to the cooling technology. After deliberating with Squamish Nation’s spiritual and cultural relationship with the marine environment of Howe Sound, in particular its values and laws relating to protecting the marine species, led to its decision to insist on a change to the cooling technology. After deliberating with Squamish

\begin{footnotesize}
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\item[\textsuperscript{13}] Cooling Technology Letter, \textit{supra} note 5. See also: Jennifer Thuncher, \textquotedblleft Sea-cooling system out, air-cooling in – Squamish Nation a catalyst for change at Woodfibre LNG\textquotedblright, \textit{The Squamish Chief} (21 October 2016) online: <https://www.squamishchief.com/local-news/sea-cooling-system-out-air-cooling-system-in-3345935>.
\item[\textsuperscript{14}] Cooling Technology Letter, \textit{supra} note 5.
\end{itemize}
\end{footnotesize}
Nation on this topic, Woodfibre LNG responded by agreeing to the change. Giraud explained the importance of this decision:

One of the things people don’t know is that this may have been one of the first times a major industrial project not only had the approval of the Nation, but they were actually involved in the selection of some of the technology. . . That’s not common.15

Giraud indicated that although the Crown assessments did not conclude that seawater cooling was problematic, it was necessary to consider the Squamish Nation perspective. In his words, the Western scientific view:

doesn’t take into account how people feel and the Squamish Nation’s connection with the water, in particular, the fish . . . when you start to apply traditional values, Indigenous knowledge, cultural issues, things that aren’t normally captured or considered . . . there are things that can be solved through a technical perspective, but it doesn’t consider the other side.16

In a statement to the North Shore News regarding the shift in cooling technology, Giraud stated: “[t]his was a Squamish Nation decision and a Squamish Nation process . . . The reason we do this is because we respect our relationship with the Squamish Nation and it was a contractual obligation we made to them.”17 Giraud acknowledged that “the air-cooling system will cost the company more” and “there’s production loss that results from the decision . . . But we accept that . . . It is something we think we can overcome.”18

15 Interview of Byng Giraud, former Woodfibre LNG Ltd. Vice President of Corporate Affairs (24 October 2019) [Interview of Byng Giraud].
16 Ibid.
18 Ibid.
Woodfibre LNG’s acceptance of Squamish Nation’s decision on cooling technology
created a conflict with the EA Certificate issued under the Crown process. Bruce explains:

What’s really interesting about this is that the provincial and federal governments had
approved seawater cooling in their processes and so the company was now in a position
where one level of government [Squamish] had said no to seawater cooling and the other
levels [Crown] had said yes to it.

So if they [Woodfibre LNG] agreed with one or the other they were going to be in breach
of one of the processes. And so they went with Squamish’s decision and had to go
through an amending process under the Crown process to change the technology under
their EA certificate.19

Because seawater cooling was the approved technology under the Crown EA, Woodfibre LNG
had to apply for an amendment to its BC EAO Environmental Assessment Certificate (which
was also approved through the federal process). It applied for an amendment on 27 January 2017
and was granted the amendment on 12 July 2017. 20 This issue illustrates the need for better
communication/harmonization between Crown and Indigenous legal orders which will be
discussed in more detail later in the chapter.

It is prudent to note here that the SN-EA Agreements contain dispute resolution
mechanisms to address disputes relating to their implementation and the status of Squamish
Nation’s satisfaction of compliance with the Squamish Conditions.21 The parties agree to attempt
to resolve disputes through their representatives in the Working Group, and if the issues cannot

19 Interview of Aaron Bruce, supra note 5.
20 In the Matter of the Environmental Assessment Act SBC 2002, c 43 and In the Matter of Environmental
Assessment Certificate #E15-02 Held By Woodfibre LNG Limited for the Woodfibre LNG Project Amendment #1
to Certificate #E15-02.
21 SN-EA Agreement Woodfibre, supra note 8 at section 8; Squamish Nation Environmental Assessment Agreement
Between Squamish Nation and FortisBC Energy Inc. (22 June 2016) [unpublished] at section 7 [SN EA Agreement
FortisBC].
be resolved, then to bring in a mutually agreed upon expert to assist. If the disputes cannot be
resolved through this process, then matters are to be dealt with through arbitration. Legal
remedies for non-compliance of the Conditions by the proponent include the equitable remedies
of specific performance and injunctive relief, in addition to damages. Bruce explained that it was
important to include equitable remedies because Squamish Nation is most concerned with
eliminating the impact to the environment, and not simply receiving monetary awards. He
explained why private law contracts with equitable remedies were a creative response to the fact
that Squamish Nation lacks the legislative authority to compel the proponents to act:

Under legislation the province and the federal government have ways to enforce their
decisions, but obviously we don’t have that and so we had to look at contract law and see
how we could ensure that if the company didn’t satisfy the conditions, we had some way
to make them do it or have some legal remedies. And, it was important to the community
that it wasn’t just about the legal term “damages” – that we would just get money if they
breached the agreement.

So, one of the key things for us on some of these major things like seawater cooling, the
economic benefits, or some of these big ticket items – if the company breached those
ones, then we had the opportunity to effectively revoke their EA certificate.

It wasn’t about damages. We wanted to make it clear here that it was more about equity,
looking at specific performance, injunctions and things like that to ensure that they just
did it. That’s what was key to the Squamish Nation – we needed a tool that would just
make the companies do what they said they were going to do.

Equitable remedies were built into the SN-EA Agreements as a mechanism to compel the
proponents to perform the Conditions imposed by Squamish Nation. Should the proponents fail
to perform the Conditions as per the Agreements, Squamish Nation can revoke the EA
Certificates it has issued pursuant to the Agreement, demonstrating it no longer consents to the

22 Interview of Aaron Bruce, supra note 5.
23 Ibid.
Projects. If this were to occur, it is uncertain what the result would be. Given that Squamish Nation did not participate in the Crown EA process, significant questions would arise as to whether the Crown has met its duty to consult and accommodate the Squamish Nation. This provides incentive for the proponents to comply with the Squamish Conditions and to maintain a strong working relationship with Squamish Nation. By structuring the process this way, Squamish Nation sought to emphasize the importance of proponent accountability. The contract is structured to enable Squamish Nation to have ongoing oversight over the Projects and to provide an avenue for Squamish Nation to ensure it can provide ongoing consent.

6.2.2 No Pipeline Construction Impacts within the Swel’wil’em Squamish Estuary Wildlife Management Area

In addition to seawater cooling, community consultation revealed deep concern about Project impacts to the Squamish River estuary located within the Swel’wil’em Squamish Estuary Wildlife Management Area.24 A Wildlife Management Area (WMA) is an area of land designated under s. 4(2) of the Wildlife Act25 where conservation and management of fish, wildlife and their habitats are prioritized. Pursuant to the Wildlife Act, “the Regional Manager for the Ministry may establish orders that prohibit or restrict certain activities that may have impacts on wildlife or habitat, and government or the Minister may make regulations respecting use or occupation of a WMA. New activities that involve use of land or resources in a WMA also

24 Swel’wil’em Squamish Estuary Wildlife Management Area online: <https://www2.gov.bc.ca/gov/content/environment/plants-animals-ecosystems/wildlife/wildlife-habitats/conservation-lands/wma/wmas-list/skelwil-em-squamish-estuary> [SSE WMA].
25 Wildlife Act, RSBC 1996 Ch. 488.
require written permission from the Regional Manager.” Management of WMAs involves a combination of considerations including “provincial legislation and policy guidance; the long-term WMA management plan for the site, and regional or site-specific regulations, policies, legal agreements and decision tools.” The province “consults with First Nations when considering the creation of new WMAs, and WMA management plans are developed or updated in partnership with First Nations to ensure their interests are respected and that they can meaningfully exercise their Aboriginal rights in the context of shared conservation concerns and public health and safety legislation.”

The Swel’wil’em Squamish Estuary Wildlife Management Area (SSE WMA) was designated under the *Wildlife Act* in 2007, with Squamish Nation as a managing partner. BC and Squamish Nation co-manage the SSE WMA under the 2007 Skwelwil’em Squamish Estuary Wildlife Management Area Management Plan (the “SSE WMA Management Plan”). The Executive Summary of the SSE WMA Management Plan describes the area as follows:

The Skwelwil’em Squamish Estuary Wildlife Management Area (WMA) is a 673 hectare area located at the head of Howe Sound in Squamish, BC. The estuary is a highly productive ecosystem and provides significant winter migratory bird habitat. The designation of the WMA is a result of 25 years of planning under the Squamish Estuary Management Committee (previously the Squamish Estuary Coordinating Committee). Upon completion of the 1999 Squamish Estuary Management Plan, a land exchange between the Province, BC Rail and the Squamish Nation along with a management agreement between the Ministry of Environment and Squamish Nation pertaining to the

management and planning of the WMA and Site A (Squamish Nation WMA) paved the way to the designation of the WMA.\(^{30}\)

Site A is a 30-hectare area within the SSE WMA that was transferred to Squamish Nation in a land exchange involving the District of Squamish, Squamish Nation, the BC Ministry of Environment, and BC Rail Properties Ltd. in 2001.\(^{31}\) A restrictive covenant was placed on the land title of Site A ensuring the site would be managed in a manner consistent with WMA objectives and since then, BC and Squamish Nation have cooperatively managed Site A and the WMA cooperatively under the SSE WMA Management Plan. The Plan states that “any development proposals not covered in this management plan should be reviewed cooperatively with the Squamish Nation.”\(^{32}\)

Squamish Nation has been connected to the Squamish River estuary for millennia. Indeed, the SSE WMA contains the village site of Ats’a’n, formally recognized in the SFN-BC LUP Agreement,\(^{33}\) and 3 former Squamish Reserves (No. 21 Skwawmish Island, No. 22 Skwulwailem, and No. 23 Ahtsann) once covered much of the area.\(^{34}\) According to Chief Campbell, the estuary has always been a source of valuable resources for Squamish people:

“The Squamish River estuary is very important for salmon rearing, fowl, all sorts of our values are there. We still collect resources from down in those areas. It is valuable


\(^{33}\) *Agreement on Land Use Planning Between The Squamish First Nation And The Province of British Columbia as represented by the Minister of Agriculture and Lands, (14 June 2007),* online (pdf):

\(^{34}\) These reserves were surrendered to the Crown in the early 1900s. See: SSE WMA Management Plan, *supra* note 29 at 7.
ecology so we want to preserve the estuary and we want to make sure that any piping that goes around the estuary would not impact it.  

Gray explained how he learned of the significance of the estuary to Squamish Nation during the community focus groups:

Hearing people talk about the history of displacement in the Howe Sound area . . . of the value of the Squamish River estuary . . . the breadbasket of life for the ancestors . . . it got me to recognize then, the weight of the co-management agreement for the Skwelwil’em Wildlife Management Area [the SSE WMA Plan], even though it is far from granting title back to the Nation, it is a recognition that this area should be hands off.

That value wasn’t stated explicitly . . . it, I would say, was revealed repeatedly by people talking about that history and I started to understand some bigger implications to Fortis’ suggestion at the time that they would do what’s called open cut trenching through a lot of the riparian areas there within the Wildlife Management Area.

That approach is not prohibited by law, but is contrary to the management objectives of that Skwelwil’em Plan . . . so they are allowed to and that’s why they are proposing it . . . and they are saying that we think the environmental effects won’t be that bad . . . that they can re-vegetate everything . . . and those facts may be true, that the biological part will heal, but I came to realize that the weight of that intrusion into Skwelwil’em, was hugely important. In other words, having industrial excavation in the WMA again had impact on Squamish Nation’s governance and cultural interests, not just the biology of the estuary. And so, if there was a way around that, we needed to start negotiating a way around that.  

The cultural and historical significance of the estuary to Squamish Nation is great, and as with Howe Sound, Squamish Nation acknowledges a responsibility to protect it and foster healing caused by past industrial damage. The community therefore has zero tolerance for any impact to the estuary and the Team understood that Conditions needed to be placed on the proponent to acknowledge this. Bruce explained how protection of the estuary was translated into Conditions:

35 Interview of Chief Campbell, supra note 5.
36 Interview of Tyler Gray, supra note 5
37 Ibid.
I would say that the other really big one [concerns], and there are a number of big ones, but the other really big one for the community was at the mouth of the Squamish River. In the estuary, there’s a Wildlife Management Area, which is a provincially protected area, the Squamish Nation actually worked with the province on a management plan for it, and naming and recognition. . . it has a Squamish name . . . so there is a deep connection to this area.

There is already an existing gas pipeline that goes through the estuary and in the Wildlife Management Area [WMA], but that was developed before the WMA was created. The gas line proponent [FortisBC] was just going to follow the same route and come up in the same place in the estuary. The community said they didn’t want any impacts, any above-ground impacts to this area, and so a condition that the pipeline company had to follow, or satisfy, was that they would go completely underneath the Wildlife Management Area and come up on the other side of Howe Sound, which is not going to be an easy task.

It was a big ask, an expensive ask, but in the end, they’ve agreed to it and are currently studying how they are going to manage that.38

FortisBC initially proposed to clear 10ha in the SSE WMA to construct the pipeline and to build barge landings within the area.39 After further consultation with the local community and particularly Squamish Nation, FortisBC decided to explore other options for routing the new pipeline outside the SSE WMA.40 In its SN-EA Agreement, FortisBC agrees to “construct the Project’s pipeline without industrial impacts within the WMA”41 and to “locate the entry and exit points of the pipeline’s installation path outside the WMA boundaries.42 It also agrees not to use barges to conduct work in the SSE WMA, or allow any of its contractors to install barge landings

38 Interview of Aaron Bruce, supra note 5
39 Interview of Tyler Gray, supra note 5.
40 Addendum 2 to its Application filed with the BC EAO. See: Fortis BC, “Eagle Mountain – Woodfibre Gas Pipeline Project: Synopsis of Addendum 2 and Addendum 3” (13 September 2015) available online: <https://www.projects.eao.gov.bc.ca/p/588511ddaeec9001b826f0d/project-details> [FortisBC Synopsis of Addendums to EAO Application].
41 SN-EA Agreement FortisBC, supra note 21, section 4.1/Squamish Condition #13.
42 Ibid.
or other physical structures in the area. To meet this Condition, FortisBC filed addenda to its Crown application modifying the pipeline route.

6.2.3 Buffer Zones to limit Pipeline Construction Impacts to Cultural Sites

FortisBC’s initial project proposal contained implications for three Cultural Sites protected under the SFN-BC LUP Agreement: Monmouth Creek, Indian River and Stawamus Creek Cultural Sites. While FortisBC took steps to avoid direct overlap with the Cultural Sites by routing the pipeline around them, construction of the pipeline would occur directly adjacent to those sites, creating high likelihood that impacts would be experienced. The SFN-BC LUP Agreement (reviewed in Chapter 3) provides significant protections for Squamish Nation Cultural Sites, including a requirement that mitigation measures be adopted in the event that development is will occur adjacent to a Cultural Site. Gray explained that there was concern that noise and human presence would increase during construction of the pipeline and that this could alter the sense of place experienced by members in the Cultural Sites, as well as lead to wildlife avoidance. To address this, Squamish Nation placed a Condition on FortisBC, requiring that it route the pipeline as best it could to avoid the Cultural Sites. It also required FortisBC to reach consensus with Squamish Nation to establish “reasonable buffer areas around each of the cultural sites.” Gray explains:

\[\text{\textsuperscript{48}}\] Gray explains:

\[\text{\textsuperscript{43}}\] Ibid.
\[\text{\textsuperscript{44}}\] FortisBC Synopsis of Addendums to EAO Application, supra note 40.
\[\text{\textsuperscript{45}}\] Interview of Tyler Gray, supra note 5.
\[\text{\textsuperscript{46}}\] SFN-BC LUP Agreement, supra note 33 at 15.
\[\text{\textsuperscript{47}}\] Interview of Tyler Gray, supra note 5.
\[\text{\textsuperscript{48}}\] SN-EA Agreement FortisBC, supra note 21, section 4.4/Squamish Condition #16.
[FortisBC is] obligated to basically minimize disturbance to that area to the extent reasonably possible, which is sort of a negotiated term, but that's going to mean that Squamish has a say on how quickly, and what time of year, Fortis does that construction in those areas. A pipeline has all sorts of ancillary components, like little lay down areas, small camps for a few trailers for a few months, little spur roads, and that kind of thing. So it's not just a strictly linear development, there are these other offshoots. Squamish now gets to say how close they can put anything like that in place. . . . through our work with the Rights and Title Department, we have hired a Squamish Nation member who is doing targeted outreach to knowledge-holders and users of these areas so that we can address that.49

As Gray indicates, the Conditions placed on FortisBC to avoid impacts to the Cultural Site are structured to ensure Squamish Nation consent is provided, and to enable continued application of Squamish Nation values and laws as the project progresses into the construction phase. The dispute resolution process is available should the parties disagree, and again, the remedies of specific performance and injunctive relief are available to Squamish Nation (in addition to damages) should the proponent not comply with the Conditions.

6.2.4 Relocation of Compressor Station and Insurance Coverage for Squamish Nation Members

The potential for explosion or malfunction of the LNG compressor were central concerns voiced by the community during consultation. Compressor stations are an integral part of a natural gas pipeline networks. They are placed strategically within the gathering and transportation pipeline network to help maintain the pressure and flow of gas. FortisBC originally proposed to locate a new compressor station in the District of Squamish, near to

49 Interview of Tyler Gray, supra note 5.
Squamish Nation reserve lands.\textsuperscript{50} Squamish Nation members and non-Squamish Nation residents living in the area expressed concern about “the proximity of the compressor station to residents, businesses, recreational opportunities, visual aesthetics and noise.”\textsuperscript{51} Chief Campbell explains:

There was going to be a compressor station right next to our community of Yekwaupsum. That’s in Squamish, known as the shops. Having the compressor station right next to an inhabited village, to us, even though probability is low, consequence is high in the case of a malfunction or explosion, so we wanted to just diffuse that by completely moving the compressor station away from any of our inhabited communities. We pushed it back to Mt. Mulligan, and that was away from any areas that could potentially be impacted by an explosion. Those conditions stemmed directly from feedback that we heard from members – of their grave concerns.\textsuperscript{52}

The community’s central concern regarding the compressor station related to safety and its proximity to a residential area. Bruce explained that EAs typically focus on environmental impacts, but because the Squamish Nation community was particularly concerned about the location of the compressor station, a Condition was placed on FortisBC to ensure the compressor station was moved to another area.\textsuperscript{53}

The Squamish Nation Assessment Report concluded that the risks of accident or malfunction of the pipeline or compressor station were low. However, as Chief Campbell, Councillor Lewis and Gray pointed out, many Squamish Nation community members mistrust industry. Memories of the impacts caused by copper mining, logging camps, pulp and paper mills, and a chlor-alkali plant reside with Squamish elders and warnings regarding the

\begin{itemize}
  \item \textsuperscript{50} FortisBC Synopsis of Addendums to EAO Application, supra note 40
  \item \textsuperscript{51} Ibid.
  \item \textsuperscript{52} Interview of Chief Campbell, supra note 5. Yekwaupsum is the name of the Squamish Nation reserve located in the town of Squamish.
  \item \textsuperscript{53} Interview of Aaron Bruce, supra note 5.
\end{itemize}
unsustainable aspects of industrialization have been passed to the current generation. Gray noted that “accountability of industry” was a prominent theme in the focus groups and thus the Team focused on structuring the Conditions to build in proponent accountability wherever it could. This was done by requiring proponents to obtain final Squamish approval in relation to many of the Conditions, as well as including equitable remedies such as specific performance should breaches to the Agreements occur.

The Team translated the safety concerns of the community into Conditions that require FortisBC to fulfill its promise to modify its EAO application, so that the compressor station is relocated to Mount Mulligan, an area away from Squamish Nation residential reserve lands. Should the EAO reject this proposal, the Condition sets out that “FortisBC will apply for an alternate location for the compressor station” approved by Squamish Nation. In addition, Squamish Nation placed Conditions on both Woodfibre LNG and FortisBC to ensure provision of insurance coverage to protect Squamish Nation members against losses that could occur in the instance of accident or malfunction of the Projects.  

6.2.5 Controlled Access Zone

As discussed above, the community expressed concern about its historical displacement and alienation from the lands and resources of Squamish Territory caused by industrial

54 Interview of Squamish Nation Councillor and Spokesperson, Chris Lewis/ Syetáxt:n, (Councillor Lewis) (25 September 2019) [Interview of Councillor Lewis]; Interview of Chief Campbell, supra note 5.
55 Interview of Tyler Gray, supra note 5.
56 FortisBC Synopsis of Addendums to EAO Application, supra note 40; Interview of Tyler Gray, supra note 5
57 SN-EA Agreement FortisBC supra note 21, section 4.4/Squamish Condition #16.
58 Ibid at section 4.6/Squamish Condition #16.
development. Councillor Lewis spoke of his family being denied access to hunting grounds during the time the Woodfibre Pulp and Paper Mill operated, and how his family has not returned to certain fishing grounds because of the pollution that historically surrounded the mill. Limitations on Squamish Nation members’ freedom to use the land and resources as they desire is a significant concern for the community. As discussed in Chapter 3, Squamish Nation identity and laws are connected to continued use of land and resources in multiple ways that span Squamish Territory. While movement along the pipeline right of way would likely only be impeded during the construction phase, movement around the LNG facility would be impacted for a much longer period of time by fencing and safety zones. To acknowledge the rights of Squamish members to use their lands and resources freely, Woodfibre LNG agreed “to provide controlled safe access to Squamish Nation Members through the Control Zone to allow Squamish Nation to practice aboriginal rights.” The “Control Zone” is defined as the “zone established around the Project Area that includes the upland area owned by Woodfibre LNG, the foreshore area, and the marine control zone.” The Condition states that if Woodfibre LNG is unable to grant access to the Control Zone due to provincial or federal laws, then it “will facilitate access around the Control Zone in a way that is acceptable to Squamish Nation.” This Condition recognizes Squamish Nation Aboriginal rights and acknowledges Squamish law

59 Interview of Councillor Lewis, supra note 49.
60 Interview of Tyler Gray, supra note 5. See also Appendix “A.”
61 SN EA Agreement Woodfibre, supra note 8 at section 4.5/Squamish Condition #5.
62 Ibid.
63 Ibid.
relating to the need for continued and unimpeded use of land and resources in Squamish Territory.

6.2.6 Environmental Management and Monitoring Programs (EMP) and Binding Mitigation Measures

As discussed above, a central concern voiced by the community relates to holding industry accountable to the promises it makes regarding the level of impact the Projects will have, and the mitigation measures that will be adopted to prevent such impacts. Gray explained how, in Crown EAs, certain details of any project get pushed forward to be dealt with in future project management plans because it is difficult to address them at the EA approval stage when the level of detail is quite general. This results in the deferral of issues until later stages of projects, when there is typically less consultation with Indigenous nations and less government oversight of the details.

Squamish Nation’s technical review of the proponent’s materials identified the following issues with the proposed management plans for the Projects:

The proponents have committed to a number of management plans and monitoring of the plans in their respective Environmental Assessment applications. We found that most of the plans proposed did not include Squamish Nation input and that there are not sufficient monitoring and enforcement mechanisms in place to implement the plans. There are plans proposed for issues of concern to the Nation such as impacts due to flare tower, emptying of ballast in Howe Sound, clearing of vegetation and wildlife management to name a few. At present these plans are only conceptual. The overall environmental performance of the project depends on responsible development and implementation of these plans.

64 Interview of Tyler Gray, supra note 5.

To address this, the SN-EA Agreements place Conditions on the proponents to ensure they partner with Squamish Nation to co-manage the environmental management and monitoring programs (EMPs). EMPs are defined as follows:

EMP means the environmental management plans, and follow-up monitoring and other programs, which will provide a framework to communicate and implement mitigation measures and best management practices, and to support compliance with applicable legislation, terms and conditions of permits, and approvals and authorizations issued in relation to the proposed Project.66

In both SN-EA Agreements, Squamish Nation can choose which EMPs require Squamish approval (“Regulated EMP”), and which EMPs simply require consultation (“Non-regulated EMP”).67 Woodfibre LNG and FortisBC agree to “submit the Regulated EMP to Squamish Nation for approval” and a framework is set out regarding timing for responses, possible amendments, and dispute resolution.68 In other words, as a result of the SN-EA Agreements, the proponents are bound to obtain approval of management plans from three levels of government (provincial, federal and Squamish) as the Projects are implemented and put into operation. Gray stated that these Conditions are extremely important because they provide a strong expression of Squamish Nation governance and control over the future development of the Projects.69 In typical Crown EAs, if Squamish Nation disagreed with the proponent’s management plan, it would need to appeal to the EAO, requesting that the Crown not approve the plan.70

66 SN EA Agreement Woodfibre, supra note 8; SN EA Agreement FortisBC, supra note 21, 67 Ibid. 68 SN-EA Agreement Woodfibre, supra note 8 at section 4.6/Squamish Condition #6; SN EA Agreement FortisBC, supra note 21 at section 4.5/Squamish Condition #17. 69 Interview of Tyler Gray, supra note 5. 70 Ibid.
Agreements establish a deliberative process that recognizes Squamish Nation oversight and decision-making authority. Gray indicated that with the Woodfibre Projects “there were many key issues that were deferred to pre-construction management plans” and now, Squamish Nation is a regulatory agency so that before the proponent can begin construction, Squamish can oversee the details. Gray also pointed out that the SN-EA Agreements contain provisions to assure the proponents that approval cannot be arbitrarily withheld by Squamish, and the dispute resolution process is always available to resolve disagreement. In other words, the Conditions within the SN-EA Agreements are structured to foster robust deliberation and negotiation between Squamish Nation and the proponents for the duration of the Projects, including a mechanism to settle disputes.

In addition, the SN-EA Agreements contain Conditions that enable Squamish Nation to monitor any of the mitigation measures established through the Crown EA. If Squamish Nation feels that voluntary mitigation measures are not being carried out by the proponents, it is entitled to written explanation, and if necessary, reliance on the dispute resolution mechanism. Again, Gray indicated that as the Projects move toward construction, Squamish Nation is using the Conditions to hold the proponents accountable. He explained that the working relationships between Squamish Nation and the proponents are productive and collaborative, but Squamish has the capacity to hold the proponents accountable in a manner that no other government

71 Interview of Tyler Gray, supra note 5.
72 Ibid. Gray noted that it is typical for a proponent to make numerous commitments in an EA process, and generally only a handful become conditions of approval by regulator.
73 Ibid.
agency is, or will, at both a technical and cultural level. Squamish has created a way that it can continue to apply its laws and values to the Projects without resorting to the Crown’s legislative-based framework.

6.2.7 Naming Swi'yát, Mill Creek Green Zone, and Squamish Nation Marine Use Plan

As discussed in Chapter 4, a common concern for Indigenous nations with almost any development project is how it contributes to the cumulative adverse impacts on Indigenous lands and resources. Indigenous nations use the phrase “death by 1000 cuts” to explain how projects impact their territories. Crown EA processes have been criticized for not adequately addressing cumulative impacts, but the SCC has been clear that the duty to consult does not encompass historical adverse effects to Indigenous rights and title. Because conventional EA methodology uses the “current” state of the environment as the baseline to measure the significance of adverse impacts of projects, historical impacts can end up benefitting current proponents who use existing infrastructure, or brownfield sites, for their Projects. With the Woodfibre Projects, both proponents utilize areas and infrastructure that have, in the past, significantly impacted Squamish Territory. The existing (1991) FortisBC pipeline, which cuts through Squamish Territory, and the Woodfibre brownfield property, where the pulp and paper mill once operated, were built

74 Ibid.
75 Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43. On the issue of what constitutes an “adverse effect” for the purpose of triggering the duty to consult, the Court ruled that the claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending claims or rights; past wrongs, including breaches of the duty to consult, do not suffice.
76 Interview of Tyler Gray, supra note 5.
without consultation or consent by Squamish Nation. Woodfibre LNG and FortisBC therefore benefit from past industrial damage, as the mitigative measures imposed by the Crown are based on current, not past or desired future, baseline for impacts.

To address cumulative adverse impacts of industrialization to Squamish Territory, the Team established Conditions relating to both cultural and environmental revitalization in Squamish Territory. Woodfibre LNG agreed to “incorporate a Green Zone into the site layout as part of the Project design to help protect the riparian areas of Mill Creek within the Green Zone, and to re-establish a vegetated area.” The Condition includes a requirement to “formally recognize that the Project is located on the former village of Swi’yát through installation of signage or artwork in the Green Zone.” Furthermore, to address the historical damage of industrialization to Howe Sound, Woodfibre LNG is to provide funding to Squamish Nation (through a future Economic Benefits Agreement) for the development of a Squamish Nation marine use plan for Howe Sound. The purpose of the marine use plan is to “assess cumulative impact of industrial projects on the marine environment in Howe Sound” and to establish a path toward revitalization. As mentioned in Chapter 3, a marine use plan was contemplated as a future goal during the development of the Xay Temíxw land use plan. Given the success of Xay Temíxw in building recognition of Squamish Nation jurisdiction over its territory, a marine use plan could serve as an important stepping-stone in strengthening Squamish jurisdiction over

77 Interview of Chief Campbell, supra note 5.
78 SN-EA Agreement Woodfibre, supra note 8 at section 4.2/Squamish Condition 2.
79 Ibid.
80 Ibid.
81 Ibid.
Howe Sound waters.

6.2.8 Impacts Benefits Agreements and the Squamish Liquefied Natural Gas (LNG) Benefits Agreement

As discussed in Chapter 2, IBAs are the legal vehicle typically used by proponents to obtain consent from Indigenous nations with respect to resource development in Indigenous claimed territories. Proponents use IBAs as a way of limiting Indigenous nations’ objections to projects within regulatory processes, and/or to prevent subsequent litigation following project approval.\(^{82}\) In exchange for their “consent” to projects, Indigenous nations receive economic benefits in the form of cash and employment opportunities related to the projects.\(^{83}\) Receiving economic benefit is important; however, as discussed by numerous authors,\(^{84}\) IBAs, on their own, represent a very narrow version of Indigenous consent when one considers the doctrine of FPIC. As Rodin and Papillon point out, “the deliberative ethic of FPIC is often undermined in the negotiation process associated with IBAs.”\(^{85}\) IBAs often “lead to a focus on certain issues,

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\(^{83}\) I have reviewed several confidential IBAs between industry and other First Nations from another LNG Project. Those IBAs contain only money and training opportunities in exchange for Indigenous approval.


\(^{85}\) Papillon and Rodin, supra note 84.
such as economic incentives and impact mitigation, but tend to circumvent broader, more
complicated questions about social acceptability of projects and their cultural, social, and economic
cumulative impact. 86

Squamish Nation recognized that IBAs alone were not sufficient to secure Squamish
Nation consent for the Projects, which is one reason why it chose to build its own EA process.
To ensure Squamish Nation values concerning protection of Squamish Territory took precedence
over economic benefits, it structured the Squamish Process such that community deliberation and
Squamish approval of the environmental side of the Projects occurred prior to discussion
concerning economic benefits pursuant to IBAs. 87 In other words, the SN-EA Agreements
contain Conditions that the proponents will negotiate IBAs with Squamish Nation, but it is part
of a bigger process. The Conditions state that if the proponents first meet the “environmental,
cultural and safety conditions” established by Squamish Nation, and if the province also agrees
to meet certain Conditions, the proponents will then “diligently and in good faith” negotiate
IBAs with Squamish Nation. Chief Campbell explained:

Before we got to the IBA, the impact benefit agreement, and the value derived from the
project, it was all about mitigating environmental impact first. We kept the lens solely on
environment, the conditions, forcing the proponent to achieve those, or working with
them to help them do the feasibility and viability, then talking about the economic
package. Once we’ve satisfied our values and principles, we can talk about any benefits
that can be derived from the project for the life of the project. 88

The Squamish Process places community deliberation and decision-making concerning
environmental impacts ahead of discussions concerning economic benefits, but still makes IBAs

86 Ibid.
87 Interview of Chief Campbell, supra note 5.
88 Ibid.
a Condition of the Process. This is essential to ensure Squamish Nation, like other governments, receives economic benefit from the Projects.

In 2018, three years after the SN-EA Agreements, the Squamish Council voted to approve two IBAs with Woodfibre LNG and FortisBC, and an LNG Benefits Agreement between Squamish Nation, BC and BC Hydro.\(^89\) In its press release, Squamish Nation stated that “approving the impact benefit agreements was a step in the Squamish Nation’s process for assessing the impacts and benefits of this project” and that “approval by the Squamish Council includes compliance by the project proponents with legally binding conditions issued under the Squamish Nation’s environmental assessment process.”\(^90\) It further stated:

Next steps will be holding the proponents accountable through the construction, operation and decommissioning of the Woodfibre LNG Project. This includes environmental, cultural, employment, and training conditions. As agreed by the proponents, we will be co-developing management plans for the project and will have our own monitors on the ground to report any non-compliance with the conditions.

Similar to other levels of government that benefit economically from the project, the Squamish Nation as a government will share in the economic benefits this project offers. Revenue collected from this project will go to the Squamish Nation and contribute to programs and services it operates for its members. In addition, there will be jobs and training opportunities and spin off business opportunities for members.\(^91\)

The Squamish Nation signed the IBAs with the proponents in early 2019. The contents of the IBAs are confidential, but the Squamish Liquefied Natural Gas (LNG) Benefits Agreement

\(^89\) For more discussion see: Jennifer Thuncher, “Updated: Squamish Nation council votes to support LNG benefit agreements”, *The Squamish Chief* (27 November 2018) online: <https://www.squamishchief.com/local-news/updated-squamish-nation-council-votes-to-support-lng-benefit-agreements-3088444>. This vote took place under new Squamish Council leadership. The vote was 8 in favour and 6 opposed.


\(^91\) *Ibid.*
(LNG Benefits Agreement) between the BC, Squamish Nation, and BC Hydro (signed at the same time) is publicly available. The purpose of LNG Benefits Agreement “is to enable the Parties to share in the benefits associated with the Woodfibre Project and reflect Squamish’s support for the Woodfibre Project,” subject to the terms and conditions of the Agreement. It contains the 5 Conditions placed on BC through the Squamish Process including:

- Not authorizing the transportation of oil through the pipeline;
- Government to Government discussions regarding a marine use planning agreement to address cumulative impacts of industry in the Howe Sound area;
- Working with the Squamish Nation to develop an Emergency Response Plan for the Squamish Valley area;
- No future expansion of the LNG Plant or pipeline without Squamish approval; and
- Entering into an economic benefits agreement with the Squamish Nation that will be reflective of the Squamish Nation’s aboriginal rights and title interests.

It also contains other benefits including funding, land transfers, skills development and training for Squamish Nation members, employment, and procurement opportunities.

### 6.3 Impact of the Squamish Process on the Crown Process

Having addressed the impact of Squamish Conditions, it is important to ask how the Squamish Process (as a whole) has impacted the operation of the Crown EAs for the Woodfibre Projects? What mechanisms have been used to facilitate communication between these two legal

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92 Squamish Liquefied Natural Gas (LNG) Benefits Agreement Between Her Majesty in the Right of Province of British Columbia, British Columbia Hydro and Power Authority, and Squamish Nation, 7 March 2019, online: <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/squamish-nation>.

93 Ibid. at 9.

orders (if at all)? What tensions arose and how were they resolved? More importantly, what has been the overall result of having two processes operating in tandem, and what conclusions can be drawn regarding the possibilities and limitations of this model going forward?

6.3.1 Limited Communication between Squamish and Crown Legal Orders

When the proponents first expressed interest in pursuing the Projects, Squamish Nation engaged with the provincial and federal governments, but soon realized governments were not interested in deviating from the consultation principles set out in Canadian caselaw and carried out through EA legislation. In Bruce’s words, “they were quite comfortable with their process” and there was little appetite to recognize Squamish jurisdiction, or to collaborate with Squamish Nation to create a shared-decision-making model that would be acceptable to Squamish Nation. As a result, Squamish stepped away from the Crown EA and built a new legal process, running parallel to the Crown, through which its community could make an informed decision about whether or not to consent to the Projects. Squamish Nation’s position was that once it had the opportunity to make an informed decision, the Nation would then be “in a position to have a meaningful discussion with the Crown on what the potential impacts of the project are on its Aboriginal rights and title and other interests.”

The Squamish Process sought to establish an EA model that first created space for community deliberations and decision-making based on Squamish laws and values, and second, moved toward negotiation and collaboration with other

95 Interview of Aaron Bruce, supra note 5.
96 Ibid.
governing authorities. In short, the Squamish Process aimed to postpone Squamish Nation and
Crown negotiation until after it was satisfied that it had gathered the information necessary to
make a decision according to its values and laws.

The Crown collaboration component of the Squamish Process did not unfold as Squamish
Nation anticipated or desired. Indeed, in its submission to the CEAA Review Panel, Squamish
stated that “reconciliation or harmonization of the Squamish Nation and Crown decisions did not
fully materialize on the Woodfibre project.”\textsuperscript{98} Upon making its decision at the community level,
Squamish Nation’s objective was then to discuss:

- coordination of similar and different conditions with the Crown;
- whether the Crown wanted to adopt some of Squamish mitigation measures and
  conditions in EA Certificate and Decision Statement;
- making implementation of the decisions as practical and efficient as possible in terms
  of monitoring and enforcement; and
- at a government to government level discuss other issues that the EAO/CEAA did not
  have a mandate to discuss or resolve, such as revenue sharing, replacement lands, a
  commitment to enter into further government to government discussion on other
  issues etc.\textsuperscript{99}

The Crown remained reluctant to acknowledge Squamish Nation’s jurisdiction to conduct a
process on its own accord that would disrupt the Crown’s formal EA process. Thus, the greatest
impact of the Squamish Process occurred at the Squamish Nation community level (where
Squamish Nation was able to develop and refine its own EA law), and at the proponent level
where Squamish Nation engaged with Woodfibre LNG and FortisBC in a regulator capacity.

\textsuperscript{98} Squamish Nation, “Written Submission to CEAA Review Expert Panel,” (23 December 2016) [unpublished] at 9
[SN CEAA Review Panel Submission].

\textsuperscript{99} Ibid.
However, because both Woodfibre LNG and FortisBC acknowledged Squamish Nation authority to conduct an EA process, certain tensions arose. These tensions are discussed below.

6.3.2 Consultation Tensions

By building a parallel process, Squamish Nation asserted itself as a third regulator over the Projects. Crown reticence to recognize the Squamish Process meant that there were no mechanisms in place to deal with the tensions caused when overlapping authorities address the same matters but come to different conclusions. While the federal and provincial governments entered a memorandum of understanding to allow the provincial process to substitute for the federal process, Squamish carried out its process without agreement about what would occur if the Crown and Squamish Process rendered different results. Indeed, there were certain aspects of the Squamish Process that put the proponents in the position of being unable to comply with the Crown EA if it complied with the Squamish Nation’s process. For example, the requirement that proponents keep all information acquired from the Squamish Process confidential, prevented the proponents from complying with consultation requirements set out in the initial EAO Section 11 Order. The Crown eventually amended its Section 11 Order to reflect that the proponents had chosen to engage in the Squamish Process; however, the Crown still required the proponents to

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100 In the Matter of the Environmental Assessment Act SBC 2002, c 43 and An Environmental Assessment of the Proposed Woodfibre LNG Project, Order Under Section 11, Schedule B-D, (21 March, 2014) [Woodfibre Section 11 Order]; In the Matter of The Environmental Assessment Act SBC 2002, c 43 and An Environmental Assessment of the Proposed Eagle Mountain Woodfibre Gas Pipeline, Order Under Section 11, (5 November 2013) [FortisBC Section 11 Order].
provide consultation updates which conflicted with the Squamish Process. Bruce described some of the tension as follows:

They [the Crown] did end up amending their section 11 order to acknowledge that the proponent was working with Squamish in a separate process. However, they also had included in that that the proponent would provide information to the Crown at a couple of places within the process, within their own process . . . The Crown process has a clock of a year or something, and they needed the information in order to meet the obligations they had under their own process, which is something we never agreed to.101

The Crown did acknowledge the Squamish Process, but it did not formally acknowledge the competing jurisdiction of Squamish Nation, or the ability of Squamish Nation to excuse itself, or proponents, from participating in the Crown’s consultation process. It continued to place consultation requirements on both the proponents and Squamish Nation, and it continued to operate as though the Crown’s process for fulfilling the duty to consult was not impeded by the Squamish Process. As will be discussed below, the Crown ultimately completed its assessment process by drawing the conclusion that the duty to consult Squamish Nation had been carried out by virtue of the proponents participating in the Squamish Process. This occurred despite the fact the proponents did not share information regarding the Squamish Process with the Crown.

Giraud indicated that in terms of consultation with other Indigenous nations, Woodfibre LNG complied with the Section 11 Order requirements, but in regard to consultation with Squamish Nation, all Woodfibre LNG could do was submit letters explaining to the EAO that it was engaged with Squamish Nation in an independent process.102 An excerpt from Giraud’s 27 April 2015 letter to the EAO reflects Woodfibre LNG’s perspective on the importance of participating in the Squamish Process:

101 Interview of Aaron Bruce, supra note 5.
102 Ibid.
Woodfibre LNG has chosen to engage with Squamish Nation through the Squamish Process because Woodfibre LNG wishes to establish a long term relationship with the Squamish Nation and to honour the Squamish Nation’s views on the preferred manner by which a project proponent will engage with Squamish Nation to discuss such a project. Woodfibre LNG is of the view that for the Project to be successful and of benefit to the company, the Province and Squamish Nation, Woodfibre LNG’s willingness to participate in the Squamish Process is essential.

In taking this approach Woodfibre LNG has adopted the provincial government recommended principles in negotiations including being respectful, engaging early, operating in an open and transparent manner, acting with honour, listening and, most significantly, adapting where possible. Squamish Nation has made it clear that creating and running its own separate environmental assessment review process is important to Squamish Nation. By supporting this process, and Squamish Nation’ approach, Woodfibre LNG is of the view that it is behaving as an innovative corporate citizen that is willing to adapt to the emerging political and legal realities regarding respecting and cooperating with First Nations.

**Importance of respecting Squamish Nation process**

As a proponent, Woodfibre LNG recognizes the necessity of the Crown to discharge its duty to consult. Woodfibre LNG also recognizes that Squamish Nation has concerns with the Crown’s environmental assessment process and has chosen an alternative approach to reviewing the Project. Woodfibre LNG’s desire, from the beginning, to build and maintain a strong relationship with Squamish Nation, led us to conclude that agreeing to the Squamish Process would provide:

- The necessary initial goodwill to allow for fulsome negotiations with Squamish Nation.
- The level of detail in the review that would satisfy Squamish Nation concerns with the Crown’s processes.
- A level of rigour that would satisfy the required consultation delegated to Woodfibre LNG by the Crown, with diminished likelihood of judicial review.

Conversely, Woodfibre LNG recognizes that the Squamish Nation process is a parallel process to the BC EA process, and that until the Squamish Nation has completed its environmental assessment process, it cannot make available or permit the release of detailed interim reports to the Crown because of confidentiality provisions under the Agreement.

Fundamental to modern consultation is ensuring that First Nations are involved in the design of the consultation process. It was made clear to Woodfibre LNG that Squamish Nation is conducting its own independent assessment of the proposed Project outside of the government’s environmental assessment process to ensure Squamish Nation aboriginal rights and title interests are protected. Woodfibre LNG is of the view that its
failure to participate in the Squamish Nation process would have decreased Project certainty, impaired the relationship with Squamish Nation at an early stage, and would have significantly diminished the likelihood of obtaining a legitimate consultation record.¹⁰³

The letter demonstrates how the proponent sought to navigate two different EA processes.¹⁰⁴ It also reveals how Woodfibre LNG understood the Squamish Process as a necessary step in fulfilling the government’s stated policy objectives that include: respectful negotiations, engaging early, operating in an open and transparent manner, acting with honour, listening and, most significantly, adapting where possible. Indeed, Woodfibre LNG appears to have concluded that that Squamish Nation was in the best position to determine the model or process that deals with its specific interests and concerns, and in regard to consultation, therefore, the company would prioritize compliance with the Squamish Process over the Crown process.

### 6.3.3 Timeline Tensions

Tensions were also caused due to the timeline requirements specified under EA legislation and its alignment with the results of the Squamish Process. Squamish Nation and the proponents agreed to complete the Squamish Process, with SN-EA Agreements in place, before the Crown made recommendations to the Ministers regarding Crown project approval. To this

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¹⁰⁴ It should be noted, however, that in the context of natural resource development, industry often must navigate and co-ordinate the rules of various jurisdictions including federal, provincial, municipal, and more increasingly, Indigenous. In the EA context, federal and provincial governments attempt to co-ordinate through substitution agreements, but this is not true of all regulatory contexts.
end, on 29 June 2015, both Woodfibre LNG and FortisBC requested a suspension of the 180-day Review Period under the Crown process to allow them time to determine whether they could meet the Squamish Conditions which were announced on 26 June 2015. The Crown suspended the review time period and agreed to resume it “once EAO was satisfied with the information provided and with the adequacy of the consultation with Squamish Nation.”

A conflict occurred because while Squamish Nation envisioned that upon completion of both processes, the Crown and Squamish would engage in collaborative negotiation regarding the results of the Squamish Process, the Crown instead concluded that completion of the Squamish Process indicated that the Crown’s consultation requirements had been met. In its 17 August, 2015 letter to Squamish Nation, the EAO acknowledges that “Squamish Nation’s expectations are that Squamish Nation and the Province will discuss the results of the Squamish Process at the end of the Squamish Process, in order for the Crown to adequately accommodate the impacts of Woodfibre LNG on Squamish Nation’s Aboriginal rights and title.”

However, the letter goes on to outline how the EAO made efforts to understand potential adverse effects to Squamish Nation’s Aboriginal interests through information made available through both processes and concluded:

> It is our opinion that the EAO has made reasonable efforts to meaningfully consult Squamish Nation and to understand the impacts of the proposed Project on Squamish Nation’s Aboriginal Interests, and EAO concludes that impacts to Squamish Nation’s

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106 Letter from Michael Shepard, Project Assistant Manager, BC Environment Assessment Office to Chief Bill Williams and Councillors, Squamish Nation, Reference: 288772, (17 August 2015) [EAO 17 August 2015 Letter].
Aboriginal Interests have been adequately accommodated.\textsuperscript{107}

In other words, the Crown presumed the duty to consult and accommodate Squamish Nation had been met by virtue of the proponent’s participation in the Squamish Process, regardless of the outcome. The letter further stated that any additional information that Squamish Nation would like to provide to the Crown could be submitted directly to the Ministers within the 45-day decision-making period. Squamish Nation responded to the Crown’s conclusion that the Crown had met the consultation requirements as follows:

We have made clear that we require the proponent to enter into a legally binding agreement to address our concerns with the proposed project. Our view is that the Crown cannot claim that it has adequately accommodated our aboriginal rights and title interests through the proponent’s acceptance of our project conditions if there is not a legal agreement in place.\textsuperscript{108}

Squamish Nation did not provide support for the Projects until the proponents entered into legally binding agreements accepting the Squamish Conditions, which came after the governments submitted their approval to the Ministers. This was a significant point of tension between Squamish Nation and the Crown, and a function of the Crown’s refusal to acknowledge Squamish Nation jurisdiction. In this one sees the limitation that occurs when the Crown fails to acknowledge Indigenous jurisdiction, but the proponent does not. In this case, the Squamish Process was more successful in compelling third-party compliance than it was at the government level.

\textsuperscript{107} Ibid.

\textsuperscript{108} Letter from Chief Bill Williams, Squamish Nation to Michael Shepard, Project Assistant Manager, BC Environment Assessment Office (18 August 2015) [Squamish Nation 18 August 2015 Letter].
6.3.4 Project Condition Tensions

The Squamish Conditions differ from the conditions placed on the proponents through the Crown EA. This also caused some tension. As discussed above, lack of harmonization between the Squamish Process and Crown EA resulted in seawater cooling being approved by the Crown but not Squamish Nation. Although Woodfibre LNG was able to amend its Crown EA Certificate to accommodate the cooling technology change mandated by Squamish, the processes would have run more efficiently if the Crown and Squamish Nation had coordinated their processes at the outset. Squamish Nation argues that there is need for better co-ordination between the two processes before approvals are granted by final decision-makers. For this to occur, the Crown must recognize Indigenous jurisdiction to conduct EAs and better accommodate Indigenous nations as third regulators. Indeed, Squamish Nation had hoped for more of a bridging between the Squamish Process and the Crown’s process in relation to the Woodfibre LNG Projects. Notably, the new BC EAA legislation makes room for government-to-government agreements between the Crown and Indigenous nations when an Indigenous nation chooses to engage its own EA process.109

6.4 Possibilities and Limitations Revealed by the Squamish Process

6.4.1 Squamish Nation as Third Regulator

While the Squamish Process had limited impact on the overall Crown process, it did have significant impact at the proponent level. By agreeing to participate in the Squamish Process,

Woodfibre LNG and FortisBC acknowledged the authority of the Squamish Nation and agreed to be bound by the Conditions established by Squamish Nation via the SN-EA Agreements. These Conditions will increase time and costs of the Projects, but the proponents saw benefit in complying with Squamish Nation governance. As Giraud explained, companies are motivated to build positive relationships with Indigenous nations for various reasons including respect for Indigenous governance, improving working relationships, eliminating objection to projects, preventing delays, and garnering support from other sectors of society.\textsuperscript{110}

In addition, it can be argued that the operation of more than one regulatory process, which considers different worldviews and value systems, leads to better projects. Giraud has stated on many occasions that the Squamish Process is enabling the creation of a better LNG project, and that Woodfibre LNG felt confident going forward knowing that it had received approval from not only federal and provincial regulators, but Squamish Nation as well.\textsuperscript{111} The cooling technology was changed as a direct result of the Squamish Process, which has decreased potential for harm to marine life in Howe Sound. Indeed, Squamish Nation’s ability to alter the cooling technology has been celebrated by non-Indigenous sectors of Canadian society. For example, environmentalist, John Buchanan, who has conducted numerous herring studies in Howe Sound over the past decade and who submitted his reports to the Squamish Council for

\textsuperscript{110} Interview of Byng Giraud, \textit{supra} note 15.

consideration in the Squamish Process, indicated that Woodfibre abandoning its seawater cooling technology was a positive decision for the herring.\textsuperscript{112}

The Squamish Process has helped prioritize the elimination of impacts to the WMA, committed Woodfibre LNG to establishing a Green Zone around Mill Creek, and has enabled greater study of marine life revitalization in Howe Sound. Furthermore, through the EMPs, Squamish Nation oversight of the Projects has become more robust and now extends through the duration of the Projects. In other words, through the Squamish Process, a governance framework has been imported into the Projects so that Squamish law and decision-making can be applied (in addition to the provincial and federal oversight) as the Projects move through their various stages. The Squamish Process has not only aimed to enhance the environmental sustainability of the Projects, but also create a larger space for Squamish Nation governance, broadening its ability to negotiate for recognition of its interests, and build relationships between Squamish Nation and the proponents (and arguably the provincial and federal regulators as well).

6.4.2 The Squamish Process as a Transformational EA Model?

Craik explains that transformational approaches to EA incorporate elements that foster deliberation,\textsuperscript{113} and EA processes aimed at deepening deliberation are better suited to achieve reconciliation with Indigenous peoples.\textsuperscript{114} Transformational approaches emphasize “the


\textsuperscript{113} Craik, supra note 4.

\textsuperscript{114} Drawing on Chambers, Stacey defines deliberation as follows: debate and discussion aimed at producing reasonable, well-informed opinions in which participants are willing to revise preferences in light of discussion, new
deliberative quality of the interactions and the justificatory nature of the decisions.\textsuperscript{115} He distinguishes between transformational and informational approaches to EA, and explains that Crown EA tends to adopt an “informational approach” that “stresses rationality of EA planning processes and focuses on the need to develop better technical tools and metrics for assessment, but tends to downplay value disputes.”\textsuperscript{116} According to Craik, the informational approach to EA “offers a limited framework” to achieve the broader aspirations of reconciliation because it does not distinguish between different sets of values, sees the purpose of participation as providing decision-makers with additional information, and grounds the legitimacy of the process in the expertise of the decision-makers. Transformational processes, by contrast, focus on the quality of the deliberations between the parties, as opposed to the expertise of the decision makers.\textsuperscript{117} To this end, Craik states:

Transformational theories better capture the essence of reconciliation, and may even provide a way of understanding reconciliation in the institutionalized context of project decision-making. Transformational approaches do not regard the interests and values of participations in EA processes as fixed, but rather understand that participation in the process itself may impact interests. Interest reformulation is endogenous to the EA process, allowing for the possibility of participants learning through the process and reconsidering their interests in light of new information and shared understandings.\textsuperscript{118}

\textsuperscript{115} Craik, \textit{supra} note 4 at 671.
\textsuperscript{116} \textit{Ibid.}
\textsuperscript{117} Craik, \textit{supra} note 4 at 673.
\textsuperscript{118} \textit{Ibid.}
Craik considers certain elements of an EA process to be “more consistent with a transformational approach” including those elements that encourage deliberation such as: the possibility of considering project alternatives; paying attention to cumulative effects; and requiring proponents to make “positive contributions to environmental and social outcomes” through their projects.\textsuperscript{119} Craik suggests that incorporating these elements into EA processes can shift it into a more “deliberative and justificatory construction” consistent with a transformational approach.\textsuperscript{120}

Several examples of these transformational elements play out in the Squamish Process. For example, through the SN- EA Agreements, a framework was put in place to allow Squamish Nation and the proponents to negotiate alternative technology. Squamish Nation’s negotiations with Woodfibre LNG concerning different cooling technologies reflects the type of deliberations characteristic of transformational processes because Squamish was able to communicate why the proposed technology did not accord with Squamish laws and values, and Woodfibre LNG was able to consider the Squamish perspective and present alternatives.

Other examples of project alternatives considered through the Squamish Process include FortisBC re-routing the pipeline outside the WMA, and the relocation of the compressor station to an area viewed safer by Squamish Nation members. In addition, Woodfibre LNG’s commitment to establish a Green Zone around Mill Creek, and to fund a Squamish Nation marine use plan, indicate how the Squamish Process established a context to address cumulative effects and sustainability, also important in a transformational EA approach. Finally, and perhaps most importantly, the ability of Squamish Nation to continue to govern the Projects throughout

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\item Craik’s words.
\item Ibid at 680.
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their duration by way of the EMPs, enables ongoing deliberations whereby the proponents must consider and incorporate Squamish perspectives and values into the implementation, operational and later decommissioning phases of the Projects. The manner in which the SN-EA Agreements structure the working relationship between the parties lends to a transformational approach because it provides the “possibility of participants learning through the process and reconsidering their interests in light of new information and shared understanding.” Craik notes that transformational decision-making processes encompass “reciprocal justification” requiring decision-makers to “carefully consider Aboriginal perspectives and seek out justifications that incorporate Aboriginal values.”

Kirsten Anker makes a similar point regarding the possibility of transformation that can occur in the negotiation process. Adopting a legal pluralist lens, Anker notes that “law in and through the negotiation space,” is not just an external factor but “something creatively engaged in a new ritual: one where differences are articulated, relationships, alliances and antagonisms consolidated, and laws enacted.” The negotiation space, if structured appropriately, can be an important site for co-producing legal meaning between legal orders. While it is early in the life of the SN-EA Agreements, they do provide an opportunity for future reflection on the possibilities of communication and transformation that can occur within the “negotiation” or “deliberative” space of the agreements. In other words, an EA process which compels parties to

121 Ibid at 673.
122 Ibid at 674.
engage in continual deliberation throughout the duration of the projects may be well suited to achieve reconciliation goals which includes building “legal meaning between legal orders.”

6.4.3 Using Private Agreements to Secure Indigenous Consent

Martin Papillon and Thierry Rodin contend that an increase in privately negotiated agreements between proponents and Indigenous nations “has emerged to compensate for the fuzzy legal norms related to Indigenous participatory rights and the inadequacies of existing IA processes” in attaining free, prior and informed consent from Indigenous nations. Proponents recognize that Crown EA processes are sites of contention and that they may better achieve successful agreements, and build relationships with Indigenous nations, through private negotiations. Papillon and Rodin argue that the disconnect between the political aspiration to implement FPIC, and the judicial interpretation of the duty to consult, has created an environment in which proponents are increasingly turning toward Indigenous nations for answers. Indeed, as Giraud indicated, Woodfibre LNG’s objective was to build a positive relationship with Squamish Nation, and it felt that this was best accomplished by participating in the EA process established by Squamish Nation, rather than simply following the Crown EA requirements.

Papillon and Rodin argue that the ambiguity surrounding FPIC implementation in Canada “paradoxically creates an opening for Indigenous agency in shaping how the norm is translated

They point to the Squamish Process and the Cree Mining Policy, established by the James Bay Cree under the James Bay Cree and Northern Quebec Agreement (JBCNQA), as examples of how “Indigenous-driven mechanisms can be powerful instruments to shape how FPIC is defined and translated into practice.” The Cree Mining Policy was established by the Cree to assert greater control over mining development proposals occurring in Cree territory. The Guiding Principle of the Cree Policy states:

The Cree Government will support and promote the development of mineral resources within the territory of Eeyou Itschee that provide long term social and economic benefits for the Cree and that addresses sustainable development in compliance with the environmental and social protection regime of the JBNQA and that is compatible with the Cree way of life and protection of Cree rights in the Cree Territory.

Cree Grand Chief Matthew Coon Come makes it clear that the Cree Nation expects to enter into private agreements with mining development companies which cover a range of issues, not simply economic:

It is clear in our policy that no mining development will occur within the Eeyou Itschee [Cree territory] unless there are agreements with our communities. Those agreements will need to address a wide range of social, economic and environmental concerns on the part of our communities. Through these agreements we will ensure that mining development is in keeping with our traditional approach to sustainably development.

127 Papillon & Rodin “Transformative Potential”, supra note 125 at 314.
128 Cree Policy, supra note 126 at 3.
129 Cree Policy, supra note 126 at 1.
Papillon and Rodin point out that unlike the Squamish, the Cree “opted to continue to rely on existing co-managed IA processes created under the JBCNQA to inform decision-making,” but like the Squamish, they have tied their consent to the negotiation of an impact benefits agreements (IBA) and the decision to sign or not sign the IBA is “subject to an internal deliberative process at the community and at the regional level.” Using these two examples, Papillon and Rodin argue that Indigenous nations are using Indigenous legal principles to fill the “institutional gap” that exists between the principle of Indigenous consent and mechanisms to implement it. Indeed, in the absence of clear Constitutional recognition of Indigenous jurisdiction, Indigenous nations are engaging various strategies, including private agreement, to revitalize their laws, challenge state legal orders, and assert their jurisdictional authority.

While private agreements present an avenue for Indigenous agency and resistance, they also bring to light a host of concerns. Natasha Affolder’s work on the role of private agreements in transnational environmental governance offers insights. She argues that private corporate entities are playing an increasingly significant role in generating and shaping international environmental norms, but that a cautious approach is required. She observes how oil and gas and mining companies, as well as banks and insurance companies, are adhering to principles of the UNESCO World Heritage Convention that establish “no-go” areas for resource development to

130 Papillon & Rodin “Transformative Potential, supra note 125 at 331.
131 Ibid at 333.
protec biodiversity.\textsuperscript{133} This is occurring despite states’ refusals or delays in implementing legislation. While on the surface this may seem positive, she warns that invoking private law to execute public law matters can de-politicize the issues and render invisible important matters that should be subject to public discussion. She states, for example, that “framing conservation contracts as a private-law tool may forestall an inquiry into the degree to which these agreements advance a wider public interest.”\textsuperscript{134} She also notes how the central tenets of contract law, i.e. bargaining power between the parties, and privity of contract, often do not fit will with nature of public law matters. As well, the “lack of a repository of private agreements” raises “key concerns about the transparency of these agreements and their negotiations.”\textsuperscript{135}

Dayna Scott raises similar concerns regarding the role of private agreement in the context of extractive industries negotiating with Indigenous nations to obtain Indigenous consent.\textsuperscript{136} As discussed above, IBAs have become the central legal vehicle used by industry proponents to obtain consent from Indigenous nations when resource development is proposed in Indigenous territories. IBAs can bring immediate economic resources to a community and ensure Indigenous nations receive economic benefit from projects occurring in their territories, but for many reasons, they are an inadequate means of attaining Indigenous consent. IBAs can reduce consent to a monetary question when Indigenous consent is, at its core, a principle of self-

\begin{footnotesize}
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\item Affolder, “Private Life”, \textit{supra} note 132.
\item Affolder, “Transnational Conservation”, \textit{supra} note 132 at 457.
\item Affölder “Private Life”, \textit{supra} note 132 at 156.
\item Scott, \textit{supra} note 84.
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determination. In other words, properly conceived, Indigenous consent is one element of a broader goal of state recognition of Indigenous jurisdiction, and not about Indigenous nations acquiring economic benefits on a case-by-case basis.

Scott asks, “In the context of increasingly contested and politicized resource extraction projects, and of reinvigorated and revitalized Indigenous legal orders, what should we make of negotiation of private contractual agreements now routinely offered up as evidence of consent?” She adopts a critical approach and argues that “we cannot simply see the turn to contracts as an expression of autonomy or self-determination without investigating the background context for the negotiations, including the underlying power relations.” In examining this background context she notes, as does Szablowski, that the state’s “regulatory regime forms the ‘skeleton’ that supports and structures the engagement process, providing valuable resources and bargaining entitlements to the parties.” In other words, “settler law’s allocation of legal rights and duties come to shape the private ordering,” and Scott argues, “the

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137 For detailed discussion on theoretical underpinning of the concept of Indigenous free, prior, and informed consent (FPIC), see Cathal M. Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The transformative role of free prior and informed consent* (New York: Routledge, 2015).


139 Scott, *supra* note 84 at 280.

140 *Ibid* at 281.
most crucial of these allocations is that the Crown claims underlying title to, and jurisdiction
over, all of the lands within the settler state’s borders.”

Scott’s examination of the context in which negotiations between private industry and
Indigenous nations take place, leads her to conclude that negotiations are heavily constrained by
state regulatory law, and that the private contracts that emerge play a central role in
depoliticizing issues and serving state interests. She finds that “it is not so much that the
contracts are filling a gap in the inadequate public regulatory regime and associated
jurisprudence (although the inadequacy is real), but that the public law regime is actively holding
open the space for extraction contracting to fill, because it insulates the settler law from demands
for reform.” She concludes, therefore, that IBAs are a means thought which the state facilitates
the dispossesion of Indigenous peoples from their lands, rather than providing state recognition
of Indigenous jurisdiction.

These observations must be considered when Indigenous nations negotiate with industry
regarding consent to use Indigenous land and resources. Indeed, it is necessary to recognize how
state law constrains private negotiations between industry and Indigenous nations, and it is
important that Canadian governments be held accountable to Indigenous peoples despite these
private agreements. Scott’s critiques suggest that more reflection is needed on how private
agreements can be structured to avoid some of the pitfalls she identifies. It is also necessary to
carefully consider whether private agreements that are more robust than a typical IBA can form
part of a political agenda to advance Indigenous jurisdiction.

\footnote{Ibid.}

\footnote{Scott, supra note 84.}
As discussed above, Squamish structured the Squamish Process such that community deliberation and Squamish approval of the environmental side of the Projects occurred prior to discussion concerning economic benefits pursuant to IBAs.\textsuperscript{143} In other words, the SN-EA Agreements contain Conditions that the proponents will negotiate IBAs with Squamish Nation, but this is part of a wider objective to assert Squamish laws and values and to broaden recognition of Squamish Nation jurisdiction. Undoubtedly the Squamish Process and the negotiations that occur pursuant to the SN-EA Agreements were constrained by state law, but as Bruce asserted, using private contract under the Squamish Process was a creative and strategic way to address the fact that Squamish Nation does not have legislative authority.\textsuperscript{144} He acknowledged that a better solution would be recognition of Indigenous jurisdictional authority pursuant to the Constitution.\textsuperscript{145} The SN-EA Agreements, therefore, are an interim solution to deal with Squamish Nation’s inability to legislate rules to be placed on the proponents, as well as a means to resist the Crown-imposed process and to try to place pressure on governments to acknowledge Squamish jurisdiction. And, while the argument that IBAs can detract from the need for public law reform is an important one, that does not appear to have been an issue with the Squamish Process.\textsuperscript{146} Indeed, the contractual agreements made between Squamish Nation and the proponents were made with the objective of encouraging public law reform by providing a concrete example that Squamish Nation could point to in emphasizing the need for Crown EA

\textsuperscript{143} Interview of Chief Campbell, supra note 5.
\textsuperscript{144} Interview of Aaron Bruce, supra note 5; Aaron Bruce and Emma Hume, supra note 97.
\textsuperscript{145} Ibid.
\textsuperscript{146} Scott, supra note 84.
reform. The Squamish Process was presented as an example that the Crown could draw insights from.\(^\text{147}\)

While a causal connection cannot be drawn regarding the impact of the Squamish Process on new EA legislation at both the provincial and federal levels, it should be noted that following the Squamish Process, Bruce did participate in several government advisory groups addressing how to reform both federal and provincial EA legislation to better include Indigenous decision-making. His recommendations, based on lessons learned from the Squamish Process, included elements such as: 1) allowing Indigenous nations to decide what consent means and whether or not to lead their own project assessments; 2) structuring the relationship between Indigenous nations and government by way of government-to-government agreements; 3) adopting a collaborative consent approach to negotiations and decision-making; and 4) putting dispute resolution mechanisms (collaboratively built with Indigenous nations) into legislative processes to address disagreements.\(^\text{148}\) Indeed, the Squamish Nation submission made to the CEAA Review Panel makes these points:

[W]e think what we are really talking about, when we look at consent in the context of reconciliation, is building a true government to government relationship where First Nations and other levels of government collaboratively develop governance structures and process to make consensus based decisions on natural resource projects. This consensus based decision-making must be built into the legislation. But before you can build such structures and processes you need to find out from First Nations what consent means to them. The federal government cannot make that decision unilaterally.\(^\text{149}\)


\(^{\text{148}}\) Interview of Aaron Bruce, supra note 5.

\(^{\text{149}}\) SN CEAA Review Panel Submission, supra note 164.
Bruce acknowledges that private agreements within the Squamish Process were a creative and strategic way to address the fact that Squamish does not have equal legislative authority with the Crown.\textsuperscript{150} He states that a better solution would be constitutional recognition of Indigenous jurisdictional authority.\textsuperscript{151} The Squamish Process was an interim solution to deal with the lack of recognition of Indigenous jurisdiction in Canada, as well as a form of refusal to place pressure on governments to acknowledge Squamish jurisdiction. New EA legislation has created a stronger role for Indigenous decision-making, but much change is still needed to affect the normative recognition of Indigenous jurisdiction at a constitutional level.

In analyzing the possibilities and limitations of using private contract in the EA arena, it is important to consider how public law norms can emerge from practices originating in private contexts and at local scales. The Squamish Process originated in the Squamish Nation community and served an important function of allowing the community to come together to deliberate. It enabled Squamish Nation land use laws to be refined and articulated in a manner that could be communicated to third parties through the SN-EA Agreements. Anker points out that legal meaning can be produced in the context of negotiations between parties to agreements.\textsuperscript{152} She quotes Tim Rowse who states:

\begin{quote}
[E]very time an organized Indigenous interest makes an agreement (about land use or about service delivery) with a non-Indigenous interest (whether government or private), something small but important is added to a growing edifice of Indigenous self-determination. Self-determination is arguably analogous to the growth of a coral reef.\textsuperscript{153}
\end{quote}

\begin{flushright}
\textsuperscript{150} Interview of Aaron Bruce, \textit{supra} note 5; Bruce & Hume, \textit{supra} note 97.
\textsuperscript{151} \textit{Ibid}.
\textsuperscript{152} Anker, \textit{supra} note 123 at 177.
\textsuperscript{153} \textit{Ibid} at 178.
\end{flushright}
Private law agreements operate in a field of concurrently operating, or overlapping, legal orders, all of which bear on one another. If law is understood as a practice, or activity, of human interaction, then an Indigenous nation’s assertion of its jurisdiction through the legal strategies available to it (community deliberation and negotiation with the state or private parties) can produce new legal norms. Use of private law tools can be an important element of Indigenous agency and resistance. Indigenous nations may take up the language of private law as a strategy to make their positions and interests known to private actors and to further their objectives. As Anker articulates, “not only does the law of each party inform and shape what they create together, but the experience of agreement-making, and the language, understanding, structures, procedures and relationships that come out of it, causes re-evaluation of what has been understood as law.”154 Indeed, when one compares the SN-EA Agreements of the Squamish process to IBAs between BC Indigenous nations and industry in the LNG context ten years ago, there is a significant difference in the range of provisions contained within. The SN-EA Agreements are far more robust in their recognition of Squamish Nation decision-making authority. It can be argued, therefore, that the agreement-making process can be more than an asymmetrically aligned contest of power. Structured appropriately, these agreements can be important sites of norm generation and legal co-production between different legal orders.

154 Ibid.
6.4.4 The Squamish Process and FPIC

There is a great deal of uncertainty in Canadian EA law with respect to Indigenous consent because while governments indicate support for the UNDRIP, and their intent to implement FPIC principles, the judiciary’s interpretation of when consent is required pursuant to the duty to consult, remains quite narrow. As discussed in earlier chapters, under the UNDRIP, “the right of self-determination constitutes the primary foundation of the requirement of FPIC in the context of development projects in or near indigenous peoples’ territories.” However, Canadian courts continue to re-iterate that Indigenous nations do not have a “veto,” and they adopt a “proceduralized” approach to measuring whether the Crown has adequately consulted with Indigenous nations when resource development is proposed in Indigenous territories. Only recently have appellate courts begun to probe what elements are necessary to foster meaningful dialogue between Indigenous nations and governments, and direct engagement between the Crown and Indigenous nations is still not the standard of consultation with all project development.

When I questioned Bruce if the Squamish Process represents an example of FPIC being carried out on the ground at a local scale, he responded:

I feel that Squamish feels that we made a decision on our terms . . . that we had the information we needed, that we found a process that worked for us, and felt satisfied that we had some control over our territory and what happens in our territory.


156 Ibid at 130.


158 Interview of Aaron Bruce, supra note 5.
He identified the process as a model for Squamish consent rather than a model of FPIC, because he sees the contested nature of the term FPIC, and the fact that FPIC is not a Squamish Nation legal term. He was also clear to say that the Squamish Process is one that worked for Squamish Nation at this juncture, but that “it is an iterative process,” which will continue to evolve with different projects and in relation to changes in provincial and federal legislation.

Bruce’s above comments about what the Squamish Process accomplished in terms of giving the Squamish Nation decision-making power resonates with Papillon and Rodin’s summary of the normative foundation of FPIC. They state:

In essence, the commitment to FPIC requires that Indigenous peoples be empowered to make autonomous decisions regarding the appropriateness of development projects on their traditional lands. This consent must be expressed freely — that is, without force, coercion or pressure from the government or promoter seeking consent. It must also be offered prior to any authorization for a given activity, and it must be informed — that is, based on complete, understandable and relevant information about the full range of issues and potential impacts that may arise from the activity or decision.

Through the Squamish Process, Squamish Nation created its own decision-making process that enabled it to make decisions on whether to consent to the Projects being proposed in Squamish Territory. The process was initially envisioned as being two-pronged: first, it would involve deliberation at the community level; second, it was hoped, there would be collaboration with both levels of government to harmonize the three processes, to some degree. The harmonization process did not materialize, but Squamish Nation has continued to assert that a model that includes both community deliberation and government-to-government collaboration

159 Ibid.
160 Ibid.
161 Papillon & Rodin, “Natural Resources Extraction”, supra note 124 at 4.
162 Interview of Aaron Bruce, supra note 5.
to achieve consent is the most effective approach. In its submission to the CEAA Review Panel, Squamish Nation explained that its own process addressed most of the deficiencies it sees with CEAA, but: “we are the first to explain that conducting an independent EA process is a challenge both in terms of capacity and coordinating with other levels of government.” Squamish Nation acknowledges, therefore, that there are “benefits in integrating our [Squamish] EA process with the federal and provincial EA processes in some way.” Squamish Nation thus recommended that reform of CEAA include “consensus based decision-making as well as an opt in provision that allows for Indigenous nations to conduct their own EA that is coordinated or harmonized with the CEAA process.” Papillon and Rodin have similarly argued that a model of FPIC that includes “both the agency of Indigenous communities to make decisions for themselves and the need for [government] collaboration could create a mutually beneficial model for decision-making in land and resource development in Canada.” The tensions revealed through the Squamish Process have led Bruce to conclude that a model that begins with community deliberation followed by a process of collaborative consent with the state would be the best approach.

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163 Papillon and Rodin, “Natural Resources”, supra note 124 at 19. They define this as a relational approach stating that a relational approach to FPIC focuses on both the agency of Indigenous communities to make decisions for themselves and the need for collaboration with state governments to create a mutually beneficial models for decision-making in land and resource development in Canada.
164 SN CEAA Review Panel Submission, supra note 98 at 10.
165 Ibid.
166 Ibid.
167 Papillon and Rodin, “Natural Resources Extraction”, supra note 124 at 19.
6.5 The Future of Squamish-Crown Governance of the Woodfibre LNG Projects

While the Crown process and the Squamish Process were initially quite separate, there is some evidence that they are beginning to align. In May 2020, Squamish Nation, the EAO, and the new federal Impact Agency of Canada (IA Agency) entered a Memorandum of Understanding (MOU) to address proposed changes to the Woodfibre Project. Woodfibre has applied to modify the Project to include a floatel (a floating boat that will be used to house workers at the Woodfibre site.)\textsuperscript{168} In the MOU, the Parties “acknowledge that each party has its own respective regulatory and decision-making process for such an amendment request.”\textsuperscript{169} The Parties “agree to cooperate during the planning and during the assessment of proposed changes to enable coordinated engagement, to facilitate common requirements for information, and to encourage joint issuance of documents and coordinated timing of decisions.”\textsuperscript{170} The Parties also agree to coordinate potential conditions arising from amendment request and to co-ordinate the timing of decisions made. The MOU reflects commitments that better align with Squamish Nation’s initial vision of how the Squamish and Crown regulatory processes should communicate with one another. Thus, it appears that the MOU sets the foundation for a more collaborative approach to assessing the amendment request, one that acknowledges Squamish decision-making authority. In one media report, Squamish Councillor, Khelsilem, stated that

\textsuperscript{168} The floatel is a solution put forth by the proponent following local criticism of a work camp being created at Britannia Beach.

\textsuperscript{169} Memorandum of Understanding Between Squamish Nation And Environmental Assessment Office And Impact Agency of Canada, (22 May 2020).

\textsuperscript{170} Ibid.
“Squamish Nation welcomes the collaborative approach to examining the barge proposal.”

He also stated: “We’d participate as equal reviewers” and “[w]e have an equal seat at the table, basically . . . whatever conditions are to be agreed to, have to be agreed to by all parties.”

The MOU suggests that going forward the EAO and IA Agency will relate to Squamish Nation at a government-to-government level in its negotiations regarding the Projects. Recent changes in both federal and provincial EA legislation recognize a stronger role for Indigenous decision-making in EA processes and thus the MOU may be reflective of that shift.

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172 Ibid.
Chapter 7: Recognizing Indigenous Jurisdiction

7.1 Recognizing Indigenous Jurisdiction

Jody Wilson-Raybould recently wrote: “[r]econciliation requires transitioning from the colonial system of government imposed on Indigenous nations through the Indian Act, to systems of Indigenous governance that are determined by Indigenous peoples and recognized by others.”¹ She emphasized that Indigenous nations themselves must “deconstruct the colonial reality” by rebuilding governance structures and capacity, by determining how to move out of the Indian Act, and by revitalizing Indigenous legal orders. In other words, reconciliation requires that Indigenous peoples play the central role in shaping the processes leading to their self-determination, and Canadian governments must recognize and support these processes.

While much scholarly attention has turned to Canada’s Constitution and the judiciary for answers regarding reconciliation between Canada and Indigenous peoples, this dissertation has shifted the lens toward Indigenous communities. The intent here has been to learn, from Squamish Nation, the initiatives and/or strategies being adopted at a local scale to strengthen recognition of its Indigenous jurisdiction more broadly. To this end, this dissertation asked: how has Squamish Nation worked outside the treaty process to create space for its own legal processes and to strengthen recognition of its jurisdiction over land, water, and resources in Squamish Territory? To answer these questions, I conducted a case study of legal processes created by Squamish Nation to address pressing environmental challenges involving industrial

logging of forests in Squamish Territory and a proposed LNG pipeline and production facility in Howe Sound. Within the contexts of land use planning and EA law, Squamish Nation resisted Crown jurisdiction by refusing to participate in the Crown-created processes and instead created its own.

Through this case study, I examined Squamish Nation’s motivations for developing its own decision-making processes outside of Crown models; the forms of community engagement used; what perspectives, values and laws community members brought to the discussions; how final decisions were made; and how Squamish Nation values and laws shaped the plans, reports, and agreements that emerged following community deliberations. I also explained how these contemporary applications of Squamish law caused tension for the state legal order, and influenced proponent behaviour, which has strengthened state and third-party recognition of Squamish Nation jurisdiction.

The Xay Temixw land use plan and the Squamish Process for assessing the Woodfibre LNG Projects provide concrete examples of “how” an Indigenous community has built legal processes to communicate with non-Indigenous legal orders. They demonstrate how Indigenous jurisdiction is strengthened by translating Indigenous legal principles across legal orders. The SFN-BC LUP Agreement, which entrenches the central principles from Xay Temixw, has been highly effective in alerting proponents to areas of Squamish Territory that Squamish Nation has determined are off limits for future development based on its land use laws and priorities. It also

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2 Interview of Squamish Nation Councillor and Spokesperson, Chris Lewis/ Syetáxt (Councillor Lewis) (25 September 2019).
prompts proponents to consider whether proposed projects can meet Squamish Nation objectives and compels them to adopt measures to ensure they do not interfere with areas Squamish Nation has determined are environmentally or culturally sensitive. As the Woodfibre LNG Projects illustrate, through the SFN-BC LUP Agreement, Squamish Nation has gained significant leverage to compel proponents to engage with the Nation on its own terms. Indeed, both Woodfibre LNG and FortisBC agreed to participate in the Squamish Nation-led EA process, to be bound by the Conditions imposed on them by Squamish Nation through private contractual agreements, and to continue to acknowledge Squamish Nation as a third regulator of the Projects.

7.2 The Importance of Indigenous Legal Processes in Building Indigenous Jurisdiction

An early objective of this research project was to learn more about the types of agreements made by Indigenous nations and Canadian governments outside of treaty, with the hope of revealing how/whether non-treaty agreements foster Indigenous jurisdiction. In other words, the focus was to be on the content of non-treaty legal vehicles. As the research unfolded, however, it became increasingly apparent that community deliberation and the processes which engender the agreements are as important, if not more, than the agreements themselves, in terms of strengthening Indigenous jurisdiction. It is within the operation of contemporary Indigenous legal processes that legal principles are refined and/or developed, and decisions are made at the community level concerning how to articulate those principles to wider audiences. The Law Commission of Canada points out: “[e]nsuring that Aboriginal people have the political space and resources to cultivate and refine Indigenous laws in accordance with their traditions could contribute not only to the health of Aboriginal communities but also to reconciliation between
Canada and Aboriginal peoples.” Indeed, an important way to strengthen the multi-juridical foundation of Canada is by supporting and learning from Indigenous governments as they exercise their jurisdiction through their own decision-making mechanisms. The practice of deliberating and making decisions regarding current problems is a crucial means through which jurisdiction is enabled. As Pasternak points out, while quoting Dorsett and McVeigh: “In some formulations jurisdiction inaugurates law itself. Thus to exercise jurisdiction is to bring law into existence.”

In the growing literature on Indigenous legal orders, it is important to consider the mechanics of Indigenous legal processes, and their interactions with state legal processes. Coyle points out that “norms relating to process form an important part of Indigenous legal orders (just as procedural rules are an important part of other systems of law),” and that there has been a gap in the literature concerning the implementation of Indigenous law within the Canadian state. My research has attempted to fill that gap by paying attention to how Squamish Nation deliberative processes have generated a body of Squamish law that is being used to address contemporary environmental problems faced by Squamish Nation today. It has focused on the way community members brought their understandings of Squamish values and laws to the information gathering processes for Xay Temíxw and the assessment of the Woodfibre LNG Projects. Through Xay

Temixw, the community translated its laws and values into a workable land use framework and set of principles to guide the state and third parties when development is proposed in Squamish Territory. These new iterations of Squamish law reflect the principles of land use and land connection that are communicated in various Squamish cultural mediums.

In the Squamish Process, Squamish Nation developed its own method of assessment using the Squamish Valued Component (Squamish VC), which it determined was a more culturally accurate way to reflect how Squamish Nation relates to the natural world. The Squamish VC “focuses on the interconnectedness of Squamish Nation values,” and “includes as its component parts the interconnection among land, waters, governance, use, occupancy, transmission of culture/history and growth/revitalization of language as one valued component to be assessed.”6 Rather than measuring impacts to discrete environmental valued components, as is the typical Crown method, Squamish Nation used Guiding Topics (reflecting the Squamish VC) to illicit the central concerns, values and applicable laws of the Squamish Nation community. It then translated those concerns, values, and laws into 25 Conditions which have been placed on the proponents through private contractual agreements. These agreements enable Squamish Nation to regulate and govern the future of the Projects in a way that would not be possible had Squamish Nation simply participated in the Crown EA process.7 To this end, the development of these legal processes is strengthening the Squamish Nation legal order and accordingly, building recognition of Squamish Nation jurisdiction over Squamish Territory.

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7 Interview of Squamish Nation legal counsel Aaron Bruce/Kelts'-tkinem (13 May 2019) [Interview of Aaron Bruce].
7.3 Recognizing the Active Dimension of Indigenous Law

A secondary aim of this research project has been to illuminate “the active dimension” of Squamish law as it as been (re)created through these contemporary Squamish legal processes. Webber argues that in any society, rarely is there an uncontestable body of norms that make up a legal order. Rather, norms are generally contested until at some point a mechanism for resolving disagreement is utilized, and norms are provisionally settled. By examining the processes of information gathering, deliberation, translation and decision-making that took place in the development of Xay Temixw and the Squamish Process, I have aimed to illustrate how Indigenous law, like all law, is fluid. In other words, Indigenous legal principles are not frozen in the past. Principles are repeatedly brought forward, re-interpreted and applied in modern ways. As Chief Campbell stated, Squamish law is not about “going backwards in time to the way it was when our great grandparents lived on these lands. It’s drawing that forward and applying it in a modern context, utilizing the best tools available to us.” In other words, Indigenous nations, like all nations, use various techniques in their law-making processes that work for their communities in specific contexts at specific points in time. These include translation techniques and borrowing from other cultures, to apply law to contemporary problems in the best way possible.

9 Ibid.
10 Interview of Squamish Nation Hereditary Chief and Councilor Chief Ian Campbell/Xalek Sekyu Siyam (August 19, 2019) [Interview of Chief Campbell].
When the first draft of Xay Temíxw was developed by the community, it was understood to be a living document that would continue to evolve. Similarly, the Squamish Process is an iterative EA process. Aaron Bruce explained that the Squamish Process will likely be used for future projects proposed in Squamish Territory but will inevitably take on new forms as the context dictates. In both the development of Xay Temíxw and the Squamish Process, there was debate and discussion in the community regarding the appropriate approach Squamish Nation should take in managing land and resources and whether it should give consent to the Woodfibre LNG Projects. As with any society, different viewpoints were expressed. Some felt that no development should be permitted because it was not certain that there would be zero impact to Howe Sound. Others were content with minimizing the most significant impacts by way of the imposition of Squamish legal principles through the 25 Squamish Conditions placed on the proponents and the Crown. Squamish values and law relating to the Projects were considered and debated within the community before a final decision was made by the Squamish Council. Once that decision was made, settling the values and laws that would be used to solve these legal problems (at that point in time) they became translated into new sources of Squamish Nation law – the SN-EA Agreements containing the Squamish Conditions.

In examining the mechanics of the Squamish legal processes, I have tried to show the fluidity of law – that law is a “language of interaction” that changes depending on context. In other words, law is grounded in human interaction within certain social contexts and is always open to re-creation. As Canada moves to recognize and strengthen the operation of Indigenous

11 Interview of Aaron Bruce, supra note 7,
legal orders in Canada, it is important to understand this fluidity and how law emerges from deliberative processes that take place in Indigenous communities. To facilitate the operation of Indigenous legal process, Canadian governments can assist by providing financial support and creating compatible legislative frameworks – frameworks that provide the space and time for Indigenous legal processes to be carried out parallel to, or conjunction with, state processes. As Webber points out, respecting another’s legal order means respecting “the order’s practices of normative deliberation and decision-making.”¹² In other words, it requires focusing “on the processes, not just on the norms that issue from those processes.”¹³

7.4 Adapting Canadian Law to work with Indigenous Legal Processes in the Spirit of Reconciliation

This dissertation has shown that creating space for Indigenous legal orders necessarily entails creating space for Indigenous legal processes to be developed, operationalized, and recognized by the state. In considering directions for law reform, particularly in the EA context where implementation of FPIC is a primary goal, the importance of using Indigenous processes for FPIC implementation cannot be understated. As discussed in other chapters, state-created processes both in the realm of land use planning and especially EA, have largely failed to establish productive spaces for effective communication between Canadian and Indigenous legal orders. Indeed, as Coyle observes:

It might seem obvious that for a process aimed at addressing inter-societal disputes to be effective in promoting consensus and mutual respect, it will be necessary for both peoples

¹² Webber, supra note 8 at 170.
¹³ Ibid.
to be able to see their values reflected in that process itself and for there to be room within that process for both peoples’ values to be discussed and taken into account.

This failure of the Court to recognize the relevance of Indigenous process norms during consultations, a failure paralleled by the policies of the federal and most provincial governments, implicitly privileges state norms and undermines the capacity of the consultation process to bridge normative differences.  

The Crown’s reliance on its own models and processes for carrying out consultation with Indigenous peoples is stunting the aim of reconciliation. Administrative law scholars point out that processes dictate outcome and thus imposing Crown processes on Indigenous nations, without Indigenous input, puts consultation on the wrong footing from the outset and is unlikely to result in any form of consent. In other words, Crown-created processes that seek to adopt Indigenous norms without Indigenous input into the overall process will likely have limited success compared with processes that are collaboratively built by both Indigenous nations and state governments.

In terms of direction for future research, it will be important to pay attention to how the Crown collaborates with Indigenous peoples to build effective dispute resolution processes currently being considered in the realm of EA. Dispute resolution has been incorporated into the new BC EAA as a means of achieving Indigenous consent; however, as Jessica Clogg emphasizes, the success of the dispute resolution process will involve “getting the rules rights” and must be informed by both Western and Indigenous science. Indigenous jurisdiction and decision-making must be recognized, and the dispute resolution process must be voluntary and

14 Michael Coyle, “Shifting the Focus, Viewing Indigenous Consent Not as a Snapshot But As a Feature Film” (2020) 27 Int’l J on Minority and Group Rights 357 at 367.
non-binding. In other words, the process must be structured to allow the Indigenous nations and the Crown to creatively engage in finding solutions without fear that participation will result in a discharge of the Crown’s duty to consult (regardless of outcome). In working as a mediator between Indigenous peoples and state governments for over 25 years, Coyle notes the importance of:

helping parties to build a process that respects both of their sets of values and allows both sides to evaluate settlement options in accordance with their own visions of justice. In many ways those negotiations present, in a microcosm, the broader challenge that Canada faces today in advancing reconciliation between the state and Indigenous peoples through equal recognition of the core values, customs, and aspirations of Indigenous peoples.

The principles of alternative dispute resolution are an important place to begin examining how collaborative processes for consultation and consent between the Canadian state and Indigenous nations may be developed.

7.5 Final Thoughts

Twenty years ago, a research project I was working on in the Squamish Nation community led me to the Squamish Valley where I learned, in a tangible way, about Squamish Nation’s connection to its territory. I learned how to pick stinging nettles to make tea, how and where to collect the materials necessary to build a sweat lodge, and I heard stories from community members about their connections and relationships to the land and its resources. Through my association with community members, Squamish Nation’s jurisdiction was revealed

16 Coyle, supra note 5 at v.
to me in a way that many outsiders would not typically see. Indeed, for over a century Squamish Nation jurisdiction over its territory has been obscured by the imposition of settler laws, and extensive industrial development that has disrupted Squamish Nation’s historical use and governance of its land, water, and resources. Even twenty years ago, recognition of Squamish Nation jurisdiction was not as readily visible to non-Squamish Nation people as it is today.

As the result of innovative strategies and the dedicated work of the Squamish community and its leadership, Squamish Nation jurisdiction is becoming more visible. It is visually represented along the Sea to Sky Highway that spans the Howe Sound corridor. Now, when you drive along this highway, you witness signs that not only include English place names, but also the Squamish Nation place names that preceded those English names. The signs display the deep historic connection and jurisdiction Squamish Nation has over the area. As Chief Campbell pointed out in his is oral testimony at the NEB hearing on the Trans Mountain Pipeline Expansion Project: “The signage is in our language – it’s not in French and English, it’s in SkokomishSkwxwú7mesh, and people don’t know how to read it or understand what it means, but it immediately conveys a message that we’re still here, that you know, it’s important to recognize the Squamish’s history.”

The most rewarding part of this dissertation was listening to, and learning from, the Squamish Nation people I interviewed. By sharing their knowledge and insights with me, the interviewees helped me develop a richer understanding of how Squamish legal processes

operate, and how these processes are strengthening Squamish Nation jurisdiction. I am incredibly grateful for the generosity shown by all the interviewees in taking time out of their busy schedules to sit down and discuss the issues with me. I hope that the case study contained within this dissertation helps to further disseminate knowledge about the important work Squamish Nation is doing to develop Indigenous legal processes and strengthen the operation of legal pluralism in Canada.
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