IMPACT ASSESSMENT IN THE ARCTIC

EMERGING PRACTICES OF INDIGENOUS-LED REVIEW

Gwich'in Council
INTERNATIONAL

IMPACT ASSESSMENT IN THE ARCTIC:
EMERGING PRACTICES OF INDIGENOUS-LED REVIEW

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SUBMITTED TO: Gwich'in Council International (GCI)

GCI represents 9,000 Gwich'in in the Northwest Territories (NWT), Yukon, and Alaska as a Permanent Participant in the Arctic Council, the only international organization to give Indigenous peoples a seat at the decision-making table alongside national governments. GCI supports Gwich'in by amplifying our voice on sustainable development and the environment at the international level to support resilient and healthy communities. For more information see **gwichincouncil.com**.

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EXECUTIVE SUMMARY

This report identifies emerging forms of Indigenous-led impact assessment. Indigenous governments are creating forms of impact assessment that combine conventional environmental impact assessment frameworks with Indigenous governance processes. These Indigenous-based processes rely on and protect Indigenous culture, language, and way of life in ways existing government legislated systems have either never contemplated or are still not accommodating.

This study was commissioned by Gwich'in Council International to inform its participation in the Good Practice Recommendations for Environmental Impact Assessment and Public Participation in the Arctic project, which falls under the auspices of the Sustainable Development Working Group of the Arctic Council. Three case studies (two in Arctic regions) demonstrate how Indigenous-led impact assessment is playing out on the ground in the Canadian context, mobilizing different types of primary relationships. Indigenous parties are increasingly co-managing impact reviews with the Crown, co-developing them with proponents, or leading them on their own.

This report is by no means intended to be prescriptive, as there are many strategies and partnerships that can be used for Indigenous-led impact assessment. It instead covers a wide range of new ground in impact assessment, highlighting trends, goals, approaches, and factors influencing the effectiveness and limitations of Indigenous-led impact assessment. Key findings include that:

- Indigenous parties are creatively using legislation and negotiated agreements to give force to Indigenous-led reviews.
- Indigenous-led impact assessments can be effective with a wide range of primary relationships, including with the Crown, with the proponent, and with no partner at all (independent). Choosing the right primary relationship is critical.
- All processes require a clear set of steps defining how the review will be conducted, and how consent to accept the findings will be given by those who hold the authority to do so.

- Creation of an Indigenous-led approach does not negate participation and use of findings from state-led processes. Indeed, a key finding is that all Indigenous-led impact assessments can benefit from shadowing the legislated impact assessment process.
- There are a variety of specific enabling factors that will improve the chances of success of an Indigenous-led impact assessment. These relate to the external legislative and project context, the capacities and realities of the nation, and the willingness of the proponent and government to lend their support.
- There are distinguishing elements that make Indigenous-led impact assessment attractive, such as the ability to ensure culture, language, and way of life are the central values that are protected and reinforced in the review in ways that the existing legislated system simply has not to date.

This report also bridges the gap between the conceptual and the practical, presenting a series of questions that any Indigenous nation considering running a process may want to ask internally (See Appendix A), and recommended preparatory actions for any that are going to proceed to conduct their own process (See Appendix B).

This report presents a series of questions that any nation considering running a process will need to ask, and recommendations for any that are going to proceed to conduct their own process.

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PART 1

OVERVIEW

Gwich'in Council International contracted The Firelight Group (Firelight) to conduct a review of Indigenous-led impact assessment and describe emerging practices of Indigenous-led impact assessment processes. Due to the fragility of arctic environments, with high vulnerability to climate change, the high proportions of Indigenous peoples within arctic populations, and increasing resource development pressures, Indigenous-led impact assessment is particularly important. This work illustrates how Indigenous governments can and have led their own impact assessment processes, thinking specifically about the choices to be made and the factors that should be considered when making the decision about whether and how to undertake an Indigenous-led impact assessment.

This report describes the strengths and limits of existing Indigenous-led impact assessment in the Arctic region and elsewhere, with a focus on case studies from the Canadian context, in order to characterize emerging practices. Note that this report does not state *best practice*; there is no single way to conduct Indigenous-led impact assessment. Every Indigenous nation has the right to develop its own Indigenous-led assessment approach based on its culture, context, and capacities.

That said, there are consistent principles and practices that can be applied that will contribute to accomplishing the overarching goals of Indigenous-led impact assessment—namely that the affected Indigenous communities themselves are empowered to make prudent, well informed, and precautionary decisions about major projects, with the best possible available information and data, using a culturally appropriate decision-making framework.

The purpose of this report is to examine the field of Indigenous-led impact assessment in Canada to learn lessons from existing efforts. The research questions framing this project are:

1. What are the key features of Indigenous-led impact assessment to date?
2. What are the outcomes of Indigenous-led impact assessment? What has and hasn't worked?

This review is timely, given that major project impact assessment is a planning process in flux, with Indigenous nations and governments starting to take a leading role in impact assessment, including the design and implement of community-led processes. Nations are making decisions about whether industrial development should occur in their lands, consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), enabled through government-to-government agreements.

Most recently, the federal government has drafted replacement legislation for the *Canadian Environmental Assessment Act*, 2012, (the forthcoming *Impact Assessment Act)* giving elevated status and recognition for Indigenous based impact assessment and decision-making alongside the federally legislated process. This federal government recognition of the legitimacy of parallel Indigenous-led impact assessment suggests the need for better guidance and tools for those choosing to follow this path; it is this information vacuum that this report attempts in part to fill.

LAYOUT OF REPORT

Part 2 describes the methods and research approach used in this study. In Part 3, the current context behind a move toward more Indigenous-led impact assessment is identified, along with a definition for what Indigenous-led impact assessment is. Then, goals, common characteristics, and factors that may influence the success of Indigenous-led impact assessment are outlined in Part 4. Part 5 moves on to examination of the three models drawn upon to demonstrate different ways to approach Indigenous-led impact assessment, with case study examples for each. These case studies and models inform the discussion and lessons learned in Parts 6 and 7, respectively.

Two practical appendices are provided for Indigenous nations considering whether and how to develop and implement their own Indigenous-led impact assessment systems.

HOW TO USE THIS REPORT

This report surveys options for Indigenous groups based on three models and case studies from the Canadian experience. This work is intended to assist Indigenous groups throughout the Arctic and beyond in deciding whether and how to establish their own Indigenous-led impact assessment processes over resource development in their homelands. In the end, there is no "one size fits all" approach; these examples must be filtered through the lens of local realities, leverage, capacities, priorities, and cultural values. We encourage individual Indigenous groups to look at their own situation against these emerging practical models and enabling factors for success, to assist in making these difficult choices. For example, Appendix A reviews the types of questions Indigenous parties may want to ask when considering the question of how to lead a review process, alongside, on their own, or with the state or a specific project proponent.

PART 2

METHODS AND RESEARCH APPROACH

After consulting with Gwich'in Council International representatives, the Firelight team identified a definition for and the typical (and optional) characteristics of Indigenous-led impact assessment (see Part 4 on goals and characteristics), drawing from the available literature and our own experience. The Firelight team then characterized three types of Indigenous-led impact assessments based on our experiences with Indigenous nations in the Canadian context and an examination of recent impact assessment public records, and then selected a case study of each general type (independently led by the Indigenous party, co-developed with a project proponent, and co-managed with the Crown). These three case studies were chosen because they were high profile cases, exemplary of a particular relationship model, had people involved who were willing to speak about their experiences, and/or involved members of the Firelight team. Each informs analysis of enabling factors for success and lessons learned.

Specific case studies are particularly important in this work because there is very little comparative or critical analysis in the environmental impact assessment literature of what O'Faircheallaigh (2017) refers to as "community based assessment" and what we call Indigenous-led impact assessment. It is an emerging field; the limited number of examples from the real world is our primary guide.

Consent to use these Indigenous-led impact assessment examples as case studies was sought from each of the nations/Indigenous organizations. Case histories were developed and accuracy of the case description was verified by the nation involved.

The perspectives sought, and key informant interviews conducted, were with the people who ran the Indigenous-led impact assessment itself, rather than the company or government representatives involved in the process. The report therefore describes the process from the point of view of Indigenous leads.

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PHOTO: ARCTIC HARE IN NUNAVUT, COURTESY JOHANNES ZIELCKE/FLICKR CREATIVE COMMONS

PART 3

DEFINITION AND CONTEXT OF INDIGENOUS-LED IMPACT ASSESSMENT

FOR THE PURPOSES OF THIS STUDY, a working definition for "Indigenous-led impact assessment" is:

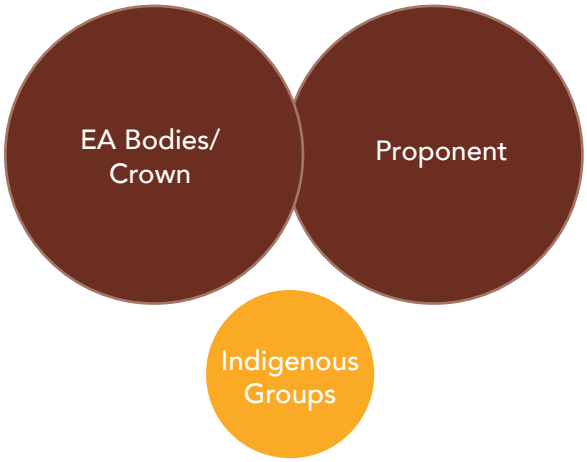
> A process that is completed prior to any approvals or consent being provided for a proposed project, which is designed and conducted with meaningful input and an adequate degree of control by Indigenous parties—on their own terms and with their approval. The Indigenous parties are involved in the scoping, data collection, assessment, management planning, and decision-making about a project.

Indigenous-led impact assessments often occur outside of and/or exhibit strong differences from currently legislated environmental assessment processes, although this is changing over time. Canada has multiple environmental assessment regimes at the federal, provincial, and territorial levels. The existing environmental assessment system depends on legislation that emerged in the 1970s (such as the Canadian federal environmental assessment process) and was substantially altered in the 1990s and 2000s to require more meaningful involvement of Indigenous peoples through unique legislation such as the *Mackenzie Valley Resource Management Act* enacted in 1998 (Gibson et al. 2016).

The current federal *Canadian Environmental Assessment Act, 2012* (CEAA 2012) went through a public review process in 2016–17. The federal government, as of February 8, 2018, tabled draft revisions to the legislation, based in part on the findings and process of an expert review panel.

Historically, Canadian Indigenous groups have often not had a meaningful voice in impact assessment. Even more rare has been any Indigenous role in actual decision-making on major projects. Indigenous groups have been left outside of regulatory processes, allowed to provide only a narrow range of *inputs* to the process—largely in the form of baseline traditional knowledge and traditional use information—without having any meaningful control over the process itself, or the *outputs* in the form of decisions about whether projects go ahead and under what conditions or rules. Not incidentally, Indigenous culture, traditional activities, rights, and title have by and large not been taken into comprehensive (or even meaningful) account in

FIGURE 1: RELATIONSHIPS IN TYPICAL EXISTING IMPACT ASSESSMENT SYSTEMS



the Crown-led and proponent-driven Canadian environmental assessment processes (Gibson 2017).

The current government-run and proponent-driven impact assessment systems in Canada are thus widely perceived among Indigenous peoples as being designed less to protect Indigenous rights and the environment they rely upon, than to expedite economic growth through major industrial development.

In recent years the field of impact assessment—both in the level of engagement of Indigenous peoples in the process and their role in decision-making—is changing due to a variety of factors, including but not limited to the following:

- Court cases have challenged the environmental assessment approach, and as a result good practice now includes integration of culture, rights, and Indigenous knowledge in project decisions. Court rulings such as the landmark title case of the Tsilhqot'in in British Columbia (*Tsilhqot'in Nation vs. British Columbia*) highlight the growing power of Indigenous communities in relation to land and resource use decision-making.
- International laws and norms have also provided guidance and momentum. Recent commitments toward reconciliation and the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) require a re-visioning of Canada's relationship with Indigenous peoples. This is a major driver in the ongoing review of Canada's impact assessment processes.
- Modern land claims settled between Canada and Indigenous groups (especially but not exclusively in the territorial north) require that Indigenous culture and rights and decision-making powers are central to effective impact assessment.
- As a result of continued Indigenous dissatisfaction with the status quo in provincial, territorial, and federal impact assessment processes, and the associated lack of protection in environmental assessment for Indigenous culture, rights, and traditional use, some Indigenous groups are conducting Indigenous-led impact assessments outside or alongside the formal system that more closely match their priorities, worldviews, and legal customs (e.g., Bruce and Hume 2015; SSN 2017).

PART 4

GOALS, CHARACTERISTICS, AND FACTORS FOR SUCCESS OF INDIGENOUS-LED IMPACT ASSESSMENT

Crown agencies responsible for legislated impact assessment develop a set of rules, procedures, and thresholds for what they consider to be the ideal approach for planning. So too should Indigenous governments. The following key points should be explicitly considered when setting these rules and formulating an Indigenous-led impact assessment process (see also Appendix B for recommendations to nations planning to develop their own assessment framework).

Indigenous nations often tie the rules and structures they set in place to their goals and aspirations for setting up an Indigenous-led impact assessment process. Example goals of a nation choosing Indigenous-led impact assessment may include seeking:

- Recognition of its inherent rights to govern in its territory and steward its lands and waters;
- To embed its own governance and decision-making processes into land and resource decision-making;
- Protection of areas in which a specific project is proposed, because it is highly important for cultural, spiritual, or environmental reasons (and concern that the state system may not protect these values);
- A desire for a more deeply engaged planning process than the existing legislated system allows for, which will lead to the nation being able to accept, reject, or change the major project in order to accommodate the particular interests of the nation; and
- A desire to engage its members and leadership more meaningfully into the impact assessment process than the current system allows for.

Note that these goals are neither mutually exclusive nor comprehensive. Indigenous nations may hold some or all of them in combination, and may have others unique to their nation. The key thing is to identify these goals in advance and make sure that the structures of your system are designed to see them achieved.

As noted previously, Indigenous-led impact assessments often look and work very differently from the existing legislated processes, in part because they are tied to very different goals and aspirations—indeed, entirely separate worldviews. Common characteristics that distinguish Indigenous-led impact assessment include but are of course not limited to:

- A process derived from and steeped in the culture, traditional knowledge, and stewardship approach of the nation.
- Explicit assertion that the process and decisions that come out of it are legally binding as legitimate elements of an Indigenous group's overall governance/stewardship rights and responsibilities within its territory: "Community Controlled Impact Assessment recognizes the legitimacy and power of Indigenous knowledge and Indigenous authority to manage resources that affect their livelihoods" (O'Faircheallaigh 2017: 7).
- A process that meaningfully engages Indigenous group members and their values at many different points. This involves the use of culturally appropriate information sharing and decision-making mechanisms, to increase community engagement and understanding of the project and its potential impacts.
- Indigenous laws and norms are at the centre of the process and decision-making.
- Indigenous knowledge is often central to the decisions, and brought in systematically through every phase of decision-making (Berkes 2012). This leads to increased support for the process and ability to socialize information at the community level, and increases the "defensibility" of the findings at the community level.
- Cultural values tend to be more broadly defined in Indigenous-led assessment. Cultural values and Indigenous law, in the broadest sense, are often at the core of Indigenous-led impact assessment, with nations aiming to promote and protect culture and language. There is typically a widely shared intent to ensure that the culture, language, and way of life are protected throughout a review.
- More timeline and process flexibility than the legislated impact assessment frameworks.
- More focus on oral discussion of issues and less on paper-driven process steps.
- More emphasis on proponents as information providers, and less on them as estimators of impact significance or acceptability.
- Less separation of valued components into separate silos, and more openness to decision-making on projects as a whole (holistically) against cultural laws and norms, sustainability, effects on future generations, and net gains to Indigenous values.
- A greater willingness to consider a future without the project if costs are deemed to outweigh benefits, as determined using Indigenous priority criteria and weighting. In other words, Indigenous-led impact assessment have led to withholding of consent for a major project more often (to date) than is the norm in the legislated impact assessment processes.

WHAT HAPPENS WHEN THERE IS AN INDIGENOUS PROPONENT OF A MAJOR PROJECT?

With the growing economic independence of many Indigenous nations, the future will likely see more and more Indigenous-owned companies (both wholly owned and joint ventures) promoting major projects themselves. Indigenous proponents of major projects, for legal, ethical, and cultural reasons, will need to be held to the same standard as non-indigenous proponents. Further, there will need to be (and is, in the case of many Indigenous governments including those that have settled land claims and self government agreements) appropriate separation of the economic development arm of a nation proposing the development, from the governance arm of that same nation that assesses its impacts and benefits. This is to avoid real or perceived conflicts of interest and ensure legitimacy of the process, including in the eyes of Indigenous group members and outside parties. Indigenous nations faced with this scenario may want to consider the way in which major infrastructure projects promoted by government departments are subjected to arms-length impact assessments—these models will provide both insights and cautionary tales.

The existing state-led impact assessment system is by and large a proponent-led system, meaning the proponent has a great deal of latitude in how it focuses and conducts its assessment of the impacts and benefits of its proposed project. Given this reality, it may be advisable in some cases where the proponent is a nation-owned company (note: this would not likely apply to a "member-owned" company) *not* to adopt an Indigenous-led impact assessment model (i.e., run the assessment through the existing legislated process), so that the Indigenous nation can focus its efforts on the proponent side of the equation without taking on the role of process manager. This may include the Indigenous proponent engaging early and often with members of the nation, choosing valued components that are often ignored in legislated systems (e.g., food security, cultural continuity, connection to land), setting up an internal decision-making process that includes members and leadership (not just company management), and the embracing of Indigenous decision-making lenses like inter-generational equity, precaution, and adherence to natural and customary laws.

Benefits of 'front-end loading' many of the positive attributes of an Indigenous-led impact assessment for an Indigenous-led project proposal prior to filing for permits and licenses, and then running it through the existing legislated system might include: reducing process costs (not engaging in two processes or running your own detailed process), development of a project plan and application materials using an Indigenous lens, and still retaining the right as the proponent to decide whether a project will proceed, at the end of the process. This last point is critical. Indigenous owned companies—like all proponents—can decide in the end whether to build their project or not, determining whether the investment is worth it using cost-benefit analyses of their own making.

ENABLING FACTORS CONTRIBUTING TO SUCCESS OF INDIGENOUS-LED IMPACT ASSESSMENTS

Enabling factors for effective Indigenous-led impact assessment—those elements that are most likely to see the nation's goals and aspirations met—are also important to identify. Based on the limited number of existing cases that we have reviewed, there are a range of enabling factors that can contribute to the success in meeting process goals. Not having one or more of these enabling factors in place does not mean that an Indigenous-led impact assessment is not possible or advisable. Having as many in place as possible does, however, radically increase the likelihood that desirable outcomes are achieved.

Enabling factors most likely to contribute to success in the implementation of Indigenous-led impact assessment include, but are not limited to, those listed below.

FIGURE 2: ENABLING FACTORS CONTRIBUTING TO SUCCESS

1. EXTERNAL CONTEXT

Legislation

- Pre-existing self-government and co-management mechanisms.

Size and complexity of project

- Project characteristics include the project being large in size, complexity, and with higher potential benefits and risk implications for the nation in question.

Strategic issues related to the location

- Where the project being contemplated is part of a much larger production system or natural resource rich region, the leverage for affected nations may be higher during early impact assessments. For example, burgeoning gas fields, strategically located pipeline corridors, and large undeveloped mineral rich areas (e.g., the Ring of Fire in Ontario), are areas where Indigenous nations have increased early stage leverage.

Not having one or more of these enabling factors in place does not mean that an Indigenous-led impact assessment is not possible or advisable. Having as many in place as possible does, however, radically increase the likelihood that desirable outcomes are achieved.

2. INDIGENOUS NATION CHARACTERISTICS AND CONTEXT

Strong connection to the area

- Generally, the stronger the culture group relationship to the particular area where the project is proposed, and the stronger the need to ensure that cultural or spiritual areas—or key environmental values—are protected, the more likely it is that the nation will rally around and embrace an Indigenous-led process.

High degree of Indigenous groups-specific leverage

- Degree of leverage held by the community, which can be attributed to the degree of connection to place, the centrality of the project's location within a nation's territory, along with legal precedents and the past and ongoing degree of community efforts to protect the territory. In addition, having the whole of a project within your territory, rather than it running through the territory of multiple nations, increases single nation leverage. Strong "strength of claim" for an individual nation is certainly a contributing factor.

High capacity—financial and human

- Oftentimes, Indigenous capacity is under-resourced, and staff in the lands departments of nations are overworked and stretched thin from the demands of managing many different outside demands on their time. Key elements of high capacity as an enabling factor for Indigenous-led impact assessment process success include strong core and external funding, and a consistent and adequate allocation of human resources.

High degree of internal community cohesion or cohesion between communities

- Community unity with respect to the proposed project and how it should be assessed. This does not demand unanimity of support or opposition to a project at any point in time, but rather intra-community consensus—or as close as possible to it—that at minimum the process is legitimate. For example, nations with a strong history of working together toward land use plans or in prior legislated environmental assessments may have a higher degree of success in running their own process.
- This unity becomes more difficult with each community added to the equation. Inter-community cohesion, in cases where neighbouring nations are involved in the same Indigenous-led impact assessment process, may be more difficult to maintain than when there is only one community involved.

Willingness to shadow and make use of state process

- A willingness to *shadow* the legislated existing impact assessment process rather than ignore or duplicate it is suggested to be a sign of higher likelihood of success, for reasons discussed in more detail further in the report. This involves the incorporation, to the degree possible, of information from parallel federal or provincial environmental assessment processes into the Indigenous-led impact assessment, thus reducing the level of effort and resources required to fuel the process, while increasing the information available to make informed decisions at minimal cost to the nation.

Strong history with and knowledge of the type of project proposed

- While not always important (Indigenous-led impact assessment is equally important for projects where a new type of activity is contemplated in a nation's territory), having a populace that has prior history with a sector (e.g., metals mining, hydro-electric dams, gas or oil pipelines) increases the sectoral knowledge and community interest and ability to identify issues to focus the assessment on.

Completed Indigenous land use plan

- Nations that do have completed land use plans have benefits in the form of pre-existing geographically delineated acceptable land uses, which can increase leverage and internal cohesion where areas that required enhance protection are put at risk. They are also a sign that the nation has the internal cohesion and historical precedent to run a detailed planning process and come to a communally acceptable solution.

3. PROPONENT AND GOVERNMENT CHARACTERISTICS

- An existing contractual agreement/relationship between the proponent and the nation.
- A proponent and government willing to support, or at least not actively opposed to, the conduct of a parallel Indigenous-led impact assessment, which will likely be related to leverage issues noted above.
- Ability and willingness to fund the process, through a variety of means.
- Willingness to learn from the Indigenous process, and enforce its findings through contractual agreements (e.g., impact and benefit agreements), or through integrating as conditions or measures.

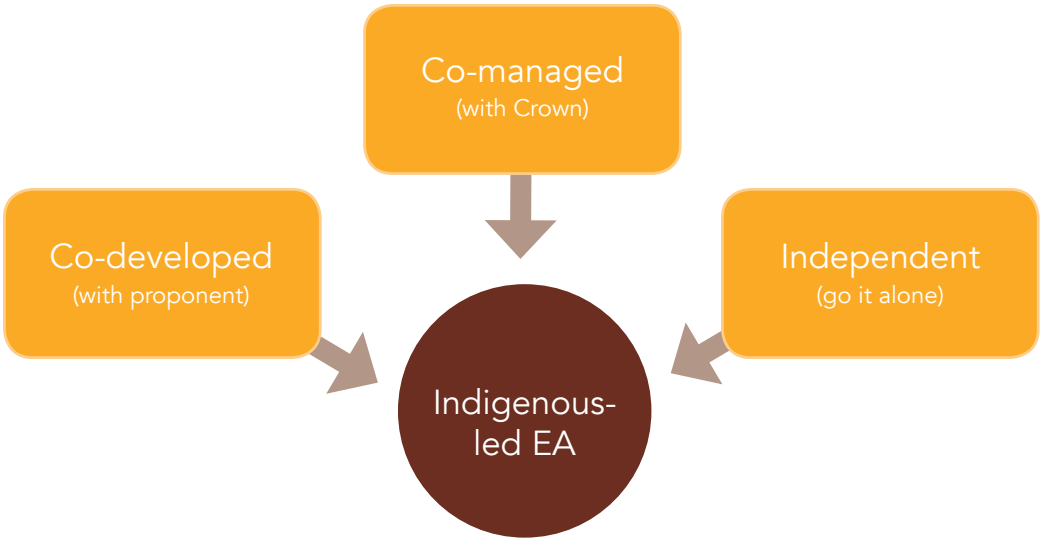
Further discussion of the role of these potential enabling factors is provided in Part 6 of this report. Examination of which of these enabling factors are in place will help inform whether and how Indigenous nations conduct their own assessment processes. In cases where enabling factors are not in place, early work may be required by the nation to overcome these deficits.

PART 5

MODELS AND CASE STUDIES OF INDIGENOUS-LED IMPACT ASSESSMENT

One way to think about the planning approach that is taken is to consider the options for partners to the impact assessment. Generally, the Indigenous government chooses the partner (if any) to the process based in the unique circumstances and realities, and may consider a variety of factors in making its decision. Options for partnerships fit into three general categories: co-managed (with Crown); co-developed (with proponent); and independent. These categories, along with exemplary case studies of each, are described in this section. The three cases drawn on are the co-managed Tłı̨chǫ Government review of the NICO project in the NWT, the co-developed review by Glencore and the Inuit of the Sivumut Project in northern Quebec, and the independent impact assessment by the Squamish Nation of the proposed Woodfibre LNG plant in British Columbia.

FIGURE 3: THREE GENERAL RELATIONSHIP MODELS OF INDIGENOUS-LED EA



CO-MANAGED PROCESSES — GOVERNMENT-TO-GOVERNMENT

A co-managed impact assessment occurs when one or more Indigenous groups assess a proposed project alongside the Crown agency, which has a duty to review the project under existing impact assessment legislation. Some form of agreement between the Indigenous group and the Crown is required, either negotiated specifically for that project assessment, or defined through a wider negotiated process agreement (for example the Carrier Sekani Tribal Council's (CSTC) Collaboration Agreement with British Columbia — Government of British Columbia and CSTC 2015) or under legislation (for example, under the *Mackenzie Valley Resource Management Act*). There is a wide spectrum of possible co-management mechanisms, ranging from the legislated requirement for joint decision-making at a nation-to-nation level, to bilateral engagement of Indigenous groups with the Crown at key steps in a impact assessment (for example, when finalizing terms of reference or determining the adequacy of an proponent's application for review).

Co-managed process results to date have been decidedly mixed in terms of meeting the goals and aspirations of Indigenous parties. Indigenous groups in British Columbia have reported struggling to get their requested changes built into the review process as well as getting proponents to comply with information requests. Also, unless there is a legislated framework or signed nation-to-nation agreement requiring joint decision-making, it may prove very difficult for Indigenous groups to ensure consent conditions and associated conditions are met within this collaborative framework; the Crown retains the ultimate decision-making power. Getting past this hurdle — going from process management collaboration to joint decision-making — is the next big hurdle for the concept of co-managed impact assessment.

There is a wide spectrum of possible co-management mechanisms, ranging from the legislated requirement for joint decision-making at a nation-to-nation level, to bilateral engagement of Indigenous groups with the Crown at key steps in a impact assessment.

Results to date have been decidedly mixed.

PHOTO: TSIIGEHTCHIC, COURTESY SARA FRENCH, GCI

CASE STUDY 1

REVIEW BY TŁĮCHǪ OF THE NICO PROJECT, NORTHWEST TERRITORIES

Legislation and government-to-government agreements set the background for the Fortune Minerals review: these are the Mackenzie Valley Resource and Management Act (MVRMA) and the Tłı̨chǫ Land Claim and Self-Government Agreement (the Tłı̨chǫ Agreement).

RENDERING OF PROPOSED NICO PIT, MILL, AND CAMP SITE, ILLUSTRATION FORTUNE MINERALS

THE TŁĮCHǪ FORTUNE MINERALS NICO MINE impact assessment is our case study of a co-managed impact assessment with the Crown. In this case, the Tłı̨chǫ Land Claim and Self-Government Agreement was foundational in setting the terms of engagement, in which the principle of consent plays a key role.

In 2012, the Tłı̨chǫ Government participated in the environmental assessment for the proposed Fortune Minerals NICO poly-metallic mine project in the Northwest Territories.

Legislation and government-to-government agreements set the background for the Fortune Minerals review: these are the Mackenzie Valley Resource and Management Act (MVRMA) and the Tłı̨chǫ Land Claim and Self-Government Agreement (the Tłı̨chǫ Agreement). As a legislated decision maker in the process, the Tłı̨chǫ Government exercised its authority through the entire process. Ultimately, the Tłı̨chǫ Government's central role assured the appropriate involvement of both traditional knowledge and western scientific methods in the assessment and conditions for project approval and made a final decision on the project.

Throughout the assessment, the Tłı̨chǫ Government was actively involved to ensure key issues related to scoping, traditional knowledge, and adequate Indigenous engagement were meaningfully dealt with. For example, public hearing dates were changed to accommodate the completion of key traditional knowledge studies and the Tłı̨chǫ Government required additional public hearings for community members to speak about the project. During the public

hearings, the Tłı̨chǫ Government requested a two-hour window be allotted for youth and women to speak. During this window, 17 women spoke of their concerns regarding the project and its impacts (Kuntz 2016).

Ultimately, Tłı̨chǫ Government exercised its decision-making authority by issuing a decision to accept the Report of Environmental Assessment, which had been issued by the quasi-judicial Mackenzie Valley Review Board. The project was approved and negotiations over benefits remain ongoing.

CONSENT AND THE MACKENZIE VALLEY RESOURCE MANAGEMENT ACT

Under Section 131 of the Mackenzie Valley Resource Management Act (MVRMA), Tłı̨chǫ Government consent is required for approval of projects wholly or partly on or across Tłı̨chǫ Lands. The Tłı̨chǫ Government can provide comment on the final report of the Report of the Environmental Assessment, and then accept, require additional review of, add or modify conditions (in consultation with the Review Board), or reject the recommendations.

This Indigenous government is making these choices in the context of an integrated system of land and water management and existing co-management boards. The Tłı̨chǫ Government holds a role in all aspects of decision making, and is enabled through the system to conduct land use planning, land and water permitting and licensing, and audit and review functions.

Through revisions to the Mackenzie Valley Resources and Management Act made possible by the Tłı̨chǫ Land Claim and Self-Government Agreement, the Tłı̨chǫ Government was not merely allowed, but required, to decide on the acceptability of the Fortune Minerals NICO Mine environmental assessment. The Tłı̨chǫ Government ultimately chose to approve the Report of Environmental Assessment. The established and legally binding governance framework, one that requires Tłı̨chǫ consent, is a powerful form of Indigenous engagement in environmental assessment, especially in relation to decision-making.

Through the MVRMA, traditional knowledge is given an equal role in the legislation that guides impact assessment. The Tłı̨chǫ Government's structure also ensures that traditional knowledge is central to every decision.

INDIGENOUS KNOWLEDGE AND CULTURAL INTEGRATION

Through the MVRMA, traditional knowledge is given an equal role in the legislation that guides impact assessment. The Tłı̨chǫ Government's structure also ensures that traditional knowledge is central to every decision, through the Chief Executive Council leadership which implements legislation between an Indigenous government and the Crown and ensures the Tłı̨chǫ Agreement implementation throughout the review.

Tłı̨chǫ voices and traditional knowledge were demonstrably fundamental to the project decision.

PHOTO: ARRIVAL AT THE TŁı̨CHǪ NATIONAL ASSEMBLY, COURTESY WHATIMOM/FLICKR CREATIVE COMMONS

Tłı̨chǫ traditional knowledge was engaged throughout the review. Elders' land use knowledge was the focus in a commissioned traditional knowledge study and in the hearings (Olsen et al. 2013). As a result of these interventions, the permits and licenses now require long-term integration of Tłı̨chǫ knowledge. For example, effluent discharge levels and locations were changed to protect particular uses that could be established only through detailed traditional knowledge collection. Also, permits require an annual cultural monitoring at K'eagoti (Hislop Lake) for the duration of the project. Tłı̨chǫ voices and traditional knowledge were thus demonstrably fundamental to the project decision.

HOME GROWN CAPACITY WAS FUNDAMENTAL TO SUCCESS

The Tłı̨chǫ Government negotiated with both the proponent and the Crown for funding to support the review. These resources did not cover the full cost of engagement, and the Tłı̨chǫ Government provided funding as well. The ability of the Tłı̨chǫ Government to have long-term capacity and continuous funding—through taxation and revenue sharing power—was key to the successful review. Nations are often financially dependent on annual allocations (rather than having core funding for impact review processes), and need to negotiate for funds directly with the proponent or government. This is never a good substitute, because it constrains the ability to actively engage through all stages of a review, compromising nation abilities from the start. In addition, financial reliance on a project proponent or the government eats up valuable time and resources (accessing the funds in a negotiated setting) that could be spent on doing studies and assessing the project, and may lead to lack of control over the level of engagement in the impact assessment process.

Financial resources held by the Tłı̨chǫ were used to hire technical reviewers, engage the community, and ensure community-based capacity building. The steps taken in the groundbreaking NICO impact assessment process are now being used to manage subsequent reviews in Tłı̨chǫ lands. This, in turn, has better equipped the lands and resources and technical staff to manage project decisions. Over 80 per cent of Tłı̨chǫ Government staff are Tłı̨chǫ citizens. The Tłı̨chǫ team ensured that culture, language, and way of life were central to the analysis of the project. This is another factor that resulted in a culturally informed and Indigenous-led process.

SEQUENCING OF IMPACT ASSESSMENT AND BENEFITS AGREEMENT

The Tłı̨chǫ Government accepted the Review Board's recommendation, which suggested there would be significant environmental impact, which may be mitigated, subject to the imposition of 13 mitigation conditions. The net benefits of the Fortune Minerals project, while considered in the environmental assessment, are also the subject of later—still ongoing—discussions. An impact and benefit agreement (IBA) will be negotiated with the intent to generate net benefit, captured through financial payments, employment, training, and contracting. This sequencing is notable, in that the Tłı̨chǫ Government reviewed first all the potential impacts, controlled those through intensive engagement, and is now negotiating follow-on benefit conditions with a stronger base of knowledge on the costs and benefits likely to accrue from the project.

The steps taken in the groundbreaking NICO impact assessment process are now being used to manage subsequent reviews in Tłı̨chǫ lands. This, in turn, has better equipped the lands and resources and technical staff to manage project decisions.

PHOTO: AURORA BOREALIS, WHATI, NWT, COURTESY WHATIMOM/FLICKR CREATIVE COMMONS

ENFORCEABLE DECISION

Fundamental to this case is the legislation. Section 131(2) of the MVRMA states:

> *The Tłı̨chǫ Government shall carry out, to the extent of its authority, any recommendation that it adopts.*

This means that it is incumbent on the Tłı̨chǫ Government to conduct compliance monitoring on any conditions it adopts. The Tłı̨chǫ Government is required to implement measures that apply to it—no mandate can be developed that does not include such requirements. The Tłı̨chǫ Government enacts this mandate through strategic intentions planning—ensuring that there is a Tłı̨chǫ Assembly vision for the term of tenure as well as specific actions to achieve that vision.

The legislation allows the Tłı̨chǫ Government to enforce its own decisions, and indeed requires it.

CO-DEVELOPED MODEL — PROPONENT WITH INDIGENOUS PARTY

The co-development model holds that the most important relationship in impact assessment is between the proponent — usually a large corporation — and the Indigenous government. In recent years, both Indigenous governments and corporations have been motivated to bypass uncertainty in the Crown impact assessment process by creating strong and lasting relationships early in project planning. The uncertainty this relationship removes may be very different for the two parties. Proponents would like to avoid process outcome uncertainty, most often associated with delay and legal risks brought about when Indigenous groups feel ignored or disrespected, and their rights are put at risk. Other benefits of co-development from the proponent's perspective may include: gaining a social license from the community; avoiding uncertainty associate with active Indigenous group intervention in the formal impact assessment process; and the fact that many proponents see Indigenous groups as critical partners who can add value to their enterprise.

Indigenous groups may be keen to work directly with the proponent to jointly plan the project from the outset, prior to the project entering into the impact assessment process run by the Crown. From the Indigenous group's perspective, this early engagement allows them a more meaningful role in project planning, siting and routing, entrenches their relationship with a party that may bring strong economic benefits (and increases their chances of capturing a larger portion of that benefit), allows for better protection of the environment, and may be a more fruitful path of engagement with a wiling partner than they expect from consultation with the Crown.

This type of relationship often, but not always, is marked with the negotiation of an impact and benefits agreement (IBA) between the proponent and the Indigenous group. At minimum, the proponent will be expected to cover the costs of the Indigenous group engaging in the co-development process, and the terms of this engagement are often defined from the outset. This too is a benefit of a co-developed impact assessment for Indigenous groups which, in the current legislated impact assessment system, often spend a large proportion of their time negotiating for capacity funds to undertake studies and process engagement with proponents, given severe limitations in Crown funding available.

As with all three of the primary relationship options, there is a wide spectrum of possible degrees of engagement with the proponent in the co-development model. A co-development process may see an Indigenous group work directly with the proponent from the outset of project planning, including on routing and siting preferences, vetting of consultants to do environmental and socio-economic studies, and analysis of the results and implications of those studies, even to the degree of filing a jointly agreeable application. After this, the Indigenous group may choose to engage or not engage in the formal Crown environmental assessment

process, having attained the provisions (for example mitigations, monitoring role, nation-specific accommodation measures) it wants already built into the proponent's filings.

Or co-development may involve a more limited role, for example with the Indigenous group having the right of prior review of all application materials prior to their filing, having an ongoing mitigation table with the proponent from early in the process, and completing certain sections of the application relevant to Indigenous rights and interests (e.g., sections on impacts to their nation-specific traditional land and resource use, culture, and socio-economic conditions), which are adopted without revision by the proponent.

Agreements with the proponent during a co-developed impact assessment may also include requirements to adhere to any Indigenous information requests and file those materials into the application; provisions for confidential engagement channels during the assessment; agreement on timing and funds for any Indigenous-led studies, e.g., culture, rights, traditional land use, or Indigenous community-specific health or socio-economic studies; and formal Terms of Reference to guide the relationship, including a dispute resolution process.

The co-developed project case study we consider in this report is the review of an already existing mine, for which Glencore Canada (Glencore) sought a mine extension. The Inuit communities and regional Inuit government were required (through the IBA) to jointly conduct a review of the impacts of the existing operations and the proposed further expansion with the proponent, at the same time as they prepared a revised negotiated agreement.

A co-development process may see an Indigenous group work directly with the proponent from the outset of project planning, and later choose to engage or not engage in the formal Crown environmental assessment process, having attained the provisions it wants already built into the proponent's filings.

PHOTO: INUVIK, COURTESY SARA FRENCH/GCI

CASE STUDY 2

REVIEW BY GLENCORE AND INUIT OF THE SIVUMUT PROJECT, QUEBEC

Legislation and government-to-government agreements set the background for the Fortune Minerals review: these are the Mackenzie Valley Resource and Management Act (MVRMA) and the Tłı̨chǫ Land Claim and Self-Government Agreement (the Tłı̨chǫ Agreement).

PHOTO: RAGLAN MINE IN NUNAVIK REGION, NORTHERN QUEBEC, COURTESY GLENCORE

THE RAGLAN NICKEL MINE has been in operation since 1997 and is currently owned and operated by Glencore. In 2016, the company filed the Sivumut project description to the Kativik Environmental Quality Commission (KEQC) for the permits and licenses to develop additional deposits located within Glencore's mining property in Nunavik. The Sivumut Project proposes to extend the mine life by over 20 years, until 2041. A 1995 impact and benefit agreement (IBA) held by the parties required them to jointly define potential impacts, mitigations, and monitoring measures in the event of such a new development at Raglan. The parties include the land claim Inuit organization—Makivik Corporation (Makivik)—and the two Inuit communities in close proximity to the project—Salluit and Kangiqsujuaq. Makivik is the recognized party in all matters dealing with the collective interests and rights of the Inuit of Nunavik and holds a mandate to use its assets for community purposes and for the general benefit of the Inuit.

There was time pressure to this process, with the Sivumut Sub-Committee formed by the Raglan Committee in April 2016 to review the environmental and social impact assessment (ESIA) measures of the Sivumut project, as drafted by Glencore. The Sivumut Sub-Committee comprised four members from the Inuit Parties and four from Glencore, with a mandate that was co-developed by their respective senior leadership. This mandate entailed conducting a thorough review of the ESIA, and an implementation review of the Raglan Agreement. Review of the ESIA and joint development of mitigations took place during the latter half of 2016 and concluded in January 2017, with the parties subsequently using the results to finalize a renewed bilateral agreement, in the form of a new annex to the IBA to manage the Sivumut project.

LEGISLATIVE BASIS

The James Bay and Northern Quebec Agreement (JBNQA) is a land claim agreements signed in 1975. It was the first signed with the Indigenous peoples of northern Canada. Under Section 23 of the JBNQA, a full environmental assessment is required for all new major mining projects. Further, a full environmental assessment, managed jointly by Glencore and the Inuit, was triggered under section 3.2.2 of the IBA (Raglan Agreement 1995). The Sivumut project qualified as a new development under Section 3.2.2 of the Raglan Agreement, requiring the parties to jointly develop a new development annex to the agreement. This annex is required to outline the potential impacts of the Sivumut project, co-developed mitigations and monitoring measures, and the jointly defined level of significance of each impact after mitigation.

RELATIONSHIP OF THE PARTIES

The KEQC, the quasi-judicial body responsible for impact assessment in Northern Quebec, conducted a review of the project. Separate from this, the proponent and Inuit conducted a chapter-by-chapter joint review of the ESIA. The intent of the review was to focus the parties on changes to the project and to the management and operation of the project in Inuit lands. The Inuit Parties chose a discrete set of chapters to review, carving out the areas that were of key interest. Makivik communicated recommendations resulting from the Sivumut Sub-Committee proceedings to the quasi-judicial body. KEQC then transmitted these recommendations to the Quebec government prior to certificate of authorization issuance, and their inclusion in the project certificate led to an enforceable decision both within and outside of the formal impact assessment process.

The Inuit Parties chose a discrete set of chapters to review, carving out the areas that were of key interest.

The inclusion of recommendations in the project certificate led to an enforceable decision both within and outside of the formal impact assessment process.

PHOTO: SHARING CULTURAL PRACTICES, RAGLAN MINE, COURTESY GLENCORE

During the ESIA review and negotiation process, there was a great deal of face-to-face contact, with six in-person meetings of the Sivumut Sub-Committee between July and November 2016 to facilitate the development of relationships across the table. These relationships proved critical, as the Inuit were successful in changing some of the provisions the company has planned for the expanded project, including agreeing to an updated set of mitigations on environment, employment and training, and business, and enhanced financial payments. In exchange the parties signed an agreement for the company to operate the Sivumut project and an agreement on winter shipping.

THE VALUE OF RETROSPECTIVE IMPACT ASSESSMENT

While not exclusive to Indigenous-led impact assessment process, one key lesson learned from the Sivumut case study is that retrospective impact assessment provisions may be valuable to build into long-term benefit agreements, as was the case with the Raglan Agreement.

A retrospective impact assessment looks at changes that have occurred over time during the life of an existing project, and compares them to predictions made prior to the project being approved, as well as (in cases like this where an expansion or other material change to the original project are contemplated) providing valuable insight into ways the management and monitoring for a project should be changed in the future.

It may be advisable for nations to build in the ability to take a look back and amend agreements, using triggers such as an expanded mine, or a set time 10 or 20 years into operating life of a gas field. It has been a consistent failing of impact assessment as a field that either verification of accuracy of initial effects have not been completed during operating life cycles or, if they are, little is done to deal with greater than expected impact loading when they are identified (via adaptive management).

Good planning looks backwards to look forwards, and by looking at the same people, the same place, and the same operator and operation type, the assessors have an ability to examine cause and effect relationships between project components and activities and the environment and communities, and what has and hasn't worked to protect the environment and protect and bolster well-being.

PHOTO: NUNAVIK, COURTESY JEAN-MARC SÉGUIN

BENEFITS OF A BILATERAL FOCUSED APPROACH

The ESIA review allowed the parties to integrate cultural information, revise the project, and settle on a decision with support for the project development. There was substantive Inuit engagement, primarily outside the formal provincial impact assessment process. Makivik and Glencore funded the process, and the communities were able to retain expertise, legal advice, and support necessary for the technical review. It is worth noting that Glencore assumed only 20 per cent of the costs; Makivik covered the remainder.

As a result of the bilateral approach to this review, the parties were able to have deep, wide-ranging, and complicated conversations behind closed doors. The parties had the latitude to explore options, have difficult and often very heated conversations, without the pressure or embarrassment of those being exposed in public. This allowed parties to juggle alternatives, assess tradeoffs and their acceptability, and ultimately settle on a jointly agreeable solution, outside the politics of the multi-party public record of the provincial impact assessment process.

The Inuit Parties did not intervene directly in the KEQC process, except to participate in scheduled public hearings on behalf of respective parties (not on behalf of the Sivumut Sub-Committee). All issues and concerns of substance were settled from the community perspective in the joint review, and through the subsequent contractual arrangements, outside and prior to the formal impact assessment process. The co-developed impact assessment process was entirely conducted among the company, the two impacted communities, and the regional Inuit government. Separately, the KEQC conducted an independent review of the project as well.

A proviso: this co-developed process worked to a mutually agreeable solution, in large part because of the goodwill, strong relationships, and contractual obligations of the parties. There are some downside risks to a co-developed impact assessment for communities in situations where an agreement is *not* reached and the parties do not agree in the end on what is fair and acceptable. In such a case, the only option may be for the Indigenous group to re-engage in either an independent, co-management, or standard legislated impact assessment to protect and promote their rights and interests.

As a result of the bilateral approach to this review, the parties were able to have deep, wide-ranging, and complicated conversations behind closed doors.

This allowed parties to juggle alternatives, assess tradeoffs and their acceptability, and ultimately settle on a jointly agreeable solution, outside the politics of the multi-party public record of the provincial impact assessment process.

PHOTO: RAGLAN, COURTESY GLENCORE

INDEPENDENT INDIGENOUS IMPACT ASSESSMENT

In circumstances where an Indigenous group sets up its own assessment process for a project, complete with a defined and largely or completely internalized assessment process and a formal decision-making and condition-setting process, we generally label that an independent impact assessment. As long as there is a discrete consent process that is free to provide or withhold consent, we consider this an independent process even where the Indigenous group also engages in the formal Crown impact assessment process.

An independent Indigenous impact assessment may require substantially more resources—financial and human—than the other two options. In addition, they may be advisable only in situations where leverage is extremely high for that individual nation; in lower leverage scenarios they may simply be too costly to run versus the likelihood of success. However, the independent route can be a powerful tool for asserting and protecting stewardship and other rights, and empower the nation and its members in important and possibly lasting ways.

PHOTO: WELCOME, WHISTLER, B.C., COURTESY JERRY MEADEN/FLICKR CREATIVE COMMONS

REVIEW BY SQUAMISH NATION OF WOODFIBRE LNG PROJECT, B.C.

CASE STUDY 3

THE SQUAMISH NATION CASE of the Woodfibre Liquefied Natural Gas (Woodfibre LNG) Project, illustrates how an independent Indigenous-led impact assessment can impose specific and mandatory conditions. The Squamish Nation scoped the review, conducted a thorough assessment, and then made a decision in support of the project, after negotiating with the company for many important project changes alongside imposing its own detailed consent conditions.

Swiyat in Squamish territory is approximately 60 kilometres north of the city of Vancouver. In 2013, Woodfibre LNG Limited (the proponent) proposed an LNG plant at Swiyat, the site of a former Squamish Nation village and later site of a pulp and paper mill. The location is at the mouth of the Squamish River, an area where the Squamish Nation developed a land use plan that includes designated cultural areas.

The Woodfibre LNG project went through an independent Indigenous based environmental assessment designed by the Squamish Nation, referred to as the Squamish Nation Process (Bruce and Hume 2015). The impact assessment is significant because of how consent was established in the decision-making process, as well as the leverage points that were written into Squamish's legally binding agreement and project approval. It is also significant because Indigenous law was incorporated throughout the project review.

The Squamish Nation Process resulted in 25 conditions that, when met, will lead to a final certificate of project approval issued by Squamish itself. It was

In 2013, Woodfibre LNG Limited proposed an LNG plant at Swiyat, the site of a former Squamish Nation village and later site of a pulp and paper mill.

ILLUSTRATION: RENDERING OF THE PROPOSED WOODFIBRE LNG PROJECT, COURTESY WOODFIBRE LNG LTD.

formalized on October 14, 2015 when the Squamish Nation's Chief and Council voted to approve the Woodfibre LNG plant and issued a preliminary certificate, which outlines the conditions and how Woodfibre and Squamish Nation will work together to ensure their implementation. The 25th condition is consent to the project itself, which will be ratified in an IBA.

In March 2016, the project also received a certificate of approval from the federal environment minister. Minister Catherine McKenna approved the environmental assessment that was completed by the province of British Columbia on behalf of both the Canadian federal and British Columbia governments. This was a separate process to that of the Squamish Nation. The Squamish Nation did keep close tabs on the legislated impact assessment process, including reviewing and informing themselves with the technical project information that was prepared for the review.

The Squamish Nation influenced the provincial regulatory process, by, for example, getting the Crown and the proponent to agree to lengthen the environmental assessment to accommodate the Squamish Process. Squamish Nation's process was funded by the proponent and was separate from—but in the end tied to via the Squamish Conditions—an impact and benefit agreement.

PROPONENT-NATION RELATIONSHIP: HIGH LEVERAGE SUPPORTED THE SQUAMISH POSITION

During this precedent setting impact assessment, the proponent was eager and willing to participate in Squamish Nation's process. A strong basis for a working relationship was formed based on an agreement written under contract. Further, the project was located in the heart of Squamish territory, adding to the Squamish Nation's certainty of rights and success in leading the assessment themselves. At the time, the province was promoting liquefied natural gas exports, and encouraged the proponent to engage directly with the Squamish Nation. These high leverage factors make this independent impact assessment an example of an extremely high leverage situation, which may not be applicable to other instances. Gauging your nation's leverage is thus critical prior to determining which assessment process option to choose.

INDIGENOUS KNOWLEDGE AND CULTURAL INTEGRATION

The Squamish Nation Process involved Indigenous knowledge holders and community participants in a series of roundtable and community meetings. Ultimately, community concerns were represented in the final outcome, and allowed for validation through community presentations on the findings. Within the British Columbia environmental assessment process, the province had focused solely on heritage resources as the only valued component related to culture. This view did not allow for the inclusion of Indigenous knowledge, laws and culture, as defined by the Squamish Nation. Through the Squamish Nation Process, the nation was able to bring a more robust understanding of Indigenous knowledge into play.

In particular, within the proposed project design, there was to be a controlled access zone that would be fenced, restricting Squamish Nation members from areas where they hunt and fish. The Squamish Nation Process addressed this issue by gaining commitments and plans from the proponent to guarantee continued access for Squamish members to and through this controlled access zone to practice their rights. There were other examples of cultural conditions, including creating buffer zones around culturally significant sites.

"A lot of what came out in our conditions reflected our concerns with the impact on history and language and culture and that got worked into project design." (Bruce and Hume 2015)

PHOTO: SQUAMISH, COURTESY JENNIFER C/ FLICKR CREATIVE COMMONS

INDIGENOUS VERSUS CROWN REGULATORY DEVICES

In the process of the Squamish environmental assessment, the Squamish Nation was strategically aware of how Indigenous rights and title can be narrowly defined to the detriment of advancement of Indigenous desired outcomes. While Western laws are codified, Squamish law is based on and continues as an oral tradition. Through creation of its own "guiding topics," Squamish Nation was able to leverage its law, location, and the direct relationship with the proponent to its benefit. The Squamish used this language of guiding topics, rather than the language of the province, for impact assessment. "Valued components" are the state-based categorization used to evaluate largely environmental indicators. The Squamish Nation Process was also unique from conventional environmental assessment in how the term "significance" was excluded from the approach to valued components; the focus was on acceptability of the project as a whole rather than significance of individual effects. This more holistic approach is much more conducive to—and reflective of—the type of communal decision-making of many Indigenous peoples.

PART 6

DISCUSSION

This review has illustrated three main approaches to Indigenous-led assessment of major projects. Each case study had a different mix of the identified potential enabling factors present. The table on the next page illustrates how each case aligns with the potential enabling factors set out in Part 4. While no case engages every enabling factor, a large number are present in each instance. Our recommendation is that nations considering whether to shoulder the burden and opportunity of an Indigenous-led impact assessment, should conduct an early community assessment of which of the enabling factors they have in place and what the implications may be of their presence or absence.

EXTERNAL CONTEXT

LEGISLATIVE BASIS

Those Indigenous nations that have strong co-management powers may never need to develop an independent process, because the have developed the background legislation and they have trust in their own government and agents thereof. The Tłı̨chǫ case is one where the legislation and impact assessment process in place supports Indigenous consent decisions and where a nation has control over many areas of lands and resource management. The Tłı̨chǫ Government relied on existing strong legislation and a Self Government Agreement that allowed for the mobilization of Indigenous knowledge holders, as well as requiring a final decision by the nation leaders themselves. This is a strong example of co-management, driven by parent legislation and enshrined rather than negotiated on a case-by-case basis.

Ultimately, the Tłı̨chǫ Government held a great deal of power as a decision maker to the environmental assessment. The Tłı̨chǫ also used many levers within the legislation to ensure equal treatment of their knowledge and perspectives. They were required to do so by the fact that their power was primarily in the tail (decision-making) end of the project; up until

that point, the Review Board—the environmental assessment process administrator—treated the Tłı̨chǫ Government as just another party to the assessment.

It was critical to the success of the process that the Tłı̨chǫ Government did not disengage and simply wait until the end of the environmental assessment to make its decision. It engaged throughout and created a foundation of knowledge at the leadership, staff, and community level about the risks and benefits of the project. This facilitated informed decision-making when the time came.

In instances where this type of enabling legislation that ensures equity in review for Indigenous parties is not in place, co-management with agents of the Crown must be negotiated in a bi-partisan framework, with different steps of an environmental assessment subject to different levels of engagement and power for Indigenous nations.

In jurisdictions where these powers have not been worked out, nations can still control and manage impact assessment, both jointly and independently. The northern Quebec case saw a nine month effort to jointly review a mine expansion, and that review was required not by legislation, but by the contract (the Raglan IBA) that the parties had signed at the outset of the project. In the case where there was no legislation to support a nation based review of consent decision at all—the Squamish case in B.C.—the nation took it upon themselves to conduct a review.

In the case of the Squamish Woodfibre assessment, for example, Squamish shadowed the provincial environmental assessment process, gathering information from it to inform their own process, consent decisions, and condition setting. The acceptance by the proponent of the parallel Squamish process—their willingness to adopt Squamish's conditions and respond meaningfully to their questions—played a key role in the success of that otherwise independent process.

Legislation and land claims set clear processes for impact assessment review. Where there is not this support, the nation can seek such clarity through the establishment of a contract (IBA) to define requirements for consent and impact assessment review. Absent these approaches, nations can also define a process that is based on their values, however this comes with some risk that their impact assessment decision will not be accepted by the state or the company.

It was critical to the success of the process that the Tłı̨chǫ Government did not disengage and simply wait until the end of the environmental assessment to make its decision. It engaged throughout and created a foundation of knowledge at the leadership, staff, and community level about the risks and benefits of the project. This facilitated informed decision-making when the time came.

PHOTO: ARCTIC SHRUBS, COURTESY NAMEN/FLICKR CREATIVE COMMONS

TABLE 1: ENABLING FACTORS

ENABLING FACTOR IN PLACE	TŁĮCHǪ: NICO	GLENCORE AND INUIT: SIVIMUT	SQUAMISH NATION: WOODFIBRE
EXTERNAL CONTEXT			
Legislation or other legal instrument in place	✓	✓	
Large or complex project	✓	✓	✓
Strategically important location	✓	✓	✓
NATION CHARACTERISTICS AND CONTEXT			
Strong connection to area — high importance	✓	✓	✓
High Indigenous group leverage	✓	✓	✓
High pre-existing internal capacity	✓		
High degree of internal intra- or inter-community cohesion	✓		✓
Shadow of state-led impact assessment	✓		✓
History with/knowledge of this type of project	✓	✓	
Indigenous endorsed land use plan	in process at time		✓
PROPONENT AND EXTERNAL GOVERNMENT CHARACTERISTICS			
Existing contractual agreement/relationship		✓	
Proponent and/or government support/willingness to engage	✓	✓	✓
Proponent and government willingness to fund the process			✓
Proponent and government willingness to endorse and implement the outcomes	✓	✓	✓

NATION CHARACTERISTICS AND CONTEXT

CONSENT AND CLEAR PROCESSES

Not identified in advance as a potential enabling factor, but one which emerged clearly through the case studies, is the development in advance or at the earliest possible time frame, a clear assessment and consent process for Indigenous-led impact assessment. In cases where the legislation defines the impact assessment approach, there is generally clarity for all parties about how a decision will be reached. Even in this context, there can be some lack of clarity about what will happen in the event of a state decision that conflicts with that of the Indigenous government. This could have occurred in the NWT case; however, the Tłı̨chǫ and NWT governments came to the same decision, in which they both accepted the recommendation that the project could proceed, with conditions.

There was also a clear process and consent decision identified for the co-developed approach in northern Quebec. In this case, the joint decision to proceed with the project, with conditions that were set by the proponent and Indigenous parties, was made outside of the state-led process. The Inuit had a clear process that was laid out in the contract between the parties in earlier years.

Co-developed processes allow for a strong bilateral proponent-nation relationship. This can provide for a very strong pathway to developing a good project. This process allowed the parties to develop, strengthen, and build new imaginative conditions, and put them in place through the contract.

Independent processes allow for a nation to make a consent decision, outside of the context of the state-led process. Once again, there is the potential for different decisions to be reached by governments. The Squamish Nation gained force behind its unilateral consent conditions because the proponent was willing to endorse them; this will not always be the case. Other nations have withheld their consent formally and had that disregarded by industry and government, including several nations involved in the Transmountain Expansion Project impact assessment.

The key requirement to a consent decision is that there is clarity on how the procedure will be fair and transparent, whether this is set out in legislation, land claim agreements, or in contracts. Where none of these conditions exist, the nation can set out a framework for its consent decision, and then work to influence the parties to accept and implement the decision. This often requires substantial political manoeuvring.

PHOTO: OLD CROW, COURTESY SARA FRENCH/GCI

CAPACITY IS CRITICAL

There are three elements related to capacity: funding, human resources, and relationship building. Funding is absolutely vital to any meaningful impact assessment. Every Indigenous-led impact assessment requires a large team and substantive effort. In each of our case studies, there were substantial funding resources put into play, and extensive human resources. The Indigenous government mandated a core set of people to follow the impact assessment from the outset through to the close. Key skills were called upon, such as Indigenous knowledge holders, lawyers, and technical specialists (e.g., on key topics where project changes could be made with the insight of technical knowledge). Government, industry, and the Indigenous parties themselves may be called upon to assume some portion of the costs of these processes; as most Indigenous groups are the party least likely to have internal capacity in this regard, the question of accessing stable funding is critical from the outset.

The Tłı̨chǫ Government relied on a large number of staff and advisors and required continual face-to-face meetings. Significant studies and funding were required. Funds were brought in from other levels of government and the proponent, and were allocated by Tłı̨chǫ Government representatives themselves. Without these substantial funds, the required data collection and due diligence on proponent filings would not have been possible.

Though there were significant ways in which the Squamish Nation Process worked well, a lack of adequate staffing was an issue. It was also difficult to get a large number of members to attend all of the meetings on the project. This suggests that ongoing resources that allow for internal systems and staff and contractor relationships are vital to ensure positions are most reflective of community and leadership intent.

A key learning is that every Indigenous-led impact assessment requires substantial investment of time and effort. Indeed, none of the impact assessments would have worked without extensive face-to-face interaction. In every case, ongoing and intense meetings over a prolonged time period led to the completion of the review. Substantial mobilization of resources and careful focus on maintaining relationships is required for any of these processes to be effective.

INDIGENOUS LEGAL ORDERS, CULTURAL VALUES, AND KNOWLEDGE INTEGRATION

Through these cases, we see there is the potential for a strong confluence of western and Indigenous law in Indigenous-led processes. In each case, the Indigenous party identified its knowledge base, and brought it bear to ensure that their values, language, and way of life were considered in the review. Because of this, they also were able to ensure that projects were changed substantially as a result of the review.

Indigenous-led impact assessment can greatly change the project in order to protect and accommodate the culture and way of life. It also leads to fundamental changes to the language of impact assessment. For example, the Squamish Nation rejected the language used by the Crown (of valued components). The Squamish Nation identified a single valued component: Aboriginal rights and title, which acted as an umbrella for interconnected "guiding topics" determined by community input. Examples of guiding topics were impacts to use and occupancy, impacts to language, and impacts to transmission of culture and history (Bruce and Hume 2015). The Squamish Nation also reduced the focus on the term significance. The nation focused on the impacts that had the highest priority to the nation as opposed to conveying the level of significance for each impact, as the nation recognized the subjectivity of significance and its limitations, and adopted "culture" as the only lens through which it reviewed the project. The adoption of Indigenous frames and lenses for decision-making is one of the most important elements of Indigenous-led impact assessment. Even where the nation uses external technical expertise, those inputs are not given higher weight (as in the past), but rather put through a filter of cultural values, to inform community decisions.

The choice to conduct an Indigenous-led impact assessment is seeing the assertion not merely of the right to make enforceable decisions, but widespread recognition by Indigenous groups that they have a responsibility to make their decisions **in the right way**.

PHOTO: FORT MCPHERSON, COURTESY SARA FRENCH/GCI

In cases where only one united group is engaged, cultural values and local priorities may be consistently shared. Where there are complex teams with a broad set of Indigenous groups and communities, it can be very difficult to ensure and maintain unity, particularly during complex and intense review. Wherever more than one community is involved, particularly close attention must be paid to internal unity issues from the outset. This was certainly the case in northern Quebec, where there were different priorities of the small Inuit communities and the regional Inuit government. Lessons learned include setting substantial time aside for internal caucus dialogue, and considering how to maintain or build unity.

PHOTO: NUNAVIK, COURTESY JEAN-MARC SÉGUIN

GOVERNMENT AND PROPONENT CHARACTERISTICS

In our case studies, there was a willingness to support and engage the Indigenous-led review. There were pre-existing requirements for the Indigenous engagement in both the NWT and Quebec. There was also a willing and engaged proponent, which at least partially funded the effort, as was the case in B.C. with Woodfibre LNG. Proponents showed their willingness to engage—to a greater or lesser degree in each case—by:

- Responding quickly to nation based information requests;
- Funding the capacity of the nation, at least in part, and supporting the nation to access funds through other sources;
- Meeting as frequently as needed to consider the key issues in a phased approach;
- Agreeing to project changes that were brought forward by the nation; and
- Agreeing to implement the conditions that were set through the review, either through an IBA or through living up to conditions set in the report of environmental assessment or consent conditions statement.

Central governments also play a role in supporting Indigenous-led impact assessment. They can:

- Negotiate or live up to enabling legislation that provides an equal footing for Indigenous-led review;
- Fund the capacity of nations to run their own processes;
- Meet on an ongoing basis with the nation to share understandings, provide context, and reinforce each other's processes;
- Prepare and share information about the project that the nation may use to reinforce its review; and
- Find ways to implement the conditions set out by the Indigenous party.

OUTCOMES OF INDIGENOUS-LED IMPACT ASSESSMENT

There are a variety of tangible, valuable outcomes coming from Indigenous-led reviews. It is highly unlikely that a state-led process would yield all of these outcomes. They include but are not limited to the following:

Control over process leads to Indigenous values integration. The culture holders themselves sit as decision makers, and they thereby ensure that their worldview and values are the fundamental starting point for every aspect of the review.

Indigenous-led impact assessment and close engagement leads to real project changes and unique mitigations. The Squamish Nation negotiated to protect cultural space, and to reject a technology that would have led to harm that was not acceptable (sea water cooling of the LNG plant). The Tłı̨chǫ Government review led to the setting of a culture camp, from which traditional knowledge research would be conducted for the life of the project.

Indigenous-led impact assessment and close engagement leads to increased local Indigenous benefits. In many cases, an Indigenous party seeks to disentangle the consideration of impact from benefit. In two cases, the impact assessment considered the nature of impacts heavily through the process, and then at a later time reviewed the nature of and required quantum of benefits, part of which was required due to the need to compensate/accommodate for the identified impacts. The Squamish Nation staged its consent approach so that its final consent was the acceptance by the proponent of all impact measures, and thereafter they opened their benefits discussions. Essentially this has meant that the impact assessment process has allowed for robust study and consideration, as well as community engagement, and the follow up negotiation process has included agreement on benefits. The Tłı̨chǫ Government followed a similar approach.

For the Inuit, the compressed timeline did not allow for a comprehensive review of the project by the Inuit Parties. Indeed, at times the Inuit Parties felt they were missing the opportunity to deeply engage community feedback. Also, the Inuit Parties were not involved in the scoping of the ESIA and directing the considerable research resources required to undertake such an assessment. A heightened role for the Inuit Parties in scoping and researching the ESIA report would likely have increased community control and enable greater influence on the findings of the report. The lesson here is for Indigenous-led impact assessment to start early in project planning for maximum effectiveness.

Finally, there is reason to believe that setting up an Indigenous-led impact assessment process the first time is the hard part, and that future assessments start to benefit from lessons learned and economies of scale and effort. At least two of the three case study nations are committed to using their processes again in the future.

PART 7

LESSONS LEARNED

Indigenous parties are creatively using legislation and negotiated agreements to conduct reviews. However, even absent these powers, Indigenous-led assessments can successfully occur, especially in high leverage situations.

Legislation and land claims set clear processes for impact assessment review. Where this powerful enabling factor is absent, the nation can seek such clarity through the establishment of a contract (IBA) to define requirements for consent and impact assessment review. Absent these tools, nations can still define a process that is based on Indigenous values. However, this comes with increased risk that their decision will not be accepted and implemented by the state or proponent. None of the cases reviewed in this report led to this outcome. In each case, Indigenous parties were able to achieve an enforceable decision. The Squamish case was one of uniquely high leverage, however, and should not be assumed (yet) to be the norm.

Effective Indigenous-led impact assessment includes a clear process for defining how consent will be given. In every process that is established the Indigenous party should establish a clear consent provision/withholding process. This does not mean that the nation has to justify or even share its decision-making criteria or weighting, however.

Creation of an Indigenous-led approach should not negate participation and use of findings from the state-led process. In fact, there are high benefits to at least "shadowing" the state-led process. Other parallel processes are valuable, with information from those processes being used to inform the Indigenous-led review. This reduces the cost and effort required by the Indigenous group and builds a stronger evidentiary base upon which to make decisions. Even when running an independent impact assessment, there will likely be some parallel role for the existing impact assessment system run by the Crown.

Governments and industry may be assets, not opposition. There are many supports that government and industry can put in place to encourage and support Indigenous-led impact assessment. These include developing and supporting legislative requirements for co-management, funding the human and technical resource needs of nations with core

funds, providing ample time and space for parallel processes, and supporting and implementing the findings of Indigenous-led impact assessment.

CLOSURE AND POTENTIAL FURTHER WORK

While this report has outlined key characteristics of Indigenous-led impact assessment, there are many areas for future work. For example, an area for further exploration is compliance monitoring and enforcement. Where there are conditions that are written after an initial impact assessment is complete, it is common to require compliance and monitoring approaches. This costs money, and currently these types of conditions are accounted for in confidential impact and benefit agreements.

There is also potential for international comparative work, including and especially significant to the Arctic, that focuses on Indigenous impact assessment processes, particularly those that are being led by Indigenous groups in other jurisdictions.

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PHOTO: AURORA VILLAGE, ARCTIC COUNCIL/FLICKR CREATIVE COMMONS

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GLOSSARY

APPLICATION—A proponent must apply for a proposed development project, with an application for the proposed development. Sometimes called and environmental impact statement.

INDIGENOUS-LED IMPACT ASSESSMENT—A process that is completed prior to any approvals or consent being provided for a proposed project, which is designed and conducted with meaningful input and an adequate degree of control by Indigenous parties—on their own terms and with their approval. The Indigenous parties are involved in the scoping, data collection, assessment, management planning, and decision-making about a project.

INFORMATION REQUIREMENTS OR REQUESTS—A request for information put in by a party to gain more data on a proposed project and the potential impacts. Information requests can be used to fill gaps in knowledge. In the case of Indigenous-led processes, Indigenous governments have submitted information requests to the Crown in order to fill gaps in knowledge (as in the Squamish Nation case).

IMPACT AND BENEFIT AGREEMENT (IBA)—An impact and benefit agreement is negotiated between an Indigenous government and a proponent to legally define the benefits a First Nation will receive for hosting a project on its territory, and the types of changes and impact measures that will be in place. See the Community IBA Toolkit at http://gordonfoundation.ca/resource/iba-community-toolkit/

IMPACT ASSESSMENT, ENVIRONMENTAL ASSESSMENT, AND OTHER PROCESSES

Each jurisdiction develops a terminology for the planning process for reviewing major projects. Hanna (2016) includes a summary of every Canadian jurisdiction. In this report, the following terms are referred to:

IMPACT ASSESSMENT—A process of evaluating the impacts on a proposed project or development.

ENVIRONMENTAL ASSESSMENT—A planning and decision-making tool that incorporates environmental factors or components into decisions.

INDIGENOUS, ENVIRONMENTAL, AND SOCIAL IMPACT ASSESSMENT (ESIA)—The intent of an ESIA is to assess all the components of a project, including the biophysical and socio-cultural.

PROPONENT—In the case of environmental assessment or impact assessment, the proponent is the company or group of companies that are proposing a development project.

TRADITIONAL LAND USE (TLU)—A traditional land use study is commonly led by an Indigenous group. These studies provide the modern physical mapped evidence around which project impacts are assessed. The effort in these studies is to quantify and qualitatively describe cultural and spiritual, environmental, habitation, subsistence, and transportation values of an Indigenous group. The knowledge accessed in traditional knowledge work for traditional use studies (TUS) is often marked through place names, in stories and songs, and through artwork. (Gibson 2017)

VALUED COMPONENTS—Valued components have been included in state-led environmental assessment processes in Canada to define the core values that will be reviewed and scoped into a study.

PHOTO: NUNAVIK, COURTESY JEAN-MARC SÉGUIN

APPENDIX A

INDIGENOUS-LED IMPACT ASSESSMENT: FRAMING QUESTIONS

There are no best practices in Indigenous-led project assessment; it is about what emerging options and choices work best for the individual Indigenous community, nation, or cultural group. In recognition that there is no one size fits all, the Firelight team has identified questions that Indigenous groups may need to consider after deciding whether to conduct an Indigenous-led impact assessment, when the key question becomes how to structure that process.

Key questions include:

1. What type of project assessment process to adopt—whether and who to partner with?
2. How much of the project assessment does an Indigenous group want to take on internally, and what parts?
3. What type of guidance to provide proponents (and in some cases, the Crown)?
4. What lens will be used in decision-making and consent provision?
5. How—and by whom—will the consent decision be made?
6. What types of project conditions are required if consent is given by an Indigenous group?

QUESTION 1: WHAT TYPE OF PROJECT ASSESSMENT PROCESS TO ADOPT?

This report has identified three general models that can be adopted by Indigenous groups looking to take more control over an individual project assessment or the project assessment process in general in their territory:

1. CO-DEVELOPED: Team up with the proponent to assess the project prior to filing for a formal environmental assessment certificate or other authorizations.
2. CO-MANAGED: Engage within the existing Crown system (federal or provincial), with more collaboration with the Crown during the project assessment than in the past.
3. INDEPENDENT: Go it alone and make your own final, independent, decision on whether a project should proceed and under what conditions.

There are advantages and disadvantages to each approach. For example, an independent Indigenous-led impact assessment may work when you have capacity (or leverage to fund additional capacity), but it has drawbacks if you do not have enough leverage to enforce the decision or conditions at the end of the process. Co-managed project assessments to date have required acceptance of the existing (often highly flawed) Crown environmental assessment system, and while you may gain a seat at the table with the Crown, the outcomes may not see the exponential change many Indigenous groups seek. Engaging with the proponent requires strong relationship building from the outset of a proposed project, but also could lead to direct adoption of your impact and benefit conditions as bilateral commitments.

What type of project assessment process you adopt will depend on a variety of factors, including:

- Your internal **excess** capacity, especially in lands departments (strong to weak);
- Your available funding (high to non-existent);
- Your leverage in relation to the project (strong to weak);
- The importance of the project (very concerning vs. a minor change);
- Your level of satisfaction with the existing system (high to low); and
- Your desired priority relationship (e.g., with the Crown or a proponent).

QUESTION 2: HOW MUCH OF AN IMPACT ASSESSMENT CAN/SHOULD AN INDIGENOUS GROUP UNDERTAKE?

Indigenous groups are faced with deciding whether or not to take on—to internalize—a full-scope project assessment, including all topics usually covered in an environmental assessment, or to separate out and focus on key elements the community is most interested in and capable of assessing without overburdening internal labour capacity or using community funds. In many cases, running a full-scope impact assessment is both beyond the capacity and interest of most Indigenous groups, and likely duplicative, given that the Crown will require its own environmental assessment as well. A better choice may be to shadow the formal Crown-led environmental assessment process for topics like engineering and much of the biophysical effects assessment, and perform key elements that Indigenous communities have shown strong ability to effectively undertake themselves. These may include but are not limited to:

- Scoping, including identification of the scope of factors to be assessed, valued components and indicators that must be assessed, and defining information requirements.
- Specific baseline data and effects characterization studies on discrete topics, such as:
    - Cultural impact assessment;
    - Community-specific socio-economic impact assessment;

- Traditional knowledge and traditional use studies;
- Aboriginal rights and interests assessments; and
- Cumulative effects context studies across multiple valued components.

- Consent provision or withholding processes defined by and conducted by the Indigenous group on the basis of the available evidence.

The *shadowing* approach is one taken to a greater or lesser degree in the Squamish Nation case.

One of the most important issues is that if specific studies are undertaken, Indigenous rights and interests may not be fully protected unless Indigenous groups are able to carry them through all the six steps of project assessment—scoping, baseline data collection, impact identification, mitigation identification, significance/acceptability/consent determination, and imposition of follow-up and monitoring. One of the biggest problems under the status quo system is that Indigenous engagement in the environmental assessment process has often been severely curtailed after baseline data collection.

QUESTION 3: WHAT LEVEL AND TYPE OF GUIDANCE TO PROVIDE?

Indigenous groups are not the only parties struggling to adapt to an era of free, prior, and informed consent (FPIC), and Indigenous-led impact assessment. Individual proponents and the agents of the Crown are learning as they go as well. Issuing clear and reasonable guidance may be critical both to the willingness to accept calls for an Indigenous-led project assessment, and to the success of implementation of that process. Among the tools Indigenous governments may choose to provide to proponents that seek project approvals are:

- Traditional knowledge protocols.
- Parallel (to the Crown environmental assessment process) terms of reference for assessment of effects on Indigenous communities.
- Additional scientific data collection protocols that go over and above the Crown environmental assessment terms of reference for a project.
- A list of required studies that only the community is allowed to undertake (see Question 2 above for examples).
- A process chart showing key points of engagement and requirements under an Indigenous based project assessment system.
- Guidance to both the proponent and Crown agents on how to engage and consult with the community before, during, and after the project assessment.
- A document that identifies the Indigenous consent regime and process, including minimum engagement and information requirements without which the community

cannot provide informed consent. *Please note that if Indigenous nations choose this route, any such document should outline the process and information required to fuel independent consent decision and not read like a checklist that* **replaces** *Indigenous independence to make a decision.*

QUESTION 4: WHAT LENS TO USE IN MAKING DECISIONS?

Historically, environmental assessment decision-making has been primarily framed around the determination of the significance of adverse impacts on the environment (including people). A significant impact is one that is relevant to Indigenous decision making on whether a project should go ahead, and under what conditions. What this has meant has been that environmental assessment remains focused on avoiding the worst rather than planning for the best. More recently, there is a recognition—especially in Indigenous-led project assessment frameworks—that the avoidance of bad change in the form of significant adverse impacts, may not be enough.

There is an increasing need to show on balance, and with special emphasis on priority rights of Indigenous peoples, net gains and contributions to reconciliation in a future where the project is allowed to proceed. There are a variety of ways and means to determine acceptability of the project overall that may assist in defining the decision-making lens for an Indigenous group. They include (and note that these are not mutually exclusive options; many can be used in combinations deemed appropriate by the Indigenous group):

- Typical Crown environmental assessment process tools, which focus on the imposition of professional judgment or quantitative thresholds of acceptable/manageable change, or both.
- Development of community-specific metrics, often using the type of decision-making tools that the Indigenous group would use to make other decisions. These may include:
    - Simple consent—what will the community consent to, and under what conditions;
    - Whether the project will provide a net gain or net loss to the community or the resources it relies upon;
    - Whether the project will make Indigenous laws and norms difficult or impossible to adhere to;
    - Whether the project will cause problems for future generations (intergenerational equity), or continue the existing imbalance of benefits and risks between Indigenous and non-indigenous peoples (impact equity); and
    - Whether the project will contribute to our take away from the reconciliation of Indigenous and non-indigenous peoples.
- Developing a set of environmental standards that must be met in order to garner consent, which may be developed across a series of valued components.

QUESTION 5: HOW (AND WHO) MAKES DECISIONS?

Here again, there is no singular formula—no best practices that trump Indigenous cultural laws and norms about how to make decisions important to Indigenous communities. It is about what is the appropriate way and group to make decisions. Options include the following, different parts of which can be mixed and matched:

- "Expert informed" process—Using outside (or internal) technical expertise to support an Indigenous-based decision framework.
- Multiple accounts evaluations—Usually with another party, like the Crown or a proponent. Decision-making on aspects of the project like siting and routing may be informed by these type of informed decision-making forums, with the values of different groups brought to bear to weigh different options. *Please note: this does not generally apply to final decision-making on the whole project. It is more a tool to be used during the process to make decisions (especially with proponents) about the most preferable routing or siting of project components.*
- Collaborative consensus—This approach has been sought in Crown-Indigenous community engagement in some provincial environmental assessments, with the two parties seeking to find agreeable measures to fuel informed consent and protect the environment. However, power imbalances with the Crown retaining control over the ultimate decision may hamstring the utility of this method.
- Community referendums or other community voting or consensus processes, using the type of governance mechanisms that are appropriate to your community.
- Leadership decision-making—In some cases, elected (or customary) leaders may be empowered by the community to make decisions on its behalf.

QUESTION 6: WHAT TYPE OF MEASURES OR CONDITIONS ARE IMPOSED?

Important decisions remain if an Indigenous group is inclined to provide consent for a project, in particular regarding what type of measures will avoid, reduce, or offset/compensate for impacts, and how to monitor the effects that do occur. There is a universe of potential measures to choose from, but the following advice generally applies across multiple assessment realms:

- Focus on measures/conditions that directly avoid or reduce the impacts Indigenous groups care about the most.
- Don't limit your measures/conditions to things the state-based regulatory system already deals with. In fact, Indigenous groups might want to avoid these if they will likely be captured elsewhere.

- Make sure the community is empowered through measures/conditions to both monitor change and require adaptive management when unanticipated/unacceptable changes occur.
- Define directly and clearly in measures as to what is an acceptable level of change, so there is a *trigger* in place for adaptive management should that level be breached.
- Include blanket conditions that require all commitments made by a proponent that are not explicitly captured as conditions to Indigenous approval, to be legal conditions, subject to compliance monitoring.
- Include requirements for the proponent to provide adequate funding to cover the cost of both implementing—and community monitoring—of all conditions and commitments.

PHOTO: NUNAVIK, COURTESY JEAN-MARC SÉGUIN

APPENDIX B

RECOMMENDATIONS TO NATIONS PLANNING TO DEVELOP THEIR OWN INDIGENOUS-LED IMPACT ASSESSMENT FRAMEWORK

CONSIDER YOUR EXTERNAL CONTEXT

- Determine for any project whether to apply your Indigenous-led process or stick with party status in the legislated system. Not every project should necessarily be reviewed by an Indigenous-led impact assessment process.
- Identify gaps in the state-led approach—review the terms of reference or guidelines that set out the key topics for the proponent.
- Take advantage of training opportunities in impact assessment, by the Canadian Environmental Assessment Agency (soon to likely become the Impact Assessment Agency), territorial bodies, and groups like the International Association for Impact Assessment. Learn the basics of impact assessment and then adapt it to your ways.
- Talk to other nations that have conducted Indigenous-led impact assessment in the past, about pros, cons, and their tips and tools.

COMMUNITY CONTEXT

- Consider how your laws, norms, and cultural decision-making processes can inform in a way that makes them relatively easy to use in your decision-making in an impact assessment (this can be kept internal as desired; many nations are reluctant to share in writing their laws, norms, or assessment criteria).
- Conduct some form of "community readiness assessment" to determine whether your nation is ready to take on this type of responsibility and where capacity building may be necessary. Review the enabling factors in this report to consider whether you are ready to mobilize.
- Determine **as early as possible** whether you will work with the proponent, with the Crown, with other Indigenous groups, or on your own.

- Develop a set of steps, including key decisions and who makes them, in advance of starting the process.
    - Determining the appropriate constituency for a decision-making body is critical and should be appropriate to your cultural decision-making processes.
    - Make sure to both map out and communicate well in advance how community members will have an opportunity to engage in the process.
    - Carefully consider engaging the community members themselves on how to structure the process. Community buy-in to the process will be critical to its legitimacy.
- Determine what elements of the assessment you want to focus on—this may include culture, traditional use, rights-based assessment, wildlife, alternative routing, or any number of factors. It is strongly suggested that not all topics be chosen for review, and that not every area is technically reviewed by the nation.
- Define a core internal team, with a mixture of technical (e.g., lands department) and leadership (e.g., a councillor) capacity and legal advisors, to identify the most appropriate approach.
- The development of a terms of reference is critical; the process should not be run in an ad hoc fashion. Consider the questions in Appendix A when developing terms of reference for the process.
- Determine whether and what type of external technical capacity you will need, what it will cost (include in your budgeting), and when to engage it.
- Scope your level of effort to realistically available funding for this exercise, and focus on capturing those funds as early as possible. Every case mixes funds from the proponent, Crown, and from the nation itself.

GOVERNMENT AND COMPANY CONTEXT

- Communicate your plans to the proponent and to the Crown impact assessment agency, and seek their support (it is not mandatory to get it) and try to mesh the processes together. Recent federal recognition of the legitimacy of the Indigenous-led assessment approach will make this easier to accomplish.
- Determine how you will engage in/shadow the legislated impact assessment process.
- Consider the likelihood the process will be accepted by outside parties, including the outcomes.
- Consider how outside funding can be accessed and what amounts, when framing your level of involvement.

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Gwich'in Council INTERNATIONAL

GCI represents 9,000 Gwich'in in the Northwest Territories (NWT), Yukon, and Alaska as a Permanent Participant in the Arctic Council, the only international organization to give Indigenous peoples a seat at the decision-making table alongside national governments. GCI supports Gwich'in by amplifying our voice on sustainable development and the environment at the international level to support resilient and healthy communities.

For more information see **gwichincouncil.com**.