

# Improving First Nations' participation in environmental assessment processes: recommendations from the field

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This paper presents results from research into the perspectives on environmental assessments of Canadian indigenous peoples, in particular British Columbia's West Moberly First Nations, the Halfway River First Nation and the Treaty 8 Tribal Association. This collaborative project included interviews with First Nation government officials and staff as well as community members to determine their analyses of what worked and, more significantly, what did not work in engaging and consulting indigenous people. Based upon this research, six key recommendations, derived from First Nations' experiences, are made; these recommendations would facilitate First Nations' future participation in environmental assessment processes in British Columbia and Canada.

Keywords: First Nations, environmental assessment, consultation, British Columbia Environmental Assessment Office, Canadian Environmental Assessment Agency, Treaty 8 Tribal Association

**I**N 2009, THE WEST MOBERLY FIRST NATIONS filed a challenge in the British Columbia Supreme Court against the British Columbia (BC) government and First Coal Corporation (FCC) over what they perceived to be a failed provincial environmental assessment (see Box 1). The case was decided in favour of West Moberly in March 2010 (*West Moberly First Nations ...*, 2010).

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What is significant is that once again the almost worst case scenario had happened. Once again, time, resources and good will have been wasted in an adversarial and confrontational response to a failure in an environmental assessment process.

Natural resources exploitation and industrial development have significant consequences for indigenous peoples, particularly for those choosing to maintain a traditional relationship with their land. In 2006 the Land Managers of three Treaty 8 First Nations in northeastern British Columbia, Canada, began discussing their concerns about the environmental assessments of resource developments that they were involved with, and the challenges they were facing regarding consultation. As a result, a grant proposal to investigate environmental assessment (EA) processes from the First Nations' perspective was developed collaboratively by the primary author, West Moberly First Nations, Halfway River First Nation, Sauteau First Nations and Treaty 8 Tribal Association (Sauteau later withdrew due to overwhelming workloads from environmental assessments). The concerns articulated by the participating

### Box 1

West Moberly First Nations, which is 34 kms north of Chetwynd in northeast BC, has filed a petition with the BC Supreme Court to overturn a decision by the Ministry of Energy, Mines and Petroleum Resources (MEMPR) to approve mining permits to First Coal Corporation (FCC) which will destroy critical habitat that an endangered caribou herd desperately needs for its survival.

'Since 2008, we have been struggling to protect the last 11 remaining caribou of the Burnt Pine caribou herd from extinction. So it was a sad day when MEMPR issued mining permits to FCC in September,' said Chief Roland Willson. 'We are not alone in believing that these permits are a death sentence to the caribou. Our Elders and the government scientists are on the same page. They all agree that coal mining in the caribou's critical habitat will result in significant adverse effects.'

'These caribou and their habitat are integral to the overall biodiversity of the area, and to who we are as Mountain Dunne-za people,' said Chief Willson. 'As stewards of the land, we cannot in good conscience stand by and watch MEMPR and FCC flagrantly ignore the law and place the very existence of this caribou herd in serious jeopardy. We have no other choice but to take this matter before the courts.'

(News release, West Moberly First Nations, 2009)

The honour of the Crown is not satisfied if the Crown delegates its responsibilities to officials who respond to First Nation concerns by saying the necessary assessment of proposed 'taking up' of areas subject to treaty rights is beyond the scope of their authority.

I am satisfied that the Crown recognized that it had a duty to consult with and accommodate reasonably, the concerns of West Moberly. I am not satisfied, however, that in the circumstances the Crown consulted meaningfully, nor that the Crown reasonably accommodated West Moberly's concerns about their traditional seasonal round of hunting caribou for food, for cultural reasons, and for the manufacture of practical items.

(The Honourable Mr Justice Williamson, *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010)

First Nations go to the heart of both the West Moberly court case and the Honourable Mr Justice Williamson's ruling in their favour. The process, from the perspective of First Nations, simply does not work, and 'the honour of the Crown is not satisfied' (Box 1; *West Moberly First Nations...*, 2010).

During our research we looked for mechanisms to improve First Nations' engagement in EA. The First Nation participants were clear that they believed current processes did not work. However, one key complaint that we heard from industry participants, and some government officials, was that they themselves lacked an understanding about what would work to facilitate First Nations' engagement during an EA:

If we knew what it was we were aiming at. Then we would do our darndest to meet it, and to be scored on, and probably go above and beyond, but if the standard, the scale and the expectations are not thoroughly defined up front; are subject to interpretation and criticism, before, during and after, the lack of certainty makes things very, very difficult. (Industry Proponent 1)

We have explored elsewhere what does not work in EA processes from the perspective of First Nations and that of industry (Booth and Skelton 2011a, b). We believe it would also be helpful to respond to the above proponent's rather plaintive question of what, from the First Nations' perspective, 'we' should be aiming at within EAs. The results of our research suggest some issues to consider.

### Methods

Research collaborators on the grant were West Moberly First Nations (WMFN), Halfway River First Nation (HRFN) as well as Treaty 8 Tribal Association (T8TA). Both Nations are located in north-eastern BC (see Figure 1). WMFN has a population of approximately 200, while HRFN has a population of approximately 227 people. The T8TA is made up of several Nations that adhered to the historical Treaty 8 in British Columbia, including West Moberly, Halfway River, Doig River, Saulteau and Prophet River First Nations.

Research methodology was negotiated with the First Nations. Driven in part by the First Nations' concerns to honour their peace and friendship Treaty (Treaty 8), all affected parties were given the opportunity to be heard. Interviews were offered to industry proponents, consultants, the British Columbia Environmental Assessment Office (BCEAO) and the Canadian Environmental Assessment Agency (CEAA).

WMFN and HRFN were asked to identify four current or recent EAs that they were involved in, as concrete examples for discussion purposes. This also

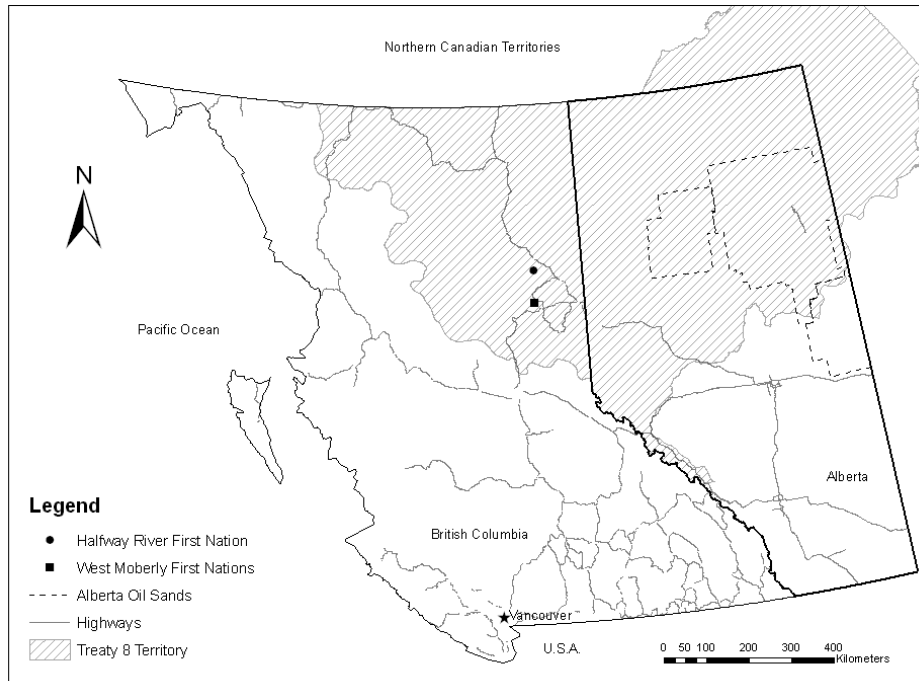


Figure 1. Map showing location of Halfway River First Nation and West Moberly First Nations

provided direction for identifying proponents and consultants. This protocol was largely successful, although some proponents and the CEAA failed to respond to repeated requests for interviews. The three proponents who did participate represented a diversity of projects and potential impacts. One project was selected as it represented a ‘successful’ EA from the perspective of the First Nations (and the proponent). The one project proponent undergoing federal environmental assessment did not respond.

Semi-structured interviews (Babbie, 2008) were arranged with First Nations participants, proponents, consultants and government officials. All interviews were taped with the participants’ permission. Most of the interviews were transcribed for analysis, and participants were offered transcripts for review. Upon request, some interviews were edited to protect anonymity. Interviews with the proponents and consultants were largely conducted by telephone. Interviews with the First Nations took place over the summer and fall of 2008 largely in their communities. Special effort was made to interview the Chiefs and Councillors, Elders and professional staff (land use managers, resource coordinators), as well as professionals from Treaty 8 Tribal Association. Fifteen community members from WMFN and HRFN agreed to interviews, as did two Chiefs, five Councillors, four staff and five Elders. Three proponents and three industry consultants also participated, as did several staff members from the BCEAO.

The actual environmental assessments and traditional use studies, where completed, were also reviewed as well as related documents. Information on the BCEAO (<http://www.eao.gov.bc.ca>) and CEAA (<http://www.ceaa-acee.gc.ca>) was derived from their official websites.

Data were analysed using qualitative methods, without the use of qualitative software. Content analysis was performed (Babbie, 2008) to identify key themes and ideas within constituency groupings (First Nations [Elders, Chief, Councillor, professional staff, community members], proponents, consultants and government). Data were also compared across constituency groupings.

In this analysis, we used extensive quotes from participants (identified by ‘role’ and a differentiating number). We felt that First Nations are often not allowed to speak on their own behalf in research. Given that this research focuses on their perceptions, their voice is particularly critical.

### The research context

Canadian First Nations’ involvement in federal and provincial EAs is mandated by the laws, by treaty obligations and by a series of court rulings that have determined that First Nations have rights and possibly title to certain lands and that, as these will be impacted by developments, First Nations must be consulted by the responsible government and, moreover, consulted ‘meaningfully’ although the definition of meaningfully has never been prescribed by judges. Further, First Nations’ rights and title must be accommodated during a development that might impact upon those rights and title. Although they hold final responsibility for consultation, and for its failure, governments often choose to download consultation obligations to the industry proponent (Booth and Skelton, 2010).

Canada conducts EA under the 1992 Canadian Environmental Assessment Act (C-15.2), which is

overseen by the Canadian Environmental Assessment Agency. The EA process is designed to minimize or avoid 'significant adverse environmental effects' and to ensure environmental issues are considered in determining if a project is to be approved. While mitigation remains the usual requirement, some EAs have also included a sustainable development focus (the 2007 Kemess Mine North EA from BC is an example of this approach; the application was turned down by CEAA (CEAA, 2007)). Certain activities are exempted under an Exclusion List including those with insignificant environmental impacts or addressing an emergency. The federal process is triggered when a development involves a federal authority, a federal authority provides funding, the project involves federal lands or the federal government must license, permit or otherwise approve a project. In many cases a project may need to undergo both a federal and a provincial level assessment, which may or may not be 'harmonized' (or conducted jointly and consecutively). Several levels of assessment are possible, depending upon the project.

The BC assessment process is governed under the BC Environmental Assessment Act (SBC, 2002: Chapter 43) revised in 2002. This Act covers projects going on within BC. Certain projects are usually exempt or are covered under other processes, such as forestry or some provincially based oil and gas development. The process can be conducted by the Environmental Assessment Office (BCEAO) or referred to a Minister to appoint a panel or other review agency. If the process remains with the BCEAO, an assessment framework and Terms of Reference are developed and submitted for public consultation and for First Nations review. When these are approved, the EA itself is developed by the proponent within the Terms of Reference. After submission the BCEAO reviews the EA for deficiencies and if the EA is deemed to be acceptable it is submitted for review by and consultation with First Nations and the public. After the public consultation phase the BCEAO prepares a report including responses to issues raised during consultation and presenting its own recommendations: it then refers the complete package for provincial Ministers' approval. When that approval is granted a certificate is issued to the proponent to undertake the project.

The federal Act specifically states: 'Community knowledge and Aboriginal traditional knowledge may be considered in conducting an environmental assessment' (Canadian Environmental Assessment Act Section 16.2). Interim Principles are laid out in one document (CEAA, 2009) on how proponents might do this: however, these are guidelines only. The BCEAO provides proponents with 'Application Information Requirements' for both Treaty and non-Treaty First Nations (BCEAO, no date). These suggest types of information to be gathered, but are also only guidelines. A court case often remains the only mechanism to determine if the required consultation

is indeed meaningful, adequate and fair to all interests. While BCEAO's 'Fairness and Service Code' (BCEAO, no date) indicates that the agency will 'identify and develop measures to prevent, avoid or mitigate any potential significant adverse effects on First Nations' interest,' complaints regarding this obligation are only fully assessed in a court of law as no other means of appeal exist.

Of significance to First Nations is the fact that a federal EA must include a study of cumulative impacts on a land base. The provincial agency does not require cumulative impact assessments, although some proponents do them anyway. A provincial EA follows administratively set timelines for each stage, for public and First Nation review and for issuing a certificate; federal EAs set their own timelines. Both agencies may choose to provide public groups and First Nations with funding to facilitate participation or can encourage proponents to do so.

Studies exist which document, if somewhat sparsely, the concerns of First Nations with regard to engagement within EA (Armitage, 2005; Baker and McLelland, 2003; CARC, 1996; Carrier Sekani Tribal Council, 2007; Couch, 2002; Confederacy of Nations, 1999; Fidler, 2010; First Nations Energy and Mining Council, 2009; Haddock, 2010; Harvard Law School, 2010; Galbraith *et al*, 2007; Gibson, 2002; O'Faircheallaigh, 2007; Plate *et al*, 2009; Tollefson and Wipond 1998; Wismer, 1996). General deficiencies with First Nations' engagement within EA have been documented since the 1990s, when the Canadian Arctic Resources Committee (CARC) (1996: 7) critiqued the EA for a diamond mine in the Northwest Territories as 'flawed in fundamental ways.' CARC stated that the assessment failed to live up to the three principles of all environmental assessments: comprehensiveness, fairness and rigour. A 1999 statement by the Confederacy of Nations to CEAA stated that the Canadian Environmental Assessment Act's required five year Ministerial review should include a recognition of First Nations' jurisdiction to conduct their own environmental assessments, and resolutions mechanisms to address the concerns of First Nations people and to ensure meaningful participation that incorporated traditional knowledge of the environment into the assessment process.

These generic failures in EA were confirmed over the following decade. Baker and McLelland (2003) noted that policies used by the BC government reflected a poor integration of First Nations people into the EA decision-making process generally. The authors stated that government needed to set clear rules for application and implementation, assess needs and alternatives, ensure transparency, monitor the results and apply the lessons, and be efficient.

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inadequate resources, the belief that the BCEAO was politically compromised, and a lack of cumulative assessment requirements. These issues were reiterated later by Plate *et al* (2009), the First Nations Energy and Mining Council (2009) and, to a lesser extent by Haddock (2010). Galbraith *et al* (2007: 40) argued that 'supra regulatory agreements' were required to address impacts that are 'insufficiently addressed with EA processes.'

The most recent criticism of EA, and of government dealings with a First Nation, came in a Harvard Law School report (2010) which argued that both the federal and BC governments needed to redress how resource development took place on lands critical to the First Nations and that substantive reformation in consultation strategies, including through EA, were required. The argument was framed as a human rights issue, rather than purely as a legal or process issue.

The research literature identifies a few common constraints on First Nations' engagement in EA. Several authors argue that levels of participant funding must be substantially increased (Baker and McLelland, 2003; CARC, 1996; Carrier Sekani Tribal Council, 2007; First Nations Energy and Mining Council, 2009; Harvard Law School, 2010). A general lack of capacity on the part of the First Nations, however that capacity is defined, has been widely identified as a key procedural failure in EAs (Armitage, 2005; Baker and McLelland, 2003; CARC, 1996; Carrier Sekani Tribal Council, 2007; First Nations Energy and Mining Council, 2009; Galbraith *et al*, 2007; Harvard Law School, 2010; O'Faircheallaigh, 2007; Plate *et al*, 2009).

More positively, Gibson (2002) and Fidler (2010) have found that sometimes EAs can have positive outcomes from the perspectives of First Nations. Gibson cited an EA in Labrador that was successful as the proponents were required by CEAA to adopt

sustainability based criteria within the project. Fidler describes a successful EA in British Columbia in which the Tahltan Nation was supportive of the EA as the mining proponent had taken the initiative to negotiate early on with the Nation, to work cooperatively to find mutually acceptable development options and to offer substantive benefit agreements.

## Analysis and discussion

Based upon our analysis of the discussion about the meaningful inclusion of First Nations within EA processes by the First Nations, industry proponents and consultants and staff from the BCEAO, we have derived the following key recommendations for improving First Nations' engagement within EAs in the future. We use some quotes from our research; these are identified by the role of the individual (Chief and Council member, staff) and an identifying number.

### *Recommendation One:*

#### *Take First Nations' concerns seriously*

One participant noted that Treaty 8 First Nations have been raising concerns about both the development going on in lands upon which they depend and the process by which they are consulted or engaged since development started in the area in the 1970s. Since that period, Canadian courts have increasingly supported Treaty and Aboriginal rights. Further, there are clear requirements for consultation and accommodating rights and title, as West Moberly's 2010 court case indicates (*West Moberly First Nations...*, 2010). It would appear to be time for both the federal and BC governments to do what judges have increasingly urged: take First Nation concerns seriously and work pro-actively to find mutually acceptable resolutions.

This research demonstrated that the Treaty 8 Nations interviewed do not feel that their concerns are accommodated or taken seriously, regardless of what government might assert to the contrary:

They spoil it. They spoil the berries, and they spoil our water there. They spoil our fishing. They kill our fish too. You spoil everything. You really kill the moose. I said, 'You get the hell out of here, because I don't want you here.' You come on and want to spray everything. I said; get the hell out of here. (Elder 1)

To be a proud First Nations person, you have to be connected to your culture. You have to know where you came from, and where and what are the important parts. What was the value of that person, and why, and why is my culture important today, and why is making dry meat, and picking these berries, critical to our way of life. The whole tone of government is economics and jobs, and training and forcing

people into this economy, and there is not an appropriate amount of attention placed on maintaining [our way of life]. We're the ones fighting. We can see our land base eroding. (Chief and Council 1)

It's all right with me, because I am old, I might be gone tomorrow, might be today, but I am looking after my great grandchildren. I got 56 grandchildren. That's what I am thinking about. Not myself. It's good. It's good to talk like this, to bring it up, everything. A lot of times I could not sleep at night because thinking about this. (Elder 2)

When I think the level of development...our children are seeing it, and they are scared. And they are upset, they are scared, they don't like what they see, and they understand, I mean they do not fully maybe understand the industry of course, but they understand what it is doing to the land and it scares them...What eleven year old should have to worry about having clean water or clean air? (Chief and Council 2)

First Nation participants could point to little in current processes that indicates that governments respect their concerns.

Well, if they actually put the environment first. It would significantly change the process. (Chief and Council 3)

This research has also indicated that a failure to do so affects everyone, including industry proponents.

I would say if there is another reason why things often fail, it is because of the absence of trust and that can apply on both sides of the table. There is not a genuine willingness to work together, and actually put effort on both sides to understand these issues and resolve them, then they don't get resolved. (Industry Consultant 1)

#### *Recommendation Two: Fix the relationship between First Nations and government*

Relational failures are just those, failures that are due to poor interpersonal relationships between the individuals filling different positions within EA processes. It was clear from examining the one EA widely considered to be successful by the First Nations, the proponent and the consultants, that sound, positive and respectful relationships were at the heart of why that EA was successful. Conversely, the failure of relationships has been identified by all participants as being at the heart of why the EA process fails, even if the EA itself eventually receives government approval.

You are fighting one government, one people you are fighting with and there is another one here behind it, and these here two, they work together, finally there are four or five people who are standing right here, and they fight with and you are alone, and that's too bad. (Elder 2)

We can talk about our concerns until we are blue in the face and they go ahead and do things any way. They don't respect us. (Chief and Council 1)

So, basically they still go ahead and approve. Approve plans without our input when that happens. And when we do get our input, well, you know a lot of times, the plans have already been approved...And what our concerns and our suggestions go for, in my opinion they are basically put to the wayside, or ignored, or whatever. And that in itself is not proper consultation. (Staff 1)

We will give them lots of thoughts on how they can change their project, or do things differently to address concerns we have, and they say thank you very much for the information, but then they don't implement what we suggest. So, there is no guarantee that our concerns are actually going to be addressed at the end of the day...They write it down, but they don't, when it comes time to, implement it in the plan or do something different, the way they are operating and still the financial bottom line takes precedence. (Chief and Council 1)

Further, the failure in relationships affects all participants; the industry proponents and consultants all stated that they were suffering as a consequence of the poor relations between the governments, their agencies and the First Nations:

I would love to undertake an environmental assessment in a context where the First Nations had as a starting point a productive and respectful working relationship with government. (Industry Proponent 2)

Thus, while a failing in relationships might seem a minor matter, its consequences are profound.

This is both the easiest and hardest recommendation to implement. It costs almost nothing (although a sound relationship should lead to taking other First Nations' concerns seriously, which will have costs) and might require limited change in law or policy. It could be implemented tomorrow. It is the hardest, because people cannot be compelled to behave appropriately if they do not wish to so do. It is clear from this research that problems exist on all sides. However, as the dominant, most powerful players on the ground, it remains the responsibility of the federal and provincial governments to take responsibility

for creating positive and respectful working relationships with First Nations, without resorting to a courtroom. The results could begin to mitigate many of the concerns First Nations have articulated through this research. It should be noted that First Nations participated in this research in keeping with the spirit of the peace and friendship Treaty. The CEEA chose not to participate despite an invitation and the BCEAO was directly required to participate by the Treaty 8 Tribal Association. Genuine efforts on the part of the governments and their respective agencies to create a new relationship would likely be seriously considered by the First Nations.

As an example of the power of relationships, the following story is offered. As part of this research, the Principal Investigator interviewed a WMFN Elder, Max Desjarlais. He told the story of being treated very rudely by a forest company official. Shortly afterwards, the Principal Investigator was asked by the BC Association of Forest Professionals to write an essay for the *BC Forest Professional Magazine* (Booth, 2008) and she used that story as an example of unethical behaviour on the part of a forest professional towards First Nations. While not named in the article, the company recognized itself and the incident. Since the article appeared, the company has made a point of trying to behave respectfully and to create a better relationship. While not perfect, the effort at a better relationship is allowing that company to work more productively with WMFN. Government officials could learn by that example.

Both the federal and provincial governments and their agencies must sit down with the Treaty 8 Nations, determine where the relationship has broken down, and jointly identify how the relationship can be improved. Both sides must then commit to, and live up to, the requirements of that respectful relationship. WMFN, HRFN and T8TA have all requested such meetings. Neither government agency has responded. The provincial government might also choose to assess how accurate is the BCEAO's assertion that only Treaty 8 Nations hold these concerns. If other relationships are broken but not identified, problems might well be brewing. (Other research supports the idea of broader concern on the part of other First Nations: see Carrier Sekani Tribal Council, 2007; First Nations Energy and Mining Council, 2009; Harvard Law School, 2010.) However, fixing interpersonal issues is only a first step; other, more substantive issues remain to be resolved. Better relations will simply facilitate those resolutions.

#### *Recommendation Three: Mutual education*

For a positive relationship to develop and to be maintained, First Nations, government agencies and industry proponents need to come to understand one another better. Both the First Nations and the industry proponents were clear on their lack of understanding of the others' perspectives and needs. The

BCEAO was the only group of participants to state that they received adequate training, but that training is clearly not sufficient to allow officials to understand First Nations' perspectives and concerns:

The intercourse is between our office and Treaty 8 as whole...but neither of those [interactions] are working. And it is something that we are not sure about. (BCEAO)

Better, mutual education is necessary.

The First Nations have repeatedly offered to spend time on the land with government and industry representatives, so that they can come to understand First Nation concerns. Government and industry should take them up on that offer. Conversely, First Nations could better understand government and industry's concerns and constraints. They should be offered educational workshops and other initiatives such as job shadowing and spending other opportunities with officials. Specific opportunities need to be mutually identified and adopted in a timely way.

#### *Recommendation Four: Prioritize fixing the procedural issues*

This research has identified substantial procedural failures in consultation and engagement.

- First Nations lack capacity. Capacity issues take many different forms. A lack of financial resources, staff resources and data are key issues, as are demands for data from critical (and overwhelmed) people such as the Elders; further complicating a lack of personnel is the absence of money to hire and retain additional qualified individuals, or to fund their own studies. Resolving this failure will likely require adequate funding for First Nations as well as resolving other procedural issues, such as timelines and a need for proactive cumulative assessments or regional First Nations land use planning initiatives.
- The provincial process timelines are highly inadequate (the federal process has no mandated timelines). The consultants and proponents interviewed also agreed that the mandated timelines were inadequate.
- As they note, by the time First Nations are first approached to participate in an EA, an EA is under way and an extensive number of environmental impacts can already have occurred through exploration and sample testing. Pro-active cumulative assessments or regional First Nations land use planning initiatives would help address this issue.
- There are simple failures in procedural fairness, some of which are related to issues of personality and relationships. Such failures have included arguments over concerns being minuted, failures to inform, notice of meetings going out too late,

playing favourites between 'cooperative' First Nations and those not so supportive of government, failure to provide full information, and verbal threats against staff.

- The most commonly employed baseline assessment method, the traditional use study (TUS), does not deliver the data necessary to understand critical impacts of industrial development on First Nations' ability to pursue a Treaty and constitutionally protected lifestyle. The most critical failing of TUS is that it only looks at a limited number of resources and subsistence activity of the past and immediate present, rather than assessing future needs and the entire spectrum of First Nation concerns.
- EA processes fail (whether that failure is legislative in origin or in implementation) to address concerns outside of resource utilization. While resource utilization is critical to First Nations, it is critical because it is the underpinning of their culture, particularly spirituality.
- The provincial EA process fails to require proactive cumulative assessment or regional First Nations land use planning initiatives.

Several of these issues are also discussed in other research (Armitage, 2005; Baker and McLelland, 2003; CARC, 1996; Carrier Sekani Tribal Council, 2007; Galbraith *et al*, 2007; Harvard Law School, 2010; O'Faircheallaigh, 2007; Plate *et al*, 2009). These issues are raised again in this article as the issues have not yet been considered let alone addressed by governments. A respectful relationship between government and First Nations would mean that it was time for these failures to be addressed and resolved, given that they are clearly identified and widely recognized by all parties to EA. First Nations and government officials must jointly prioritize a schedule for resolving these procedural failings based on the severity of impact, identify necessary resources, and develop mechanisms for resolution with agreed upon timelines. Then both must abide by those choices.

*Recommendation Five:  
Respect Treaty and Aboriginal rights*

WMFN and HRFN adhere to Treaty 8, which grants specific rights, including the right to continue their way of life as if a treaty had never been signed, as affirmed by the original Treaty Commissioners:

But over and above the provision, we had to solemnly assure [Treaty 8 signatories] that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be **as free to hunt and fish after the treaty as they would be if they never entered into it.**

We assured them that the treaty would **not lead to any forced interference with their mode of life** (Laird *et al*, 1899; emphasis added)

First Nations have made clear their interpretation of their rights.

[W]e have treaty rights that are guaranteed and protected by the Constitution of Canada, and they have to, and all the regulations and all their legislation that they do, they have to incorporate that into it. (Chief and Council 1)

Both the federal and provincial governments must be forthcoming and clear about what their interpretations are. If the differences are vast or irreconcilable, mechanisms for resolution must be identified, although it is preferable that this occurs outside the Supreme Court of Canada. Both governments must respect the unique legal position of First Nations and must be prepared to honour both the legal agreements of any Treaty and of the Constitution. Further, as judges have urged governments, any interpretation must err on the side of the First Nations when unjust infringement occurs.

I can't see us continuing our way of life and having that [industrial] infrastructure in that area that we use all the time...I would say we have gone beyond a threshold where the Treaty says our way of life will be protected. As if we had never signed the Treaty. And I would say today we cannot do that. We can't exercise our way of life in any way that resembles what was contemplated at the time of signing of the Treaty. (Chief and Council 1)

*Recommendation Six: Reconsider the process itself*

The First Nation participants in this research indicated clearly that EA processes fundamentally and philosophically fail First Nations and that tinkering with existing processes will not fix these failings.

I think the EA process is so fundamentally flawed, I don't think that we could just change a couple of things. (Chief and Council 3)

Other recent critiques (Carrier Sekani Tribal Council, 2007; First Nations Energy and Mining Council, 2009; Harvard Law School, 2010, Plate *et al*, 2009, Treaty 8 Tribal Association, 2008) confirm this assessment. Both Carrier Sekani Tribal Council (2007) and Plate *et al* (2009) offer substantive recommendations for re-framing federal and provincial EA processes to address First Nation issues (including the use of Impact Benefit Agreements, re-structuring the EA process and the role of First Nations within the process). Although further work in collaboration with the First Nations is required to ensure these



recommendations are suitable for all Nations (and Metis and Inuit), the only thing truly missing is the will to begin to revise the process in response to First Nation concerns (although the recent decision by the federal government to narrow the list of what is subject to EA suggests this is not the direction of government interests).

One indication that the outcomes of EAs for First Nations are not likely to improve was the reaction of two agencies to the first draft of this report. The BCEAO and the CEAA both received copies of the draft report, as did the First Nations, Treaty 8 Tribal Association and the other participants. The First Nations have accepted the findings, indeed the entire Treaty 8 Tribal Association adopted the findings as reflective of all Nations, regardless of whether they participated. The CEAA, as a subject, did not respond. As a funding agency, the CEAA has refused to post the report on its website. The BCEAO did respond and their response was of considerable note. The foremost criticism was that the report:

presents numerous highly subjective views and statements about the EA process (and other regulatory processes) that are taken entirely at face value...the EAO recognizes these subjective statements may be views held personally by interviewees, however, no objective assessment of these statements is provided' (Mazur, BC Environmental Assessment Office, personal communication, 21 January 2010)

They did not describe the statements by proponents, consultants nor by themselves as 'subjective.' Such a statement might not only be seen as prejudicial in a human rights sense (only First Nations offer 'subjective opinions,' non-native participants offer something less challengeable), but it calls into question whether the agency takes seriously any concerns expressed by First Nations as anything other than 'highly subjective and inaccurate' views. If they cannot accept First Nations' concerns as valid, it is unlikely the BCEAO will be open to meaningful engagement of First Nations in either an EA process or in revising the process itself. Indeed, since the draft report on this research was circulated, the First Nations have indicated that their relationship with the BCEAO has only worsened.

## Conclusions

This research is not unique in its findings. Although not well trodden, the path is visible. The need is certainly there for better opportunities for more First Nations to state their concerns (preferably in their own words); however the greater need is for the federal and provincial governments to recognize that in their failure to address First Nation concerns regarding EA processes, they compromise efficient and environmentally sound development of the country's

considerable resources, risk the disapprobation of fellow democratic nations and their own citizens, and continue to face court proceedings which are likely to again reiterate the need to address First Nations' concerns and to accommodate constitutionally recognized rights and title and Treaty rights. Further, they perpetuate hostile relations with their indigenous people, risking protests and stand-offs (Oka being the most famous Canadian example).

It is worth noting that the circumstances of West Moberly and Halfway River First Nations are not unique. Other research has demonstrated that similar concerns regarding First Nations' consultation and mitigation are concerns shared in other parts of Canada (Agyeman *et al.*, 2009; Armitage, 2005; CARC, 1996; Galbraith, 2005; Nadasdy, 2003; O'Faircheallaigh, 2007). Research has also demonstrated that indigenous peoples in other parts of the world also share similar experiences and concerns (Ali, 2003; Caruso *et al.*, 2003; O'Faircheallaigh, 2009; O'Faircheallaigh and Corbett 2005). This would suggest that many of the lessons developed from this research have application in other parts of Canada, as well as other parts of the world. Countries like Canada should be leading by example in EA reform to address indigenous concerns.

One last finding should be noted. Despite the significant challenges they face, West Moberly First Nations and Halfway River First Nation remain optimistic about having a future as indigenous people. They work hard to retain their cultures and to perpetuate them. They expect a future for their children although they are uncertain as to what that holds. It is time that the federal and provincial governments supported the future of their indigenous peoples. To maintain the status quo of EA as currently practised, given the failures articulated by the First Nations, is to destroy that future and so destroy West Moberly and Halfway River as cultures and as peoples.

## References

- Agyeman, J, P Cole, R Haluza Delay and P O'Riley 2009. *Speaking for Ourselves: Environmental Justice in Canada*. Vancouver: University of British Columbia Press.
- Ali, S H 2003. *Mining, the Environment and Indigenous Development Conflicts*. Tucson: University of Arizona Press.
- Armitage, D R 2005. Collaborative environmental assessment in the Northwest Territories, Canada. *Environmental Impact Assessment Review*, **25**(3), 239–258.
- Babbie, E R 2008. *The Basics of Social Research*. Belmont: Thomson Wadsworth.
- Baker, D C and J N McLelland 2003. Evaluating the effectiveness of British Columbia's environmental assessment process for first nations' participation in mining development. *Environmental Impact Assessment Review*, **23**(5), 581–603.
- Booth, A L 2008. Ethics, foresters, forestry and First Nations. *BC Forest Professional Magazine*, **15**(6), 13.
- Booth, A L and N W Skelton 2010. First Nations' access and rights to resources. In *Uncertainty and Conflict: Resource and Environmental Management in Canada*, ed. B Mitchell, pp. 80–103. Toronto: Oxford University Press.
- Booth, A L and N W Skelton 2011a. Industry and government perspectives on First Nations participation in the British

- Columbia Environmental Assessment Process. *Environmental Impact Assessment Review*, in press.
- Booth, A L and N W Skelton 2011b. 'We are fighting for ourselves' – First Nations' evaluation of British Columbia and Canadian Environmental Assessment Processes. *Journal of Environmental Assessment Policy and Management*, in press.
- BCEAO, British Columbia Environmental Assessment Office, no date. 'Application Information Requirements and Treaty Nations', 'Proponent Guide for Providing First Nation Consultation Information (Non-Treaty First Nations)' and 'Fairness and Service Code'. Available at <<http://www.eao.gov.bc.ca>>, last accessed December 2007.
- CARC, Canadian Arctic Resources Committee 1996. Critique of the BHP Environmental Assessment: purpose, structure, and process, 21 June 1996. *Northern Perspectives*, **24**(1–4), 7.
- Carrier Sekani Tribal Council 2007. *First Nations Perspectives on the BC Environmental Assessment Process*. Prince George: Carrier Sekani Tribal Council.
- Caruso, E, M Colchester, F McKay, N Hildyard and G Nettleton 2003. *Extracting Promises: Indigenous Peoples, Extractive Industries and the World Bank. Synthesis Report* (May 2003). Baguio City, Philippines Forest Peoples Program and Tebteba Foundation.
- CEAA, Canadian Environmental Assessment Agency 2007. Kemess North Copper–Gold Mine Project. Joint Review Panel Summary, 17 September 2007. Ottawa: CEAA. Available at <<http://www.ceaa-acee.gc.ca/050/documents/23469/23469E.pdf>>, last accessed 27 September 2010.
- CEAA, Canadian Environmental Assessment Agency 2009. *Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the Canadian Environmental Assessment Act — Interim Principles*. Available at <<http://www.ceaa-acee.gc.ca>>, last accessed December 2009.
- Confederacy of Nations 1999. *First Nation Participation in the Five-Year Review of the Canadian Environmental Assessment Act*, Ottawa, April 12–14, 1999. Available at <<http://www.afn.ca/article.asp?id=887>>, last accessed December 2009.
- Couch, W J 2002. Strategic resolution of policy, environmental and socio-economic impacts in Canadian Arctic diamond mining: BHP's NWT diamond project. *Impact Assessment and Project Appraisal*, **20**(4), 265–278.
- Fidler, C 2010. Increasing the sustainability of a resource development: Aboriginal engagement and negotiated agreements. *Environment, Development and Sustainability*, **12**, 233–244.
- First Nations Energy and Mining Council August 2009. *Environmental Assessment and First Nations in British Columbia*. Discussion Paper. Available at <<http://www.fnemc.org>>, last accessed May 2010.
- Galbraith, L 2005. *Understanding the Need for Supreregulatory Agreements in Environmental Assessment: An Evaluation from the Northwest Territories, Canada*. Simon Fraser University, Burnaby, BC.
- Galbraith, L, B Bradshaw and M B Rutherford 2007. Towards a new supreregulatory approach to environmental assessment in Northern Canada. *Impact Assessment and Project Appraisal*, **25**(1), 27–41.
- Gibson, R 2002. From Wreck Cove to Voisey's Bay: the evolution of federal environmental assessment in Canada. *Impact Assessment and Project Appraisal*, **20**(3), 151–159.
- Haddock, M 2010. *Environmental Assessment in British Columbia* (Draft, May 2010). Environmental Law Centre, University of Victoria, BC.
- Harvard Law School 2010. *Bearing the Burden: The Effects of Mining on First Nations in British Columbia*. International Human Rights Clinic, 7 June 2010. Available at <<http://law.harvard.edu/programs/hrp/BearingTheBurden.pdf>>, last accessed 22 June 2010.
- Laird, D, J H Ross and J A McKenna 1899. *Report of Commissioners for Treaty No. 8 Winnipeg, Manitoba, 22nd September, 1899*. Available at <<http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/t8/trty8-eng.asp#chp4>>, last accessed 27 July 2010.
- Nadasdy, P 2003. *Hunters and Bureaucrats: Power, Knowledge and Aboriginal-State Relations in the Southwest Yukon*. Vancouver: University of British Columbia Press.
- O'Faircheallaigh, C 2007. Environmental agreements, EIA follow-up and Aboriginal participation in environmental management: the Canadian experience. *Environmental Impact Assessment Review*, **27**, 319–342.
- O'Faircheallaigh, C 2009. Effectiveness in social impact assessment: Aboriginal peoples and resource development in Australia. *Impact Assessment and Project Appraisal*, **27**(2), 95–110.
- O'Faircheallaigh, C and T Corbett 2005. Indigenous participation in environmental management of mining projects: the role of negotiated agreements. *Environmental Politics*, **14**(5), 629–647.
- Plate, E, M Foy and R Krehbiel 2009. *Best Practices for First Nation Involvement in Environmental Assessment Reviews of Development Projects in British Columbia*. West Vancouver, BC: New Relationship Trust. Available at <<http://www.newrelationshiptrust.ca/initiatives/governance-capacity/best-practices>>, last accessed August 2009.
- Tollefson, C and K Wipond 1998. Cumulative environmental impacts and Aboriginal rights. *Environmental Impact Assessment Review*, **18**(4), 371–390.
- Treaty 8 Tribal Association 2008. *Identifying the Shortcomings and Limitations of British Columbia's Environmental Assessment Process*. A joint initiative between British Columbia's Environmental Assessment Office and Treaty 8 Tribal Association and Member First Nations. Working Document March 2008.
- West Moberly First Nations 2009. *First Nation takes BC to Court to Protect the Last 11 Caribou from Coal Mining*. News release — 26 October 2009. MarketWire.
- West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2010 BCSC 359 (March 19, 2010). Reasons for Judgement.
- Wismer, S 1996. The nasty game: how environmental assessment is failing Aboriginal communities in Canada's north. *Alternatives Journal*, **22**(4), 10.

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