2022 Virtual Mackenzie Valley Resource Management Act (MVRMA) Workshop Series: Session 3: Engagement and Consultation

WORKSHOP REPORT

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Submitted To

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Executive Summary

Co-management Boards and the federal and territorial governments in the Mackenzie Valley typically host an annual workshop on the *Mackenzie Valley Resource Management Act* (MVRMA) for community representatives, Indigenous governments, and organizations as a key engagement activity to support an effective co-management system. Given the ongoing COVID-19 circumstances, the MVRMA Workshop Planning Committee chose to host a series of four virtual half-day workshops in 2022 rather than the typical several-day long in-person workshop once per year. The topics of the virtual workshop were based on a survey conducted in Fall of 2021.

The third instalment of the four-part virtual workshop series was held on September 28 and 29, 2022 and focused on the engagement and consultation within the context of the MVRMA. The workshop was intended to:

- Clarify the scope and meaning of engagement and consultation;
- provide historical and legal context;
- highlight innovative and collaborative approaches to engagement and consultation;
- provide information on current initiatives; and
- get feedback and insights from participants on how to improve engagement and consultation as it relates to the co-management processes in the Mackenzie Valley.

164 participants joined the virtual workshop on Day 1 and 168 on Day 2, representing government employees, co-management board members and staff, industry representatives, and Indigenous government/organization employees. The workshop included presentations, panels, virtual engagement tools, breakout group discussions and open question and answer periods to explore, develop and clarify concepts within the workshop scope. See Appendix A for the Agenda.[1]

Day 1 of the workshop included an initial presentation to clarify what is meant by the terms engagement and consultation as it relates to the MVRMA. A keynote presentation and panel discussion explored the legal underpinning of engagement and consultation in the MVRMA and various perspectives on engagement and consultation.

Day 2 of the workshop began with additional perspectives on engagement and consultation, including an example of an innovative approach outside the Mackenzie Valley, and how the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) may affect this work going forward. The Land and Water Boards, the Review Board, the territorial and federal governments briefly presented updates on ongoing policy initiatives and projects. Most of day two was spent in breakout group discussions with the participants to gather feedback on how to improve engagement and consultation as it relates to the MVRMA.

Key takeaways from this Engagement and Consultation Workshop include:

[1] NOTE: Appendices are found under a separate cover.

- Engagement is different than consultation: Engagement aims to build relationships and trust by exchanging information in the absence of legal consultation obligations. Engagement can help to fulfill the obligations of consultation.
- The MVRMA is a unique piece of legislation: The consultation practice that has evolved is unique as well through the way it blends land claim, co-management statutory and case law requirements.
- Engagement and consultation in Mackenzie Valley is different from rest of Canada: Need to "look in the mirror" and recognize the good work that is being done in the Mackenzie Valley, while being honest and open to continual improvement.
- The Boards are not the Crown: The Crown holds the ultimate responsibility for ensuring adequate consultation; however, governments rely on the Boards' processes to help fulfil their duty to consult. The Boards' must follow the consultation requirements laid out in the land claims and the MVRMA.
- Communities drive engagement and they need capacity to do this well: Communities should be engaged early and inform the process of how they should be engaged. Consultation fatigue is real and everyone needs to consider ways to address it (e.g., participant funding, more plain language materials, type/format/amount of documents shared, etc.)
- Get in the community and on the land: The pandemic demonstrated how we could engage online but need to keep building the relationships within the community in-person.
- We all need to work collectively and at a personal level to build positive relationships: Engagement and consultation should be based on respect, relationships, responsibility, and reciprocity. It is upon everyone, at every level, to do this within their workplace, organization, community and as an individual.
- Be accountable for this reciprocal relationship: Be transparent with what you say you're going to do; set up systems for getting feedback and make adjustments based on what you are hearing.

Introduction

Co-management Boards and the federal and territorial governments in the Mackenzie Valley host an annual workshop on the *Mackenzie Valley Resource Management Act* (MVRMA) for community representatives, Indigenous organizations, and government as a key engagement activity to support an effective co-management system. The third instalment of the four-part virtual workshop series was held on September 28 and 29, 2022 and focused on the engagement and consultation process in the Mackenzie Valley.

The workshop was attended by participants representing government employees, co-management board members and staff, industry representatives, and Indigenous government/organization employees. The workshop included presentations, panels, virtual engagement tools, breakout group discussions and open question and answer periods to explore, develop and clarify concepts within the workshop scope. See Appendix A for the Agenda.

Workshop Purpose

- To help familiarize participants with the co-management and integrated system of land and water management established through the MVRMA.

Workshop Goals

- Clarify the scope and meaning of what engagement and consultation means in relation to the MVRMA.
- Provide historical and legal context of consultation and engagement as it relates to the MVRMA.
- Highlight innovative and collaborative approaches for engagement and consultation and where it might be going in the future.
- Provide information on current engagement and consultation-related initiatives.
- Get feedback and insights from participants on how to improve engagement and consultation as it relates to co-management processes in the Mackenzie Valley.

The Workshop Planning Committee was responsible for the delivery of the workshop. Stratos Inc., an ERM Group company (Stratos) was engaged to support the design and facilitation of the workshop, provide technical support and prepare this report. A full list of the Workshop Planning Committee and Stratos Delivery team members can be found in Appendix B.

This report provides a detailed account of all presentations and discussions from the two sessions. Much of the content is the opinion of speakers and participants and reflects a range of views. This report can be used to inform the next steps to be taken by industry, co-management boards and the government as they work to improve the engagement and consultation process within the Mackenzie Valley. All presentations are available and can be accessed in the Appendices under a separate cover.

Synopsis of Day 1 (September 28, 2022)

Land Acknowledgement

The first day of the engagement and consultation workshop was held virtually on September 28, 2022 (9am-12pm MT). The workshop began with powerful opening remarks and a land acknowledgement from Tanya Lantz, Community Outreach Coordinator with the Mackenzie Valley Land and Water Board.

Tanya informed the participants that it is a long-standing tradition for Indigenous people to acknowledge the land we are on to show awareness and respect of Indigenous presence and land rights. She acknowledged that she is on Chief Drygeese Territory in Treaty 8, and she acknowledged her brothers and sisters in Treaty 11, for "as long as the sun shines, the river flows, and the grass grows."

Tanya stated the importance of land acknowledgements on the road to reconciliation. Land acknowledgements are sincere when followed by action, such as learning, volunteering, or donating. She also gave her opinion about what land acknowledgements should share - acknowledgements are expressions of relationship, not only acknowledging land or territory, but the connection to the land based on knowledge, getting to know the people, creating reciprocal relationships, getting know to know the land and water, and acknowledging that it sustains us. She humbly encouraged everyone to reflect upon the historical legacies held in the land they occupy.

Tanya ended by paying respect to the histories, languages, and culture of all Indigenous people and encouraged all to remember that September 30th is a very special day to take action and honour the spirit of the National Day of Truth and Reconciliation. This day honours the children who never returned home and survivors of residential schools, as well as their families and communities.

Introduction of the Workshop Session

To introduce the workshop, Jane Porter, Stratos facilitator, acknowledged the 2020 MVRMA workshop on Engagement and Consultation. Many participants may have already been involved in conversations around the topic of engagement and consultation as it relates to the MVRMA. She noted that the information previously discussed has not been lost; it has been incorporated into a lot of policies and processes and has helped steer the 2022 workshop. The co-management boards are not trying to re-invent the wheel, but rather continue the journey ahead and improve the engagement and consultation process forward.

Warm Up Activity: What do these words mean to you? Who's in the room?

Following the opening remarks, participants were invited to join small breakout groups of ~3-4 people to introduce themselves and briefly discuss the prompt: ***When you hear the words "engagement and consultation" what are the first three words that come to mind for you?*** Participants were invited to share their thoughts in plenary using a virtual engagement tool that generated a Word Cloud of ideas. The most popular answers are demonstrated by a large font size[2].

Figure 1: A snapshot of the Word Cloud generated from participants sharing what words come to mind when they hear the words "engagement and consultation"

Participants were asked other questions using the online engagement tool to better understand who was in the virtual room. Most participants (86% of respondents) aligned more with the statement "I normally do engagement / consultation work", compared to the 14% who responded, "I normally am being engaged / consulted". The breakdown of the type of organization participants work with can be seen below, with the majority (49%) of participants working with the Government of the Northwest Territories (GNWT) or federal government.

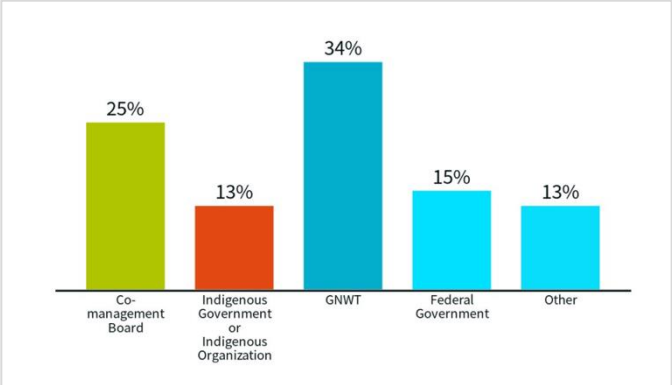


Figure 2: Breakdown of participant affiliation

[2] To view all answers collected during engagement, see Appendix C.

Overview: What is consultation and engagement under the MVRMA?

To ensure all participants had a foundational understanding of what was meant by the words *"engagement"* and *"consultation"* in relation to the MVRMA from the start of the workshop, Mark Cliffe-Phillips, Executive Director of the Mackenzie Valley Environmental Impact Review Board (MVEIRB) provided a short overview presentation.

Figure 3: Two sisters who were participating at a Tłı̨chǫ assembly

Mark spoke to the objectives of engagement and consultation rather than trying to determine a sole definition for the terms.

He began by highlighting a picture used in the presentation. One of the key things he looks for when doing engagement and consultation is the facial reactions of the people around the room. You can often judge how well your engagement or consultation is going by reading the faces of the people you're meeting with.

Crown consultation refers to the legal obligations of the Crown (government) when Aboriginal interests (rights and title) may be adversely impacted by a Crown decision. This is not a role of the co-management boards; however, governments rely on the Boards' processes to help fulfil their duty to consult. The Boards must follow the consultation requirements laid out in the land claims and the MVRMA.

Engagement is different than consultation. It aims to build relationships and trust by exchanging information in the absence of legal consultation obligations. Engagement can help to fulfill the obligations of consultation.

In general, when engaging or consulting, it is best to cast a wide net and seek to hear from as many voices as possible of those who may be impacted by a decision.

Mark outlined an analogy to describe engagement and consultation by comparing the process to the development of a story:

- Engagement: the story line is being provided for through the developer and the applicant. The Board is seeking feedback on how to finish that story to do so in the best way possible, so that everyone wants to read the story.
- Consultation: the Boards have entered into an agreement with people to help them write the story in a way that is to include their voice in the story, as a requirement of the agreement.
- Outreach: the Boards have already developed a story and they're going out in communities to tell the story to people in order to receive feedback and write better stories in the future.

Access to Mark's presentation can be found in Appendix D.

Keynote with John Donihee: The Evolution of Consultation Law and Mackenzie Valley Boards' Consultation Practice

John Donihee
Willms & Shier Environmental LLP

John Donihee holds graduate degrees in both Environmental Studies and Law. He practices law in all three northern territories. Between 1997 and 2004 John was a Research Associate at the Canadian Institute of Resources Law and Adjunct Professor in the Faculty of Environmental Design at the University of Calgary. He also taught Natural Resources Law in the first Akitsiraq law program in Nunavut. He is currently of counsel with Willms & Shier Environmental Lawyers LLP.

For more about John, please see Appendix E.

The Importance of History and Context

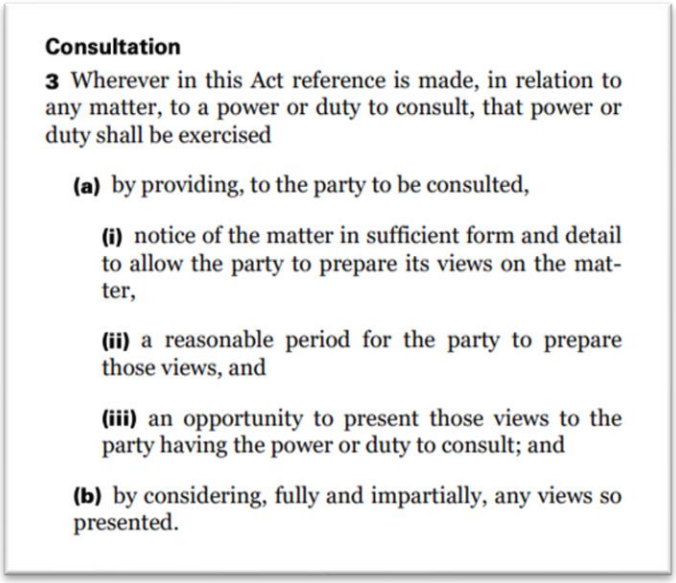
John set the stage of his presentation by addressing the importance of understanding the historical, legal, cultural, and social context of consultation practices. Consultation practice has to be tailored to your geographic context and to the kind of problems that are being addressed in your consultation. He noted that consultation is not a product of simply checking off boxes, but rather it is a process intended to build relationships and lead to accommodation and reconciliation. The MVRMA is a unique piece of legislation and the consultation practice that has evolved is unique as well through the way it blends land claim, co-management statutory and case law requirements.

John highlighted that within the Northwest Territories, consultation is influenced by many factors, including:

- Resource development and communities: What is planned to take place and how does that plan/proposed activity effect Indigenous rights or title?
- Land claims: Is the proposed activity taking place in an area with a settled land claim?
- Co-management: Every settled land claim employs a co-management framework, regardless of whether there are self-government provisions in the land claim or not.
- Implementation legislation: E.g., the MVRMA, Environmental Assessment Legislation, etc.
- Case law: Specifically, the co-management boards' role in case law.
- Leadership policies and processes

Land Claims and Statutory Consultation

John noted that at the time when the land claim agreements were established in the various regions of the NWT, the case law was not very well developed. Negotiators who had been at the land claim table for years were trying to make sure that there was a guarantee of some appropriate interaction between the land claims organizations and governments once the land claims were being implemented. The negotiators included a definition of



Consultation

3 Wherever in this Act reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised

(a) by providing, to the party to be consulted,

(i) notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter,

(ii) a reasonable period for the party to prepare those views, and

(iii) an opportunity to present those views to the party having the power or duty to consult; and

(b) by considering, fully and impartially, any views so presented.

Figure 4: Definition of 'consultation' in the MVRMA

consultation in land claims and specific provisions in the resource management chapters require consultation by governments and boards before decisions are made. (See side box for MVRMA definition). John noted that this definition for consultation requires little more than administrative law fairness.

The MVRMA and its regulations require more on consultation, particularly in relation to the Mackenzie Valley Environmental Impact Review Board (MVEIRB). Whether or not a consultation satisfies legal objectives of the MVRMA is decided based on the definition of consultation in the Act. Land claims that have statutory consultation requirements set a much lower bar than the requirements of Crown consultation – just being fair is required. He pointed out that simply meeting statutory requirements would not satisfy the obligations of the Crown and the courts have gone much farther in imposing obligations, in appropriate situations, on governments or decision makers that are caught with the responsibility to conduct consultation.

Co-management tribunals bring a community's context and expectations directly into the environmental assessment and regulatory decision-making process. Many representatives on the boards are members of the communities, so these boards can make decisions based on true understanding of the concerns at hand because they share the community context.

The Evolving Case Law

John explained that the requirements of the case law were driven by Section 35 of the *Constitution Act* and came into force in 1982. To better outline case law and its context, John spoke to a few cases, mostly involving decisions of the Supreme Court of Canada.

Case	About	Importance / Relevance for the Boards
Sparrow Case (1990)	Involved a challenge to a fisheries regulation	• Important in determining what an existing Aboriginal right was (tied to language of Section 35)
Delgamuukw Case (1997)	Aboriginal title	• The Supreme Court of Canada stated that there is always a duty of consultation, but the nature and the scope of the duty will vary with circumstances. John highlighted that consultation must be in good faith, and with the intention of substantially addressing concerns of Indigenous people whose land are at issue.
Haida Case	Set the foundation for modern Crown	• Consultation requirements are proportionate to the strength

(2004)	consultation law	of the claim and seriousness of a potential adverse impact on the exercise of a Section 35 right. • The strength of claim point is less important in the NWT because in most instances, Indigenous governments that don't have land claims are already involved in the negotiation of a comprehensive land claim and the Crown has already accepted the potential existence of the Aboriginal right, preventing argument about strength of claim. • There must be an asserted or existing Aboriginal right for consultation to be required and there must be a potential adverse impact – the stronger the impact, the greater the depth of consultation required. • From 2004 to 2010, it was unclear what the role or responsibilities of administrative tribunals was in consultation. It was clear they could and should be involved, however, their actual decision-making authority in the consultation process was unclear. • **The honour of the Crown cannot be delegated; however, the consultation exercise can be delegated. The Boards can have a role in assisting the Crown to ensure that consultation requirements are satisfied.**
2010 Beckham and Rio Tinto	Clarified the role of the Crown and Tribunals regarding consultation	• Beckham Case from Yukon, that involved the allocation of land for agricultural purposes that had affected a trap line. The Yukon Government argued that the land claim contained essentially everything that the Crown had to do to satisfy the Crown consultation obligation. He invited the audience to think back to the Yukon Final Agreement that was settled in the 1990s and the consultation definition in the land claim, which only requires the Crown to be fair. The Yukon Government brought this argument to the Supreme Court and were unsuccessful in their delivery. **The Supreme Court stated the Crown cannot contract out of its duty of honourable dealing with Indigenous peoples and the honour of the Crown has an existence outside of the black and white letters of the land claim agreement.** • Rio Tinto was a case from British Columbia. The British Columbia Utilities Commission was dealing with export contracts and there were challenges advanced by the Carrier

			Sekani Tribal Council stating that the export contracts could not be approved by the Utilities Commission until historical concerns related to the impacts of the dams were dealt with. The Courts said that some tribunals can play a role in both the procedural consultation and assessing the adequacy of consultation. John noted the importance of assessing the adequacy of consultation because it requires the authority to decide how strong an Aboriginal right or claim might be. **Rio Tinto is such an important case because of the role it identified for a tribunal in consultation**.
2017 Clyde River and Chippewas of the Thames	Whether the tribunal could fulfill the Crown's duty to consult	•	The Chippewas of the Thames Case involved the National Energy Board (now the Canadian Energy Regulator or CER) planning to approve a pipeline underneath the Thames River in London, Ontario. The issue was whether the tribunal could fulfill the Crown's duty to consult. The Supreme Court of Canada determined that the National Energy Board could do so. At the time, the National Energy Board legislation held strong procedural powers with the ability to make determinations of law and deal with constitutional questions. **The key takeaway from the Chippewas of the Thames Case is that a tribunal or agency must possess both the powers to affect compromise and to do whatever is necessary to achieve reconciliation of the divergent Crown and Aboriginal interests.** Procedural and remedial powers depend on tribunal jurisdiction because tribunals are created by legislation.

Boards' Consultation Policies

John highlighted that the initial LWB Consultation and Engagement Policy was finalized in 2013 after the 2010 Rio Tinto Case – meaning there were approximately 10 years of operational experience in between without a finalized Policy. Rethinking and revisioning of the Policy began after the Clyde River and Chippewas of the Thames decisions in 2017 and in 2019, MVEIRB adopted the policy on an interim basis as a collaborative effort was initiated to address board consultation obligations.

The revised draft of the LWB's Policy does not include MVEIRB since there are different roles in decision-making authorities between MVEIRB and the LWBs. MVEIRB makes recommendations to ministers at the end of an environmental impact assessment and it is not clear that they have general authority to make decisions on questions of law. Due to the roles in consultation being so different, there is an effect on policy.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

John outlined the idea of Free, Prior, and Informed Consent (FPIC), which is the state obligation to consult and cooperate with Indigenous peoples to obtain FPIC. He noted that the federal government's position in relation to FPIC is that it builds on and goes beyond the duty to consult and the federal legislation in place to implement UNDRIP does not immediately change Canada's existing duty to consult Indigenous groups or other consultation and participation requirements set out in legislation.

Key Takeaways

To conclude his presentation, John highlighted the key takeaways from his keynote presentation, including:

- The Boards are not the Crown – the Crown holds the ultimate responsibility for ensuring adequate consultation.
- MVRMA Boards are not the Canada Energy Regulator (CER) or BC Utilities Commission, which are vested with extensive legal procedural and remedial powers.
    - Must look at what the LWBs and MVEIRB can do under the MVRMA in the context of issues that are raised about impacts on Indigenous rights, and whether those powers are sufficient to achieve either accommodation or reconciliation.
- Powers can vary with the decision required.
- The case law must be applied in the proper context and with an understanding of what a board can and cannot do based on its statutory jurisdiction.

John then brought the audience back to context by **emphasizing that consultation and engagement are central components of the MVRMA framework.** The MVRMA tribunals operate in a unique context, and their co-management tribunals make a difference – not only procedurally, but substantially to the way that they conduct their business and their consultation and engagement exercises. The Boards have the historical knowledge, cultural experience, and in many cases, Indigenous language speakers, to provide for a satisfactory consultation outcome.

Question and Answer with John Donihee

Are there any differences between the meaning of consultation for the United Nations (UN) and what we have in the North under the MVRMA? If so, how can we reconcile the differences?

UNDRIP is very wide-ranging. How consultation law has developed in Canada is largely focused on existing Aboriginal rights. UNDRIP, and with it, FPIC, is mostly relevant for the resource development context. Due to the federal legislation, efforts will have to be made to reconcile its legal framework with UNDRIP and with Aboriginal rights. I expect that from the federal perspective, the case law coming out of the Supreme Court is expected to evolve as well. In the last MVRMA workshop in 2020, we tried to identify what you have to do to get a decision out of a Review Board or Land Water Board and how does that law in the process line up against what UNDRIP requires. I am happy to share a draft paper that will help with the understanding of the UNDRIP question. The draft paper John spoke to can be found in Appendix F.

How can the Crown change its approach to consultation in light of the changing nature and need for reconciliation?

The Crown will inevitably be driven by the way the case law evolves and the law about Section 35 is what is driving all of this. Most of it is coming from the Supreme Court of Canada and that is going to continue to evolve as the Supreme Court has been consistently talking about accommodation and reconciliation. There are times when it is difficult to get the government to move beyond just consultation. The real solution is one that allows the continued exercise of the right, and from the government's perspective, the development to proceed. I realize that not all the Indigenous governments and Indigenous organizations in the NWT are that committed to the MVRMA system, but I do think that co-management tribunals listen and work hard to try to find solutions. I commend the territorial government since it is largely responsible for making decisions whether to adopt these measures or not, and several innovative approaches have emerged from the co-management tribunals in the last few years since Devolution.

Can you expand on the difference in consultation 'authorities' between MVEIRB and the LWBs?

The LWBs make final decisions on water licences and land use permits with hearings. When they make final decisions, it must be made in a way that is consistent with the Constitution; therefore, there are not any violations of section 35 rights and consultation obligations have been honoured. The LWBs are final decision-makers and have authorities to make decisions about the law. In the environmental assessment process, MVEIRB has the authority to make decisions about the law that it is working with and the way it runs. However, the MVEIRB process generates a series of recommendations to ministers who make the final decisions. Only then do the measures end up being reflected in regulatory instruments, like land use permits or water licences, which influences how MVEIRB must do its work in relation to consultation. The authorities to make decisions on questions of law between the two tribunals are quite different.

What would be an example for a board to consider the honour of the Crown? Is it about fulfilling commitments to mitigate and accommodate, or is it more about proof of fairness and integrity?

I think it is the former. It depends on which board we are talking about, but I will answer in relation to the LWB – the LWB must run a fair process. It's required by the MVRMA and the nature of the tribunal. If issues arise about consultation in the context of the LWB process, the LWB will adapt their work plans to attempt to provide space, time, and dialogue to address the concerns. Sometimes the concerns can be addressed simply through regulatory means (i.e., include new terms and conditions into a permitting licence). They are constrained by legislative timelines, however, there is room for the process to be paused to ensure that all concerns raised are given fair consideration and they can direct an applicant to work with the Indigenous rights holder that has concerns. For the Review Board, they have statutory timelines as well, but their processes tend to take longer to get through, giving them more time to address concerns when they come up to ensure they are addressed before environmental assessment report is written. If more needs to be done, the Review Board will make recommendations to the ministers. After the report is drafted, rights holders are contacted and given the opportunity to comment on the recommendations that the Review Board proposes.

Panel Discussion: Perspectives on Engagement and Consultation

Following the morning break, Jane Porter of Stratos moderated a panel discussion with representatives who are practitioners of engagement and consultation – people who work at the community level, with different backgrounds including legal, government, and community perspectives. Tim Heron, Sara Mainville, and Nuri

Frame participated in an interactive roundtable of questions to share their perspectives on how the engagement and consultation process is going and where they see it going forward. [3] Janet Bayha McCauley was unable to join the panel on Day 1, however, Janet shared her remarks on engagement and consultation on Day 2 of the session. Following the questions posed by Jane, participants were asked to engage via questions on an online tool, then invited to pose questions to the panelists using the chat function. As time permitted, the below questions were asked of the panelists.

Tim Heron
Northwest Territories
Métis Nation

Sara Mainville
JFK Law

Nuri Frame
Pape Salter Teillet LLP

Tim, can you share a bit about your experience with engagement and consultation and then can you share your perspective on the definition of engagement and consultation – or more specifically, who should define what this means? (e.g., defining these terms at the regional government / community level)

Tim: Engagement belongs with the proponent because we must be educated on what their proposed plan is, and consultation always lies with the Crown because of Section 35 for all Indigenous people, even if we don't have a treaty or are working on the modern-day treaty language. That is how we define engagement and consultation; we don't go too far to the left, or too far to the right, we go straight forward. Consultation belongs with the leadership of the communities and engagement belongs with the community people because they are the ones that really drive our processes. They have the lands around them and are the most impacted, not the regional government.

Communities drive the engagement and the big problem there is capacity. We need more capacity, but we are slowly getting there. I was speaking with youth from the community. They are going out and getting educated and a lot of them are becoming lawyers, so we are gaining capacity, but it's not going to be gained overnight. The MVRMA is working for us as Indigenous peoples in the NWT, and we are not going to give up on that because it allows us to be involved and have our concerns addressed through engagement and consultation.

If a developer comes up with an idea, we want them to come into the community and talk with us because that is where everything

> *"If a developer comes up with an idea, we want them to come into the community and talk with us because that is where everything starts – from the ground up. It is like anything you see in nature, the plants start from the ground up, and that's what Indigenous thinking is – we look at nature. We are a part of nature; we are not separated just because we are top of the food chain. We must think how we live in harmony with the environment."*
>
> - Tim Heron

[3] For full bios of each panelist, see Appendix E.

starts – from the ground up. It is like anything you see in nature, the plants start from the ground up, and that's what Indigenous thinking is – we look at nature. We are a part of nature; we are not separated just because we are top of the food chain. We must think how we live in harmony with the environment.

As the Lands and Resources Coordinator for the Métis Nation prior to my retirement, I know that communities are the bosses because they're right on the ground, and they have to get their answers before they could make a well-informed decision. Any decision that is made must be good for seven generations – the proponent must understand our traditions, too.

Section 35 is the big driver of consultation. We need to know how you are going to impact our Aboriginal rights. Many times in the past, it would be given to the minster, who never indicates in the decision papers how our concerns have been considered under our Section 35 rights. Many refer to our Indigenous governments as Indigenous organizations but we are a government and we would like to be treated as one. We would like to start seeing a government to government approach – if you have an idea, come talk to us about it because we may want to be a part of the action, too. It is really important to engage the community, but also to engage the Indigenous governments as well because we have the legislation to make change. We would like to see a partnership approach where we can't be left out of the process and only engaged once the decision is already made. This approach could allow for the process to go much faster and smoother for plans that are beneficial to everyone if we are engaged right from the beginning.

Sara, is there anything you want to elaborate on from your experience? What should we be striving for? I know there's a story or teaching you wanted to share as well about Indigenous law so feel free to share it.

Sara: I agree with Tim's standpoint because it's so important that we're evolving and building capacity. It is important that when we do consultation and accommodation work from both the government side, the proponent side, and the Indigenous government side, we should be transferring capacity as we're going along to allow the Indigenous government to stand side by side with other governments as they made decisions.

> *"It is important for proponents and Crown bureaucrats to want to be included in the ceremony and discussions because it is all about relationships. As more and more plans are happening in a region, it is important to become more sophisticated and have better relationships. When you have a trusted navigator that is helping Indigenous governments build capacity, you see success."*
>
> - Sara Mainville

In my nation, we have a resource law that has existed since our treaty in 1873 and it is focused on ceremony. It is important for proponents and Crown bureaucrats to want to be included in the ceremony and discussions because it is all about relationships. As more plans are happening in a region, it is important to become more sophisticated and have better relationships. When you have a trusted navigator that is helping Indigenous governments build capacity, you see success. That is a lot of the work that I have been doing while working with Indigenous law in the South and really focusing on not just the nation-to-nation relationship that is in the Numbered Treaties, but also the fact that, this aspect of ceremony is another important actor. It is not a religious undertaking, but it certainly is a spiritual one.

I liked what Tim said about the plants. I know in Anishinaabe law we are said to be planted in our territory and I really like that symbolism. We are so integrated with our territory, and with our water that we are a part of it. Our health and well-being really depend on us caring for our environment. All the work being done in the North is so

interesting to me. I think at the core of our human dignity as Indigenous peoples is to be stewards of the land and that type of process is really of interest. The South must desperately look to the North for some guidance in ways forward, especially when talking about self-determination, government-to-government relationships, and the spirit of treaty relationships.

I write about these issues in my academic work about how to do dispute resolution and understanding Indigenous law. There are really good answers in Indigenous law about keeping long-term relationships real, true, and practical, but also creating win-win situations for all parties in a treaty relationship.

Nuri, you've done a lot of work across Canada. Can you share a bit about your experience in the Mackenzie Valley compared to elsewhere in Canada? Can you share some of those concrete examples that you've seen where engagement has really worked? Not so much when you're looking at the case law, but just at the practical level on the ground.

Nuri: As Jane mentioned, I practice cross-country, but a lot of my work is done in Ontario and in the NWT and the Yukon. In the NWT, I am lead council for the Tłı̨chǫ Government.

It is important to keep in mind that what we experience when we work in the NWT and in the Mackenzie Valley is not the experience that Indigenous peoples are having throughout much of the rest of the country. I know that Sara, who like me, does a lot of work with First Nations and Indian Act Bands here in Ontario will be very aware with experience of how different things are south of 60. No regime is flawless, and the regime in the Mackenzie Valley is certainly not flawless, however, I think it is profoundly different in its inclusion of and its sensitivity to the perspectives of Indigenous peoples in ways that the regulatory regime here in Ontario is not.

> *"No regime is flawless, and the regime in the Mackenzie Valley is certainly not flawless, however, I think it is profoundly different in its inclusion of and its sensitivity to the perspectives of Indigenous peoples in ways that the regulatory regime here in Ontario is not."*
>
> - Nuri Frame

If you are dealing with a major development, such as a mining project in Ontario, Indigenous people are outsiders looking into a process, which is not very accessible or transparent, and where the outcome isn't all but the very rarest of cases, a foregone conclusion. You are commenting on something outside of your control, which is not sensitive to cultural and spiritual issues, such as Indigenous rights issues and relationships to land, that Sara and Tim noted. There is work being done making the situation better all the time, but it really is night and day north of 60 to here in Ontario. Often you feel like you're shouting at the rain in Ontario, trying to influence a process that has very little interest in being influenced.

The other problem that you often feel in the south is that when consultation does occur, it is almost entirely limited to environmental impacts and the mitigation of those environmental impacts. I have often heard my clients and the Nations that I work with in processes speaking eloquently and passionately about their rights, their relationship to the land, their treaties, and their Elders' knowledge of the place and their aspirations for their future generations in the place, and what you get back from the regime is a very surface-level solution. There is this sense that discussions about very fundamental human rights related questions that are enshrined in treaties or when it is trying to Indigenous peoples' relationship to their land, you can often see more esoteric or abstract notions of rights and relationships to rights. We have built systems that don't know what to do with the rights, and we've staffed them with people who don't know what to do with them – that is nobody's fault, but I think it is

a problem that we need to look hard around the country and say increasingly, what we're doing is not environmental assessment; it's the assessment of a project that includes its environmental impacts, socioeconomic impacts, but increasingly and necessarily, it includes the impacts on Indigenous peoples' rights, treaty rights, relationship to land and relationship to land where they may have Aboriginal title. That idea does not have a lot of the space in the current regime. I think in the Mackenzie Valley, there seems to be a much greater level of sensitivity to those issues and part of that is because of basic human things, so often that people involved in the process, the decisionmakers on the boards, are from the communities.

When we were preparing for this panel a few days ago, I was thinking about a hearing that the Wek'eezhii Land and Water Board was holding for a mine. I remember there was a group of Tłı̨chǫ Elders speaking about their relationship to the Tłı̨chǫ Traditional Territory and the board members were responding to their questions in Tłı̨chǫ. The entire discussion was had in the language of the people in the place where the plan was to occur and all the things that resonate with the understandings of place names and worldviews which are embedded in the language that is used. That is impossible south of 60; I don't know if there is a single person who works in the regulatory regime in Ontario who speaks Cree or Anishinaabemowin, or any of the Indigenous languages used in Ontario. For all those reasons, I think representation is the most important. There must be representation of the people who will be impacted in the people who will be making the decisions to approve these projects. That is a fundamental difference that you don't see in much rest of the country, to our collective detriment, not just to the detriment of Indigenous people, but to the detriment of Canadians around the country.

On a scale from 1 to 5, are we getting this right? Are we striking a balance of engaging/consulting with the right people with the right amount of information?

Tim: It is getting better because of what we had in the past – there was nothing until the Mackenzie Valley legislation came into play and brought us into the conversation. It is getting better, but now that the territorial government got Devolution, how does that effect the meaning of engagement and consultation? To me, the territorial government has to settle its land claim before the First Nations and average people of the NWT need to settle their land claim. Come and put our shoes on and see what we must go through. It is getting better because we now get to voice our opinions and help make decisions since our people are getting on the Boards and getting educated. I'm happy for that, but I always say give us time to get there, it will not happen overnight. So, what does that mean to the territorial government how they must engage and consult? Our people are on the Boards, pushing them to improve.

> *"So, what does that mean to the territorial government how they must engage and consult? Our people are on the Boards, pushing them to improve."*
>
> - Tim Heron

Sara: There are some really good actors on the proponent side and then it's also true that there are some bad actors. I love seeing when Indigenous governments have a lot of capacity to have a consultation unit or team that is doing the necessary triaging so that they do not go through the consultation fatigue that I often see in the South. There are so many small engagements that are a waste of time and energy to get involved in because they go nowhere, and someone is in a corporate office checking off the boxes. When the Indigenous governments have the capacity to

> *"There are so many small engagements that are a waste of time and energy to get involved in because they go nowhere, and someone is in a corporate office checking off the boxes. When the Indigenous governments have the capacity to have a consultation team, they can be very strategic about different issues."*
>
> - Sara Mainville

have a consultation team, they can be very strategic about different issues. Hopefully, they have a good legal counsel helping to give good advice and achieve good agreements.

With my Nation, we work hard on having a traditional process for what we call an authorization. As an Indigenous government, getting an authorization was a necessary internal development and it involved 28 communities working together, which was very difficult in itself, but was very important. If we are truly in self-determination, we need to know how to say yes, but we also need to know how to say no. There was a practical difficulty of everybody in those 28 communities all being of one mind about something. It is a difficult internal process, but we put together, through a traditional system of decision making, a process using the medicine wheel of four directions, in Anishinaabemowin terms, to understand how to get from step A, to step B, to step C, to step D. I hope that there is a strong, concentrated effort to get Indigenous governments to those points because it is very necessary and important work.

Nuri: I believe that the NWT is in a terrific place, but some constant vigilance is required to maintain the independence of the co-management structures; maintaining not just the representation, but their independence from public government and focusing on the 'co' in the co-management idea that is so essential to the MVRMA – it is fundamental to the success of the regime. I am sure many people participating today will remember the efforts by the prior federal government to dismantle the regional land and water board regime and collapse it into a single pan-Mackenzie Valley land and water board, which was ultimately stopped through litigation by Indigenous governments. One of the reasons there was so much concern around this was because it felt like public government, believing it knew best, was dismantling the efficacy of the co-managerial regime and was supplanting the voices of the co-management board members, whether they were appointed by Indigenous governments or public governments, and seeing that roll back towards what the minister thinks is best. When that starts to happen, you erode the trust and the confidence in an institution, and without confidence in the institution, you are on a slippery slope where it will be much more challenging for Indigenous governments to support and trust in the decisions that are being made.

> *"Having trust in the institution that is making those decisions and having trust in your representation and participation in those institutions is essential for their legitimacy and their effectiveness."*
>
> - Nuri Frame

Having trust in the institution that is making those decisions and having trust in your representation and participation in those institutions is essential for their legitimacy and effectiveness. In the Mackenzie Valley and in the MVRMA regime, we need to maintain the co-managerial structure and the independence of the co-managerial structure and avoid any regression back towards a public-knows-best approach, in this post-Devolution territorial environment. In terms of public government, I am not questioning people's motives, but I think that the somebody else knows best approach has been one of the great challenges for Indigenous people for centuries in this country, and we need to avoid any slippage back to the prior models that were abandoned for very good reasons.

Participant Engagement

After the initial panel discussion, participants were invited to engage using the prompt: *in your perspective, when it comes to engagement and consultation with the MVRMA regulatory system, what direction are we going? (1 = worse, 5 = better).*

The results were shown as an average between 1 and 5 to demonstrate the average ranking.

- The collected results indicated a 3.7 average in the direction of better.[4]

Participants were then asked *to rank a list of statements by how much they agree with the statements (1 = strongly disagree, 5 = strongly agree).* * Refer to the warm up activity of 'who's in the room' (Figure 1) for a reminder of the breakdown of participants who completed this survey.

The results were shown as an average between 1 and 5 to demonstrate the average ranking. The average rankings include:

- People in communities feel like their voices are heard on potential projects and projects going through the regulatory process: 2.8/5
- The people doing the regulatory engagement and consultation in the Mackenzie Valley have strong cultural competencies to do this work: 2.9/5
- Indigenous people are properly recruited and retained to work within the regulatory system: 2.4/5
- We have the right policies and processes in place for how to engage/consult: 3.1/5
- Engagement/consultation policies are appropriately communicated to communities: 2.7/5

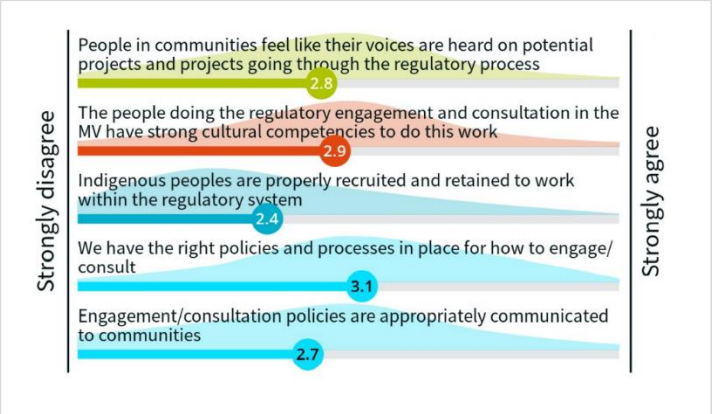


Figure 5: A snapshot of the average rankings submitted by participants on how much they agree with the listed statements

Following the answers submitted by the participants, Jane asked the panelists their thoughts on the responses.

I want to give you each a moment to reflect and respond to what you're seeing come back from the audience…Are we achieving those values-driven directions? If not, how do we do that?

Nuri: It seems consistent with my impressions, and it is interesting that the general consensus is that we are doing okay, but certainly could be doing better on all of these accounts. That is important for us to be aware of, especially for people like me as practitioners who work with the regime. It is most disappointing to see the general sense that Indigenous people are not being recruited and retained to participate as employees within the regulatory regime and that consultation and engaging policies are not appropriately communicated to communities. Those are the biggest warning signs for me that if you're not achieving representation and people in communities are not feeling as though they understand what is going on and are not communicated with in a clear way. Issues and policies need to be communicated, not just to legal counsel practitioners, but most importantly to the members of the communities where the projects are going to have the greatest impacts. If communication is falling short, that to me, is where improvement is the greatest cause for concern and where

[4] NOTE: Majority of answers are representative of people who are doing the engagement and consultation, rather than those being engaged and consulted. This is a snapshot of responses mostly from Boards and government perspectives, and some Indigenous governments. There is limited to no representation of the community perspective in these results.

improvement is urgent.

Sara: I appreciate the arrangement of the questions because those are really good targets and evaluative questions for our system. A system of this nature, we can see is likely getting better, but these specific details shine a light on how to get better.

Tim: I agree with both Nuri and Sara, but the biggest concern I have is with desktop reviews that are completed every few years. I have been complaining to the committee that completes the review to get into the communities to hear from them about whether the system is working and how to improve it, instead of skimming through documents. Involvement of the people at the community-level is the best way to improve engagement and make sure that the system is working in the proper way.

Question and Answer for the Perspectives on Engagement and Consultation Panelists

Participants were invited to pose questions via the chat function to the panelists. The questions posed for the panelists include:

How do you think COVID-19 has impacted engagement efforts and strategies with communities? Do you think people's expectations for how they want to be engaged and consulted in a post-pandemic world has changed?

Nuri: The biggest change that I witnessed my clients experience during COVID was how challenging it was to stay on top of the endless consultation requests. COVID-19 was extremely challenging for the whole world, but certainly in smaller, more remote communities, which many of my clients are located in. There were so many issues associated with mental health and wellness and substance abuse, which, because of the lack of support to due to the stresses of COVID-19 on top of all the other systemic issues there, the challenges of trying to keep the community safe put tremendous strains on an already very strained system. There are situations where Indigenous communities and governments, sometimes only a few hundred people, are engaging in a volume of projects equivalent to one a large ministry and a large public government would be doing, on top of trying to deal with housing, education, community safety and welfare, and trying to implement their own rights and treaties. During COVID-19, I was most aware of the degree to which consultation processes can overwhelm the capacity within Indigenous governments. It is important that the regulators and public government officials handling consultation are sensitive to the limits of the Indigenous governments.

Sara: I would echo Nuri's points – it was a very challenging time and consultation was piling on to the challenges. The only silver lining is that there are new tools for the community to engage in innovative ways. One of the things I have brought to bear in my practice is when a government needs to do something in a quick way, they find a way to do it. In some respects, Indigenous governments need that same sense of urgency to get solutions on the table in legislation. The governments can move mountains when they need to.

Tim: During the peak of the pandemic, we were not going to go to Elders' homes because we might have been carriers of COVID. Our Elders are valuable tools because they hold so much knowledge. Since we could not engage and consult with our Elders at the time, the government must put the brakes on their projects and realize that COVID has affected all of Canada and the rest of the world, yet their process continues without any adjustments. Timelines need to be adjusted accordingly because if they want to meet their legal obligations of consultation, people must be able to talk properly in the open forum. COVID has had a big impact on decision making and that must be considered from the authorities in the system.

I am interested to hear and explore how Indigenous governments can articulate and communicate their protocols and processes to governments, proponents, and co-management boards. How are we doing in that respect?

Tim: Information comes to the regional body and then gets distributed to communities, then when the community speaks, all the information must be recorded and reported. The only way to get proper engagement is to speak to the communities. If you are approaching consultation right, you are getting the information right and helping address their concerns. The MVRMA came out of the Dene Métis days because the people of the North wanted to be involved with the development system – they created this legislation for us to participate. It is working somewhat to our liking, but you must get into the communities, meet with leadership, the Elders, and the youth, ask what they need, and bring their concerns forward to the system to make the decisions. We are always looking around to see how everybody else is doing, but we must look in the mirror and see what we have and how we are working with it because everyone else is looking to the North because of our ability to talk to each other. There is so much land in the NWT to look after, yet the population is small, and the capacity is low to be able to look after all the land, resources, and environment, but it is working because we are able to communicate with each other throughout our interconnected communities. When we can go out for lunch or dinner without government employees around, we are able to have open dialogue with one another and discuss how the system is truly working. We are all one people in the North, and we must look after what we have.

It is working somewhat to our liking, but you must get into the communities, meet with leadership, the Elders, and the youth, ask what they need, and bring their concerns forward to the system to make the decisions. We are always looking around to see how everybody else is doing, but we must look in the mirror and see what we have and how we are working with it because everyone else is looking to the North because of our ability to talk to each other.

- Tim Heron

What can we do to bring more transparency to consultation processes and the Crown consultation process, in particular?

Sara: It is important to mention that the Crown process is solely focused on environmental impacts and that's not how Indigenous people see the world. Focusing on not just the environment, but the social, economic, and cultural impacts is the general discussion that needs to be had. It is also important in early engagement to allow a form of capacity transfer to make sure that internally there is information retained by the community and they can turn to their own people to trust and to inform their decisions.

The topics of capacity constraints and the importance of providing Indigenous governments enough time for review came up amongst the panel. These processes come at quite a cost to Indigenous government, as they too hire dedicated staff for the job. Are you seeing Indigenous governments requesting these costs to be covered by the proponent?

Nuri: Absolutely, Indigenous governments are asking for these costs to be covered by the proponent and they should be 100% of the time. There are so many legitimate and important demands on the time of the Indigenous governments from community health and welfare, housing, and education, and drafting and developing their own laws and government structures. Necessarily, time is being pulled away from those other priorities and investments are necessarily being taken from those other priorities and put towards responding to proposed resource development and industrial activities, and in my view, should be funded by a proponent 100% of the time. With my clients, I am seeing those requests consistently made and they're consistently honoured. Where the challenge tends to arise is the projects that are most willing to put forward real dollars for engagement, are

projects that are very advanced in their lifecycle and are able to begin their development. Often, the biggest projects are very likely to fund the engagement process, however, it is the multitude of small projects that eat away at capacity. There are so many minor projects that still require a response because they may be impacting important and sensitive cultural or harvesting areas, and those proponents often say they don't have the resources to provide funding. I think that is where support from institutions of public government will be most important – the many early-stage projects, which really suck up capacity and don't have the dollar associated with them.

You mentioned the need for creating more space for looking at issues like Aboriginal rights and title and values-based impacts and environmental impact assessment. What does that space look like and how do we create it?

Nuri: Start with the interests that you're hearing from Indigenous peoples and Indigenous governments and bring forward those interests to find a way to address and assess those. One of the big obstacles is that so often before the Indigenous government has said anything, the box is already built. There are things within the box, and everything else is outside of the box, but it is time to get out of the box. When what you say is outside of the box, they respond saying we are in the box business. The co-management regime in the Yukon explicitly says that they can solve environmental impacts which may intersect with rights, but they do not consult on impacts to rights. That reveals that there are threshold problems in the way – we have structured regulatory institutions around the country, and we need to restructure those institutions so that we can approach engagement with Indigenous governments around their rights, rather than going into it with our collective hands already tied. The second point is to approach it in the spirit of listening to Indigenous governments and Indigenous people who are participating and hearing what they're saying to have a conversation. So often there is the repeat PowerPoint presentation that is used for every consultation session, and the same boiler plate on every letter received, which communicates that nobody is listening; they're fulfilling a duty and engaging in a process. Proponents need to get out of the box and be willing to explore flexible and innovative solutions, rather than be tied to the approaches of the past. Proponents must approach it in a spirit of listening and humility to truly hear what Indigenous governments and people are bringing forward to figure out how to solve those problems, not to figure out how to make those problems go away.

Part of this means being really active to make sure that people are engaged in the system and the processes we run. Are there other types of systems or infrastructure that we need to have in place to keep us going strong and maintain that integrity?

Tim: Nuri is exactly right about the box system we are in. When you are in the box, you can't see what is on the other side of the box. You have to get outside of it and see what is missing. When we were kids, we used to play games on the floor and to have a good look, we would stand up and look down to see the whole picture. As landowners, we are always looking at the big picture and when proponents come from a concrete building to make a decision, they don't know what's there and how it will impact our culture or our health. Colonialism works to get everybody off the land and into the cities, so it is cleared for development, but we still have trappers here and campers who stay on the land. The way we use the land has to be part of the decision. Humans are part of the environment, and we need to know how these decisions are impacting them mentally, physically, and emotionally. When we get out into the wildlife, we are part of nature and that needs to be accounted for when making decisions.

Please share your key reflections from the conversation today on how to improve the engagement and consultation system.

Sara: From the Indigenous community perspective, some of the best success stories are when the communities work together. It should be a valued goal of everybody to get the communities their own internal forum to do consensus building because it is key to successful decision-making by Indigenous governments. Something that is happening in the South is consultations that are leading to equity proposals. There is a transmission corridor that has a large equity stake by the First Nations that were consolidated in my territory. In these cases, when Indigenous governments are doing the consultation, they use Indigenous law to seek out the consent of their constituent communities.

Nuri: The one reflection I am left with is to remember how much this is really about people. "Get off the desktop and into the community" is such a profound statement because it reminds us all that these are not desk reviews or abstract academic questions…these are questions about real people in real places on real lands that have real impacts on people's daily lives. Having regulatory regimes to keep reminding us that this process is about real people is so important because government institutions, by nature, can be dehumanizing, and I think it is working well in the NWT.

Tim: I've traveled all over Canada, and we are miles ahead. My advice is do not go backwards, continue doing what you are doing because we are a showcase. Getting the capacity as an Indigenous government takes time to get educated and up to speed, but we are getting there. We are not going anywhere because this is our home, and we are going to defend it. Decisions cannot be based only on impacts to the environment, it must be assessed based on impacts to the human factors as well.

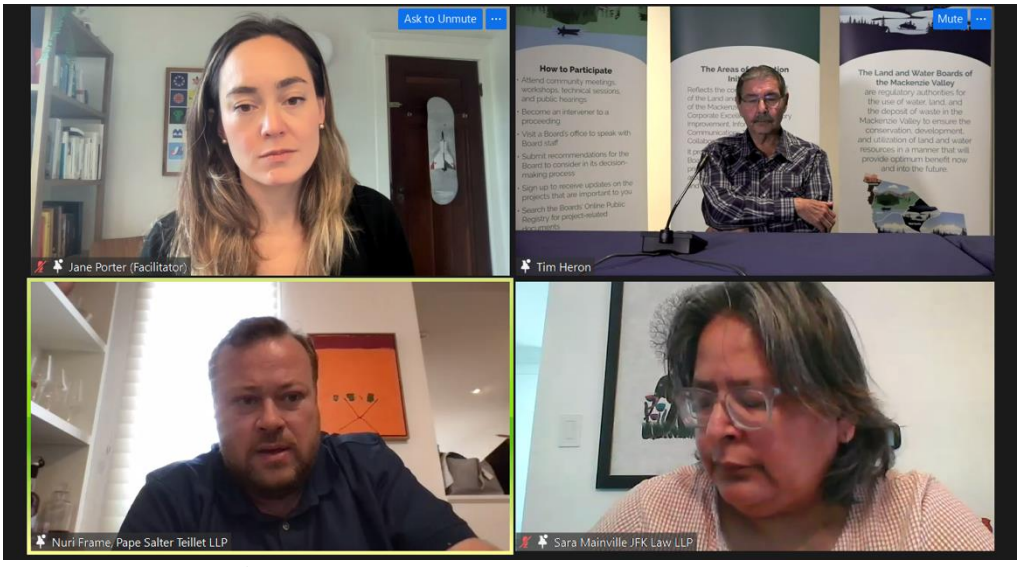


Figure 6: A snapshot of the Day 1 Panelists and Moderator, including Jane Porter, Tim Heron, Nuri Frame, and Sara Mainville.

Jane concluded the workshop by thanking all the speakers and panelists from the day and reviewed the agenda for the upcoming day 2 of the session. She distributed a survey link for participants to submit feedback on any of the virtual sessions on the Land and Water Boards' websites.

Synopsis of Day 2 (September 29, 2022)

The second day of the virtual workshop was held on September 29, 2022 to continue the conversation on engagement and consultation as it relates to the MVRMA.

As a warm-up to the second day of the workshop, participants were invited to share *one reflection from the previous day's discussion*. Some answers expressed by the participants include:

- "Reconciliation requires capacity for growth and learning. The consultation process should have this as a goal."
- "Emphasis on early and transparent communication."
- "Get into communities; don't just check boxes."
- "Build and maintain trusting relationships with transparency."
- "It's not just about environmental assessment, it's the assessment of a whole project - including relationships with the land, rights, future opportunities."
- "Remember the intent of the land claims."
- "We really need a different approach to dealing with "small" projects, given capacity challenges and the number of different "small" activities proposed by people and companies from outside communities."

Perspectives on Engagement and Consultation: Janet Bayha McCauley

Janet Bayha McCauley
Tulita Land Corporation

Janet Bayha McCauley was unable to join the panel on Day 1, however, Janet was invited to share her remarks on engagement and consultation on Day 2 of the session.

Janet, tell us a bit about your perspective on engagement and consultation, especially from the community perspective.

I am glad that the organizations, governments, and boards recognize that there must be an improvement in engagement and consultation. I want to touch base on the questions that were raised yesterday – is the engagement and consultation process getting better? It is getting better, but we still need improvements. Consultation in the small communities is quite different from outside – in small communities, when people come in to do engagement and consultation, they have to educate the community on the project by coming and talking about it within the affected community; not only one time, but rather four or five times, so that you will have involvement from the community since they will have a greater understanding of the project. If the community is properly addressed ahead of the project, there will be stronger engagement because the proponent has made the effort to come into the community and educate the members on the project.

We often say that when organizations come into the community to do presentations, hardly anyone shows up to participate – the reason is because they don't understand what the project is about. Leadership is often the only party to attend the consultation meetings, and so the relationship-building and education aspects are something we have to improve upon to make sure that community members attend the meetings.

Youth and Elders take the information differently – youth use all kinds of technology, however, Elders prefer face-

to-face meetings that have translators to support them. It is difficult when proponents prepare large booklets of information because many do not know how to read and write – Elders require visuals to better understand, in addition to the translators in the room. When COVID hit the communities, we all had to learn how to use Zoom and other online tools. The consultation meetings did not have the audience of the Elders because they did not use the technology, so they were left out of the engagement. At the time, engagement and consultation processes should have slowed down, but they didn't, so we had to adapt really quickly to learn how to use the technology to make sure we were still involved in the process. In that timeframe, Elders lost a lot of information because of the barriers involved with using technology.

> *"It is very important that we keep building the relationships within the community again in-person, rather than using online tools. We've spent the past few years apart, so it is time to reach out again and connect with the youth and Elders in face-to-face meetings."*
>
> - Janet Bayha McCauley

Opening Prayer

Following Janet's opening remarks on her perspective of engagement and consultation at the community level, Florence Catholique shared a prayer to start the session in a good way with recognition of the work being done and a hope for the best work in the future. She acknowledged that within constructive workshops, like the session being held, that we have to say some things that may be hurtful to people spiritually, mentally, or physically, however, there is no intention of harm. To conclude, Florence recited the Lord's Prayer.

Innovative Approaches to Engagement – TMX – Indigenous Advisory and Monitoring Committee (IAMC)

The Innovative Approaches to Engagement session included a presentation from Tracy Sletto, Executive Vice President of Transparency and Strategic Engagement at Canada Energy Regulator (CER) and Chief Marcel Shackelly, member of the Indigenous Advisory and Monitoring Committee (IAMC). The presentation focused on an example outside of the MVRMA regulatory system of how Indigenous peoples are providing advice to regulators regarding the monitoring of the Trans Mountain Expansion (TMX) Project and existing pipeline. Access to the slide decks of these presentations can be found in Appendix D.

Tracy Sletto
Executive Vice President, Transparency and Strategic Engagement, Canada Energy Regulator

Chief Marcel Shackelly
Member, Indigenous Advisory and Monitoring Committee

Tracy and Chief Marcel began their presentation with a brief introduction and land acknowledgment to the territory they joined the session from. Tracy introduced Michelle Wilson, Professional Leader of Reconciliation at Canada Energy Regulator and previously co-chair of the IAMC for TMX, who also joined to support the presentation.

Tracy Sletto

Tracy set the context of the CER's role, which is to oversee infrastructure – primarily pipeline infrastructure, and electricity infrastructure. CER also has regulatory responsibilities in the North, as their strategic plan is focused on safety and ensuring that they provide proper regulatory oversight with a safety and environmental protection lens and a strong commitment to reconciliation through the implementation of UNDRIP. The Trans Mountain Expansion Project Indigenous Advisory and Monitoring Committee (TMX IAMC) was initiated as part of the accommodation considerations in the context of the Trans Mountain Project. This was a project that was initiated many years ago and the IAMC has just concluded its first five years of operation.

The four strategic priorities of CER are interconnected and include:

Trust and Confidence

Data and Digital Innovation

Competitiveness

Reconciliation

Tracy highlighted that CER's path to advancing reconciliation is guided by UNDRIP, which has been made clear in their strategic plan, and within that approach there are three important baskets of work, including:

- Enhancing Indigenous involvement & driving meaningful change
- Renewing relationships
- Improving cultural competency

In CER's view, the TMX IAMC is a place where relationships are built, nurtured, and maintained. CER aims to improve cultural competency of its organization, which includes ensuring that they as regulators have a positive culture for Indigenous colleagues to feel a sense of belonging and welcoming within the organization, but also to make sure that everyone at CER understand the importance of Truth and Reconciliation work and UNDRIP. The third important basket is enhancing Indigenous involvement and driving meaningful change in the energy transportation sector that CER regulates. Tracy noted that to drive meaningful change, they need to rely on cultural competency and ensure that they have the relationships built to guide that work.

Figure 7: A snapshot of the TMX IAMC at the most recent meeting in August 2022.

The IAMC is representative of several different interests and perspectives, from various federal departments and Indigenous communities across the entire line of the Trans Mountain Expansion project. The committee is meant to work in partnership on the oversight of the Trans Mountain Pipeline. There are 129 Indigenous Nations along

the route that are directly impacted by the work. At the committee itself, there is membership from 13 Indigenous communities and six government departments that meet relatively frequently to discuss the project.

The six government departments and the communities represented at the committee have formed a strong relationship over time and have been able to build a good amount of work for the communities. One of the key accomplishments of the IAMC is the development of a joint inspection program that has Indigenous monitors from communities, inspectors from the CER, inspectors from Fisheries and Oceans Canada (DFO), Parks Canada, and from the Province of British Columbia to monitor compliance with the regulatory framework in the community and out with boots on the ground. Tracy highlighted that in 2021, there were 129 days with Indigenous monitors in the field, with a variety of different types of activities that were completed, including joint inspection, emergency management, socioeconomic monitoring, and research.

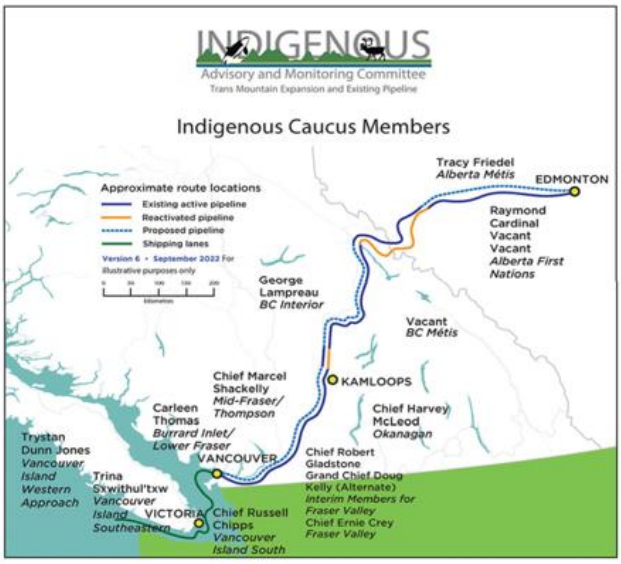


Figure 8: A map of the Trans Mountain Pipeline route and the Indigenous communities it runs through.

Tracy emphasized another key accomplishment of the IAMC is the work done to co-develop policies and programs. The IAMC works not just to implement programs and deliver funding to communities, but also to focus on ensuring that they are improving regulatory practice and working with companies to improve their practice to go beyond what is minimally required and to identify joint improvements that the company must implement.

Tracy spoke to COVID in the context of her presentation. Like everyone around the world, they experienced a lot of confusion and unknowns in terms of how long the pandemic was going to last and how it was going to impact operations. To great credit of the Indigenous caucus, the IAMC focused on ensuring that they used the committee to convene a workshop of regulators to discuss how they would bring the communities and various regulators from federal, provincial, and territorial agencies together to define their roles and responsibilities for COVID oversight.

Tracy concluded her portion of the presentation by looking towards the future and speaking to next steps. The IAMC has been involved in the oversight for the past five years and once construction of the pipeline is completed, it will shift to an operational phase within the coming year. They must think about the role of the committee and the potential for the committee to continue their work at a different phase of the infrastructure oversight. Tracy emphasized the importance of this partnership because engagement and involvement of Indigenous communities as partners is central to the discussion about the future and next steps.

Chief Marcel Shackelly

Tracy turned to Chief Marcel to share his perspectives on the TMX IAMC. He spoke to the beginning of the IAMC, when they were creating their Terms of Reference on how to engage, they decided that they wanted a higher level of community engagement. Instead of producing the tools and procedures and then going back to

community to relay the decisions, they kept connecting with them throughout the process to ensure they were heading in the proper direction.

The IAMC has a line wide engagement process every year, where all the communities are invited to come and provide advice on how they can improve in the upcoming year. Inside of the Indigenous monitoring subcommittee, there are employer working groups that meet every two weeks to listen about what is and isn't working in the process and to discuss some opportunities for Indigenous-led Compliance Verification Activities (CVAs). Chief Marcel noted that inside of the socioeconomic subcommittee, one of leading and pushing factors for it was missing and murdered Indigenous women. He stated that they don't often have large projects in his area, so they didn't know what it was like to have big work camps located near the community and how that was going to impact them. He emphasized how he wanted a statement identifying how people must conduct themselves when in the community's territory to clarify minimum standards, so that if there is turbulence down the line, then all the socioeconomic monitoring would be able to capture it.

Next, Chief Marcel spoke to the impacts of COVID on face-to-face meetings. Pre-COVID, he used to travel approximately 120,000 kilometers per year throughout the Trans Mountain Pipeline Corridor for meetings. However, during COVID, meetings did not happen in-person. He noted that in-person meetings are so important because you are inside of people's energy fields and able to see their complete body language to understand when people are agreeing with you, or when they are disagreeing with you – it tells a lot of the story. In present day, they are experiencing a blend of in-person and online meetings, which Chief Marcel highlighted as a good thing to be able to get into shared spaces with people and have real conversations.

Chief Marcel spoke to the TMX project and how it was originally approved for 7.4 billion dollars and is now up to 20 billion dollars. He noted that his mind has a hard time comprehending the exponential jump in value, so the time value of money and zeroing in to create relevant agreements is of high importance. Chief Marcel compared this advanced project to a mining agreement that he has with the Teck Highland Valley Copper operations, which is an implementation agreement where he sits with the proponent back towards the regulator at the IAMC.

Question and Answer for the Innovative Approaches to Engagement Speakers

Participants were invited to pose questions via the chat function to Tracy and Chief Marcel. The questions posed for the panelists include:

Can you speak about how Traditional Indigenous Knowledge was incorporated into this project?

Tracy: The focus of the IAMC is not on the adjudication side. There was a very intensive adjudication process phase, and this was formerly when we were the National Energy Board before we became the CER. It is important to think about how Indigenous Knowledge is incorporated into the oversight activities that happen every day. On the construction of the TMX project, and through the joint monitoring activities that occur, it is key. In the joint monitoring work, you will see Traditional Indigenous Knowledge both with the monitors that are present in the inspection activities and the planning and coordination of the verification activities for the CER. It is important to engage Elders and community members on the inspection process when there is going to be work within their community. It is key to consider Indigenous Knowledge when thinking about how to plan that activity, how to conduct it safely, and what to be cautious of while conducting the activity, such as sites of significance, heritage resources and cultural practices. Now I think that is a part of the conversation because of the work of the joint monitoring committee, and the IAMC specifically.

Chief Marcel: there are 15 individual Indian Act Bands that comprise the IAMC. To pick the Mid Fraser Thompson representative, all of the Chiefs were invited and the decision of who to appoint had to be made. With all my previous work inside the referrals process and running departments and procedures and designing information systems, I had some experience. One Chief provided a test scenario, saying that fishing season had just opened, however, you have a meeting to go to – what are you going to do? He was asking me not to go fishing and for us, fishing is huge. If that was the level of commitment they wanted, I was going to provide that. Inside one of our cold-water river crossings, they were planning on trenchless crossings, so they were going to set up pumps and pump them through. During that time of year, the water temperatures are so sensitive. You could go swimming with your kids and in one week, you could see the water temperature rise just a little bit and it will kill everything inside the river. Our water levels are dropping down so much, so to set up pumps in the river at that time could cause significant impacts. The proponent bumped the process from a summertime crossing to January, where our concern over the temperature sensitivity would start to drop because the temperature would not spike as much to create the high mortality rate. Down near Hope, the water levels are a lot higher than they usually are and the fish cannot make it through certain areas, so there are some fish that would not be found in that area. It is very rare that they would start swimming up there, so nobody from my Nation would have said that you would find fish there, however, because of the higher water levels, they are now able to get through there and it is triggering DFO to make sure that we are protecting those species. If they lay their eggs there, that would become a new fishing spot.

To gauge Trans Mountain Corporation's responsiveness to the community's advice, was there any rerouting of any portions of the pipeline after consultation showed a local community's objection?

Chief Marcel: In my Nation, everything is still so compressed, and we are so tightly packed. If I go 10 minutes from here, I am in my cousin's reserve, and 10 minutes from there we are into the Coldwater Indian Band. The original routing of the pipeline was going straight through the Coldwater Indian Band's community aquifer, which would contaminate their water system – yet it was still approved. The Coldwater Indian Band's Chief continued to fight it and at that point I didn't sign an implementation agreement with the company because I was standing beside my brother. That is why the Certificate of Public Convenience and Necessity failed the first time, so they ran the process, and the Coldwater Band got the western alternative, which bumped the route around the community's aquifer.

When the Compliance Verification Activities (CVAs) are undertaken, joint or otherwise, can you talk about the disclosure transparency around any breaches of terms or conditions? Are communities notified or made aware in a timely manner? What does the process look like, how are communities involved in the remedies to the breaches?

Tracy: I think this question is specifically around if there is a finding when the inspection team is out, that there is a non-compliance. The company is subject to the entire regulatory framework, so if the company is not compliant with the requirements of the framework, then there are very specific protocols around ensuring that there is transparency around those findings. We post inspection officer reports, and we pull and provide the write up that is worked on jointly by inspectors, officers, and Indigenous monitors. After, the Indigenous monitors report back to the communities to keep transparency. We are building the program and continuing to operate it in a way that is transparent and committed to posting significant issues publicly. Also, the company could be required to notify

the regulator if there is a breach or if there is an injury or accident, and when that accident occurs, one of our protocols is to immediately get back in touch with the IAMC and additional community notifications could be triggered.

Chief Marcel: There is a formal framework in place where if the breach is significant enough then the CER could review and potentially apply financial penalties against the company. There were atmospheric rivers last year, that was a one in 750-year event. A couple days prior to that there were some approvals made and then the big storm happened, and highways were destroyed, rivers were rerouted, etc. In my mind, I questioned if this changed anything, do we need to modify the plans? The plans were not modified, but my challenge back to the federal partners was, are we going to maintain our social license to keep on speaking on behalf of this project? Let's maintain the social license and do the right thing. The idea is best practices versus wise practices – wise practices is where I learn something tomorrow, I'll implement that tomorrow versus best practices where I think I'm doing the best, so I don't need to do anything better. Implement using wise practices – if you learn something tomorrow, do it better.

> *"The idea is best practices versus wise practices – wise practices is where I learn something tomorrow, I'll implement that tomorrow versus best practices where I think I'm doing the best, so I don't need to do anything better. Implement using wise practices – if you learn something tomorrow, do it better."*
>
> - Chief Marcel Shackelly

Figure 9: A snapshot of the Innovative Approaches to Engagement – TMX – Indigenous Advisory and Monitoring Committee (IAMC) presenters, Chief Marcel Shackelly and Tracy Sletto

UNDRIP: What are International Expectations and Perspectives on Engagement and Consultation and What Does This Mean Locally?

Jennifer Duncan
Barrister and Solicitor,
Duncan Law Office

The UNDRIP: What are International Expectations and Perspectives on Engagement and Consultation and What Does This Mean Locally session included a presentation from Jennifer Duncan, Barrister and Solicitor at Duncan Law Office. The presentation focused on international expectations regarding engagement and consultation as it relates to UNDRIP and what that means at the community level.

Jennifer began her presentation by providing context on her personal experiences as a lawyer in Indigenous law. Jennifer's first experience at the international level was 20 years ago when she attended an Arctic Council meeting in 2002 as a delegate with the NWT Native Women's Association. To read more about Jennifer, see Appendix E.

Jennifer spoke to the duty to consult and accommodate Indigenous peoples under Section 35 of the *Constitution Act* (1982) is frequently fulfilled by Boards as established by legislation, such as the MVRMA. Statutes like the MVRMA, common law, and case law, which have been helpful to set out the rights of Indigenous people and to consult and accommodate, sometimes the case law and the common law don't always reflect all of the nuances of the constitutional nature of the duty to consult and accommodate and really be respectful of Indigenous rights and peoples. Jennifer noted that there can always be improvements through revisions to the Federal Act to better codify Indigenous rights and exceed the minimum standards. Jennifer highlighted her excitement to see improvements being considered in light of the new Canadian legislation to implement UNDRIP and these improvements have the potential to continue towards the goals of reconciliation between Canada and Indigenous people and sustainable development.

Jennifer provided context on the UNDRIP legislation, which was adopted in 2007 by the General Assembly of the United Nations. The declaration is a collective international achievement by Indigenous peoples and is an embodiment of Indigenous knowledge and ways of existing in the world. She acknowledged that it has taken 14 years, until 2021, for Canada to bring into force legislation to implement UNDRIP in Canada and during that time Indigenous people in Canada have been working hard to get the declaration respected and recognized by the Canadian government. On June 21, 2021, National Indigenous Peoples Day, the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDRIPA) came into effect as a federal legislation. She noted that it is great that the legislation has finally been adopted, however, we still have a long way to go in Canada and around the world.

From an international perspective, when we talk about international engagement and consultation, it is key to look to Article 32, which is FPIC (Free, Prior and Informed Consent). Consent is a human rights norm and is based on the right to self-determination of Indigenous peoples. It is also an expression of Indigenous jurisdiction in law and is a minimum international standard, so FPIC is entrenched throughout UNDRIP. Article 32 is an obligation placed on States and so they shall consult and cooperate in good faith with Indigenous people through their own institutions and to obtain their FPIC prior to the approval of any project affecting their lands, territories, or other resource, particularly in connection with development, utilization or exploitation of resources. FPIC is compatible with Canadian constitution law and is a minimum standard, which arguably exceeds the current Canadian standards and thus the current legislative implementation of UNDRIP through our Canadian federal legislation.

The Supreme Court of Canada has incorporated some parts of FPIC, but federal legislation in this area could be improved.

Jennifer spoke to Article 46, highlighting that in Canadian law there are some limitations on Indigenous rights and consent. Article 46 has been part of the declaration and can be applied as a limitation on the rights of Indigenous peoples. It took about 25 or 20 years for Indigenous peoples to negotiate and try to get UNDRIP adopted, however, a lot of the states were not in support of UNDRIP, so they wanted the states to see Article 46 of the declaration. A lot of the Indigenous people who were negotiating the declaration did not want to have any limitations on the rights, however, some Indigenous people saw Article 46 as a compromise. In the end, Article 46 was included in the declaration and was set out to be a balancing provision.

> *"The current MVRMA regime may already incorporate a lot of the significant elements of FPIC because of its premise on collaborative decision-making and it is encouraging to see that the MVRMA can continue to meet and exceed minimum standards"*
>
> - Jennifer Duncan

In relation to the MVRMA, UNDRIP and FPIC does apply because of the new Canadian federal legislation, which is set out to implement UNDRIPA in Canada and it sets out that the Canadian government is to review all federal legislation to ensure that it complies with UNDRIP. The MVRMA is a federal legislation, so it is one of the pieces of legislation that can be analyzed from the lens of UNDRIP. Jennifer noted that exactly when and how UNDRIP is going to apply to the MVRMA is a massive question that is difficult to answer.

The obligation to consult and cooperate in good faith to obtain FPIC belongs to the Crown. The Boards, established under the MVRMA, can assist in meeting that obligation. Proponents also realize that they must comply for projects to succeed. FPIC and consent in general is relational – there is an ongoing process, and it is not just a one-time yes or no. All parties must look to implement a consent-based decision-making model, especially when talking about international perspectives. The current MVRMA regime may already incorporate a lot of the significant elements of FPIC because of its premise on collaborative decision-making. Jennifer emphasized that it is encouraging to see that the MVRMA can continue to meet and exceed minimum standards.

There is significant advocacy for the implementation of FPIC, but there also remains a lot of disagreement about what that is going to look like in practice. Some scholars feel that FPIC should replace the duty to consult and they argue that unlike the more malleable, free-flowing duty to consult, which is more difficult to pinpoint, FPIC would provide more certainty and would empower Indigenous communities. Jennifer stated that replacing the duty to consult with FPIC would help to create more legal certainty and a better base for Crown-Indigenous relationships. Although there is still debate, Jennifer concluded by stating that the spectrum is shifting towards a more consent-based process that will be stronger in fulfilling the principles of FPIC.

Board and Government Updates

Five speakers representing various co-management boards and government departments and agencies involved in the co-management system presented on on-going initiatives and projects as they relate to engagement and consultation. Access to the slide decks of these presentations can be found in Appendix D.

Land and Water Boards (LWB) of the Mackenzie Valley

Tanya Lantz, Community Outreach Coordinator, Mackenzie Valley Land and Water Board (MVLWB)

The Land and Water Board engagement and consultation policy and guidelines were implemented in 2013 and updated in 2018 with editorial revisions based on a legal review of the case law related to consultation and to account for Devolution. The policy sets out the Board's values and principles for engagement and consultation and is supported in part by the engagement guidelines, which includes specific requirements for applicants and suggested wise practices.

The LWBs communicated their intent to update the policy in August 2019 to all users of the Board's online review system, held one-to-one meetings, and hosted open virtual workshops throughout Fall of 2019 into Summer of 2021. The public review closed early September and the draft is currently up for review inviting comments through the Board's online review system. An engagement process similar to the process for the policy update is anticipated to commence in 2023 following Board approval of the policy.

The LWBs are committed to relationship building and outreach, which is reflected in the newly released 2022-2026 Strategic Plan for the LWBs of the Mackenzie Valley. There are four areas of concentration, including:

- Relationship building and outreach
- Internal processes and policies
- Capacity building
- Policy and guidance

The LWBs are working on a Community Outreach Strategy aimed to release in 2023, which will outline where the Boards will focus their efforts regarding relationship and outreach and how they will go about their collective work together. The key messages of that strategy include:

1. Improve on building relationships and trust
2. Increase effort and focus to build Indigenous capacity
3. Increase general knowledge of the regulatory system in communities
4. Promote accessibility for communities to be able to participate

The LWBs have introduced cultural awareness and sensitivity training to provide tools to Board staff to help them improve cultural sensitivity. The goal is to create awareness and understanding of the impact of colonization, to understand the individual and collective role in reconciliation, and to provide the necessary foundation and tools to move towards a better understanding for better decision-making.

Government of Northwest Territories (GNWT) and Government of Canada

Melissa Pink, Manager, Project Assessment, Department of Lands, GNWT and Boyan Tracz, Manager, Consultation, CanNor, Government of Canada

The presentation spoke to the improvements being made to the consultation process during environmental assessments (EA) in the Mackenzie Valley.

The Mackenzie Valley Environmental Impact Review Board (MVEIRB) Environmental Assessment process begins with the initiation of the EA and ends with MVEIRB issuing a report of environmental assessment. Embedded within that process, are steps where GNWT and the Government of Canada consult together and allow for participation opportunities for Indigenous governments.

Some of the efforts implemented to improve the consultation process include:

- Working jointly with the Board on the EA start up process is key to prevent duplication of efforts and put less strain on existing capacity issues.
- Providing clarity through follow up calls or meetings on the consultation letters to ensure that organizations have received the letter and opportunity to discuss any concerns.
    - In-person conversations are important to have again to allow for side conversations and dialogue to occur.
- Bringing in expert advice from government departments and agencies to help explain their perspective and mandates on the issue.
- Tracking and analyzing information as it is obtained to help with the development of briefing materials to the decision-makers, ensuring decision-makers have all relevant information related to the duty to consult.
- Sending follow up letters and calls to Indigenous governments and groups after a decision is made to ensure that the Board's recommendation to the minister mitigates any potential to Aboriginal and/or Treaty rights.
- Ending with a decision that is based on information collected from the consultations and providing reasoning behind the final decision.

Mackenzie Valley Environmental Impact Review Board (MVEIRB)

Eileen Marlowe, Manager of Communications, Engagement and Partnerships, MVEIRB and Kate Mansfield, Manager of Policy and Planning, MVEIRB

MVEIRB has clear responsibilities for consultation that are laid out in the MVRMA and land claims. They are working to go above and beyond the requirements by ensuring they are running fair, transparent, and inclusive processes that provide meaningful opportunities so that communities and Indigenous governments can share their concerns about development and suggest ways to minimize impacts on the environment and people. While considering the protection of Indigenous and treaty rights, MVEIRB is aiming to improve engagement and consultation so that they are moving forward and working collaboratively to ensure that Indigenous voices are represented in resource management decision making processes and strengthening the role of 'co' in co-management. Good strategic and meaningful engagement helps MVEIRB meet their consultation responsibilities and is also essential for making good environmental assessments.

Eileen highlighted some of the key messages that MVEIRB has heard and what they are doing in response. Eileen emphasized that this work is currently in progress to improve upon the key messages. The key messages and efforts by MVEIRB include:

Work together respectfully

- Co-develop engagement strategies
- Increase Indigenous representation at staff level

Start early and engage throughout

- Include Indigenous governments and organizations in planning
- New guidelines to promote collaborative project planning

Respect and consider local contexts

- Language & translator at workshops
- Efforts to visit communities and meet people

Reduce the burden of engagement

- Collaborative initiatives
- Coordinated processes
- Education and outreach activities to build relationships and strengthen local understanding

Support capacity building initiatives

- Responsibility for everyone
- Advocate for participant funding

As next steps, MVEIRB will work towards:

- Making changes to improve the engagement and consultation process;
- co-developing engagement strategies with Indigenous governments and organizations;
- implementing the strategies; and
- validating their approaches with input from Indigenous governments and organizations.

Breakout Group Discussion: How do we break down the barriers for good, meaningful engagement?

To foster discussion on the topics discussed throughout the two-day session, participants were invited to discuss in small breakout groups with a few prompt questions. Before breaking out into groups, Jane invited participants

to reflect individually on the results from the engagement questions posed during the previous day's session.

Tanya Lantz shared some guiding thoughts before the breakout group discussion. She reflected on the Word Cloud that was generated by participants when asked what words come to mind when thinking of engagement and consultation:

- Respect: Respect is acknowledging the diversity of histories, cultures, languages, needs, priorities, and protocols within the area we live and work. It is key to recognize, support, and respect the unique capacity that everyone has, and respect should be based on mutuality – mutual recognition, mutual respect, and sharing mutual responsibility to manage natural resources together.
- Relationships: Important to find improvements to strengthen existing and emerging relationships on a foundation of trust and recognition of rights.
- Responsibility: With relationships comes responsibility – everyone is a steward of the land. Tanya emphasized that timely communication and knowledge exchange is vital in making the system work based on open, reciprocal dialogue. Recognizing the mutual, acceptable outcomes are contingent on clear, open, and transparent communications at every stage of the process, and she stated that the Boards are committed to investigate the outcomes of the breakout group discussion session for ways to improve solutions to barriers, and actions that lead to wise practices.
- Reciprocity: Different ways of knowing and perceiving are accepted and recognized. Building and nurturing reciprocal relationships is the goal of the Boards, and with that they must keep in mind the unique capacity of Indigenous communities and the unique capacity of settlers and immigrants that have also made this land their home. Although the MVRMA and the co-management system is a product of the land claim agreements and is unique in Canada, it is also a piece of legislation that brings many onerous tasks with it that are laid on the doorsteps of Indigenous communities and governments. It is key to educate one another on the land, water and people that have been in the Mackenzie Valley since time immemorial.

She concluded by inviting participants to reflect before heading into breakout groups ask themselves what they bring to the table when they meet for consultation and engagement conversations? She also asked do you have the same knowledge and values? How do things need to change and what education needs to be done to have a reciprocal relationship in which all parties benefit? Are you engaging in a way that you should?

The Boards committed to transparency and accountability, and to report back on the actionable items and the building blocks of wise engagement.

Following Tanya's remarks, participants were placed into breakout groups of approximately 6 to 8 people to discuss the following prompt questions:

1. What could we/you do to help improve our rating on each of the issues proposed in the virtual engagement question? (e.g., how are you contributing to these ratings?)

- **Engage in the community and on the land:** The most frequent comment centered around ensuring engagement and consultation efforts were held in the community and on the land. Even if this is already practiced, there was a clear call for more of it. For example:
    - Prioritize chat with community members over core work
    - Propose on-the-land community meetings rather than at the community hall
    - Government seems too hesitant to go to the land, with many internal bureaucratic hurdles
    - Tie engagement efforts to existing community events
    - Have community tours and in-person communications
- **Prioritize face-to-face engagement & recognize online engagement shortcomings:** The pandemic demonstrated that online engagement is possible, and can be useful, but must recognize its shortcomings and prioritize in-person where possible.
    - Need more funding to do more in person engagement
    - Online technology difficult in small communities, especially with Elders
    - Recognize that online engagement has a different dynamic altogether, a lot of important information is missed
    - Consider looking into new technologies to better understand different voices
- **Increase / evaluate participant funding and build capacity to engage**
    - Intervenor funding should be expanded to include both assessments and permits
    - Consider how people can travel together to save costs
    - Funding should be equitable between settled and unsettled areas
    - Consider creating "best use of funds during EA" process map
    - Most of the capacity of the EA system is held in larger communities; sometimes smaller communities cannot keep up with timelines and things move forward without their involvement
    - Government and the Boards should build more knowledge within the communities to better participate in engagements and consultation processes outside of the applications (e.g., GNWT ITI-CSR, REDI initiatives, MVRMA 101)
    - Consider having this type of workshop but for applicants and proponents
    - Consider a secondment program to build capacity and share knowledge
- **Improve communication (expand channels, use plain language, styles, translation, etc.)**
    - Expand the communication channels to target important segments within communities (e.g.,

target youth through social media (be on all the platforms); use local radios, community bulletin boards, posters)

- Use plain language and Indigenous languages, have necessary translations (people get discouraged when government comes in and no one understands what they are saying)
- Recognize importance of oral / visual communication styles
- Consider conversations and tactile tools (like 3D models) versus presentations / Q&A ("Put a map on the table. Let the stories be told.")
- Use verbal submissions for the ORS (and remind people about this option and explain how to use this method during community sessions)
- For an AEMP review, had an "outside of the box" consultation, made it into plain language and had an in-person meeting (technical aspects were "converted" into how it impacted their lives; concerns were raised during the in-person meeting and then placed on the ORS)
- Make information more accessible. (e.g., Not just scientists speaking to scientists or boards talking to other boards. Make the language accessible to all)
- Need to update contact lists (most are out of date)
- Phone calls are usually better than emails

- Consider shifts in engagement format to improve outcomes and participation, e.g., targeting sub-audiences (women, youth, Elders): Small changes in the format could elicit better engagement from participants (e.g.,
    - Ask how communities / people want to be engaged and start from there
    - Involve youth, this will help the elders open up too
    - Consider targeting engagement for sub-audiences like women, youth, Elders (may need different approaches) The voices of Indigenous women bring a whole other layer of wisdom and knowledge and communication, so this is super important and requires/represents systemic change
    - Develop a shared calendar (everyone needs to be aware of cultural events / seasons of when not to engage)
- Understand roles and focus on relationship building (including understanding the context, building cultural awareness and competencies)
    - What are the best ways to get info to IGs, recognizing must be two-way communication and not a one directional download?
    - Understand communities' priorities and how your engagement fits within that (recognize that sometimes there are competing interests within the communities)
    - Admitting and practicing cultural competencies are two different things
    - Once you start engaging, don't just stop engaging or this could damage the relationship

- Reduce downloading issues to the developer (who may not be in the best place respond to social, cultural, economic concerns that are outside of their control)

- Increase Indigenous employment within the system
    - Board level has good representation, but staff level is more of a problem because it's not representative of the general NWT population
    - Increase staff on the boards who can speak the language would be helpful – they would be an important bridge
    - Have more community liaisons, a link between government and the communities. A full-time staff in the community?
    - Recruit and train on the proponent side too (not just regulatory system) to guide the proponent adequately
    - Develop Indigenous inclusion policy / Indigenous Retention Policy Framework for the workplace
    - Include youth in engagement and get them to work as community engagement specialist positions
    - Speak to potential Indigenous staff around you, they may be a source of knowledge. By being openminded, researching, and listening to people/communities it could help increase cultural competencies

2. What are you doing towards building that positive relationship within your workplace, organization, community, and as an individual to improve engagement outcomes?

- Focus on building relationships with Indigenous peoples and communities, at a personal level:
  Participants had a range of ideas/comments on how they do this, such as:
    - Get out and interact with community members where possible; take the time to introduce yourself (go to events, participate in community events, get a sense of the people, place, land)
    - Do your homework – understand what reconciliation means, understand the geography, history of the places you're working in
    - Be better: Be humble, be open, listen well, be informed, be present, be respectful, be honourable in your interactions. (e.g., Don't come in with predetermined decisions re: Crown consultation, project design, etc.)
    - Follow up, be honest about mistakes and move forward
    - Do more: The minimum isn't enough
- Build positive relationships within the workplace
    - Try to get the government to be more open and transparent

- Always push from Indigenous side to ensure government lives up to what is required of them
- Build positive relationships within the workplace (be transparent)
- Engage in wise practices instead of best practices (be self-critical) to help with future projects

- Build capacity and avenues for professional growth
  - Provide training - workplace cultural sensitivity and awareness are so important!
  - Do more job shadow training
  - Provide mentorship/sponsorship to give people voices and be advocated for
  - Find ways for professional growth, especially Indigenous employees (e.g., The companies say there will be training, but the jobs seem limited to technicians and entry-level, rather than promoting progression to management/more senior roles.)
  - Increase education and employment (especially for northern, young community members, particularly for long-term projects)
  - Don't just train operators and monitors! Train young people in regulatory and review skills! Create co-op opportunities for youth to learn from real processes
  - Advocate for presence in the north; in person presence at meetings, hearings, etc. Need to have staff in the north to build the community, make connections, and build understanding
- Be aware of and avoid consultation fatigue
  - Try to avoid consultation fatigue - have an annual community tour (including a map) showing ongoing smaller projects
  - Inform people who are not able to attend (e.g., "What we heard - did we get it right?" brochure put as a mail out in post boxes to ensure that everyone in community, even if they did not attend meeting knew what was talked about)

3. How can we all stay accountable within this reciprocal relationship?

- Remember why we are doing this
  - Stay focused on who and why we have these regulations for - protecting environment and people. Focus on Section 35 rights. Can be distracted by the science, come back to the people/environment/reasoning
  - Ask: What does accountability look like to IGs and communities?
- Set up systems for getting feedback (especially from communities)
  - The poll done within this workshop is important but must recognize that the people attending this workshop are mostly those doing the engagement. Need to ask community members for their feedback

    - Consider third party evaluation of how well mandate is being met
    - Do surveys 'how did we do?' 'What could be improved for next time?'
    - Consider workshops to evaluate success of engagement and adapt to be more effective
    - Good engagement takes time. Spend the time to do it respectfully
- Be transparent with what you say you're going to do
    - Make a record, keep it public; if they don't think it's right/inaccurate, they can speak to it; be as open and transparent as possible
    - Ensure accountability of replying back. LWBs are being relied on to address the concerns, but what about proponent responses to the comments?
    - Be clear on what hats you are wearing and where you are coming from; being frank about the limits of your ability to influence
- Make adjustments / changes based on what you're hearing
    - Be open to feedback
    - Allow some mistakes and learn from them. No mistakes = no growth
    - Wise practices will help the Boards and government learn, and put in practice right away, relationship and trust
    - Report more often and widely on progress of projects and decision-making with performance measures
    - Provide written reasons in shorter documents that describe how the views of communities were included/concerns were addressed

Closing Thoughts

To conclude the third instalment of the MVRMA Workshop Series, Jane summarized the engagement and consultation topics discussed over the two-day event for the audience and thanked all the speakers and the participants for engaging on the topics and providing such thoughtful and important reflections.

Mark Cliffe-Phillips offered closing remarks to comment on how the Boards will hold themselves accountable in the journey to improving their own engagement and consultation processes. The key takeaway from the workshop is that engagement and consultation is about having meaningful and respectful conversations with an expectation that people are going to be heard, their thoughts are going to be considered, and their voices are going to be reflected in the decisions that the Boards and governments make.

Mark emphasized that it is important for the Boards to recognize that message at a personal and organizational level. He noted that from the responses of the two-day session, the Boards are doing a sufficient job at engagement and consultation, however, there is room for improvement. The Boards are working hard to build relationships and processes to better hear, listen, and reflect the voices within the decisions being made.

As next steps, the Boards will look at the outcomes of the conversations had and come back to work with the communities, partner Boards, and governments to determine next steps forward on how to action the ideas and feedback that have been heard. In honour of Truth and Reconciliation Day, the Boards provided a donation on the behalf of the speakers of the workshop to charities within their region, including the Indian Residential School Survival Society and the Orange Shirt Society.

Figure 10: A snapshot of Florence Catholique and Violet Camsell-Blondin providing a closing prayer

To end the two-day workshop in a good way, Florence Catholique and Violet Camsell-Blondin provided a closing prayer.

Appendices under separate cover

2022 Virtual Mackenzie Valley Resource Management Act (MVRMA) Workshop Series: Session 3: Engagement and Consultation

APPENDICES

Submitted To

Mark Cliffe-Phillips, Executive Director
Mackenzie Valley Environmental Impact Review Board
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Yellowknife, NT X1A 2N7
mcliffephillips@reviewboard.ca

Prepared By

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Appendix A: Agenda

DAY 1: WEDNESDAY, SEPTEMBER 28, 2022 (9AM – 12PM MDT)

8:45 - 9:00	**Virtual check-in** We ask that you sign in to Zoom in advance to ensure a proper start at 9am
9:00 – 9:30	**Welcome & Overview: Engagement & Consultation in the Mackenzie Valley** Welcome and overview of the workshop objectives and agenda. We will engage the audience on the topic of engagement and consultation and clarify the meaning and scope of what these terms mean as it relates to the MVRMA.
9:30 - 10:15	**Presentation: Understanding the legal underpinning of engagement & consultation with regards to the MVRMA** **John Donihee (Willms & Shier Environmental LLP)** John will share a retrospective about MVRMA board practice as a comparison to the evolution of the law on consultation and/or the way the Courts have developed the role of tribunals as participants in the consultation process. Presentation will be followed by a Q&A session.
10:15 - 10:30	Break
10:30 - 11:45	**Panel Discussion – Perspectives on Engagement and Consultation – Are we getting this right?** **Janet Bayha McCauley (Tulita Land Corporation), Nuri Frame (Pape Salter Teillet LLP), Tim Heron (NWT Métis Nation), Sara Mainville (JFK Law), Nuri Frame (Pape Salter Teillet LLP)** A panel of practitioners with different backgrounds (legal, government, community perspectives) will share their perspectives on how it's going now and what we should be striving for when it comes to good consultation and engagement. We will also engage the audience members on their sense on "are we getting this right?", offering the panelists time to reflect on what they hear from the audience.
11:45 – 12:00	**Closing and wrap up Day 1**

DAY 2: THURSDAY, SEPTEMBER 29, 2022 (9AM – 12PM MDT)

8:45 - 9:00	**Virtual check-in** We ask that you sign in to Zoom in advance to ensure a proper start at 9am
9:00 – 9:05	**Opening and welcome back**
9:05 - 10:15	**Presentation: Innovative approaches to engagement – TMX-IAMC by Tracy Sletto, Executive Vice President, Transparency and Strategic Engagement at Canada Energy Regulator and Chief Marcel Shackelly, Member of the Indigenous Advisory and Monitoring Committee** An example outside of the MVRMA regulatory system of how Indigenous peoples are providing advice to regulators regarding the monitoring of the Trans Mountain Expansion (TMX) Project through the Indigenous Advisory and Monitoring Committee (IAMC). **Presentation: International perspectives on engagement & consultation by Jennifer Duncan (Duncan Law Office, Barrister and Solicitor)** Presentation on international expectations regarding engagement and consultation (UNDRIP) and what that means at the community level.
10:15 - 10:30	Break
10:30 – 10:50	**Board/Government Updates and Presentations on Engagement/Consultation & Q&A** Brief presentations from the Land and Water Boards, the Review Board, the territorial and federal governments on ongoing policy initiatives and projects. Presentations will be followed by a short Q&A.
11:00 - 11:50	**Breakout Group Discussion: Improving engagement and consultation as it relates to the MVRMA** We will break into small groups for all audience members to reflect on what they've heard and share perspectives on how to improve engagement and consultation as it relates to the MVRMA.
11:50 – 12:00	**Closing**

Appendix B: Workshop Planning Committee

STRATOS DELIVERY TEAM

- Jane Porter, Facilitator
- Julia Ierullo, Notetaker
- Rebecca Lafontaine, Tech Support

MVRMA WORKSHOP PLANNING COMMITTEE

- Sarah Elsasser (WLWB)
- Ryan Fequet (WLWB)
- Mark Cliffe-Phillips (MVEIRB)
- Eileen Marlowe (MVEIRB)
- Kate Mansfield (MVEIRB)
- Tanya Lantz (MVLWB)
- Shakita Jensen (GNWT)
- Shelagh Montgomery (MVLWB)
- Jody Pellissey (WRRB)
- Melissa Pink (GNWT)
- Marcy MacDougall (CIRNAC)
- Michelle Lewis (CIRNAC)

About Stratos

Our Vision

A healthy planet. A productive and engaged society. A clean, diversified and inclusive economy.

Our Mission

We work collaboratively with governments, Indigenous peoples, business and civil society to navigate complex challenges, develop integrated and practical solutions and support societal transitions that result in sustainable outcomes.

Stratos runs its business in an environmentally and socially sustainable way, one that contributes to the well-being of our stakeholders – clients, employees and the communities in which we operate. Reflecting this commitment, we have an active Corporate Social Responsibility program. For more information about our commitments and initiatives, please visit our Web page: www.stratos-sts.com

Appendix C: Mentimeter Questions and Results

Mentimeter is a virtual engagement tool that allows facilitators to utilize interactive polls, quizzes, and Word Clouds to encourage feedback and interaction with the workshop audience. Throughout the workshop session, participants were invited to use the tool to answer various questions and prompts related to the workshop material. Over the two-day event participants used the platform to submit answers and feedback.

Below are the questions/prompts asked over the two-day period and all of the answers provided by participants.

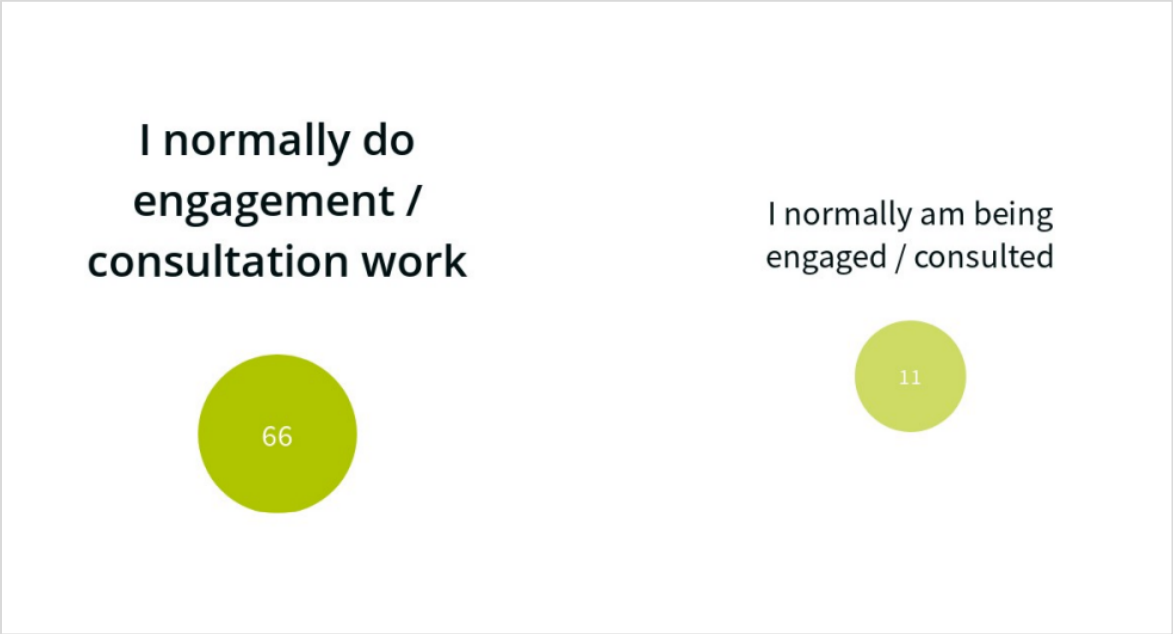
DAY ONE

When you hear the words "engagement and consultation" what words come to mind for you?

(57 responses - participants could submit up to 3 responses each)

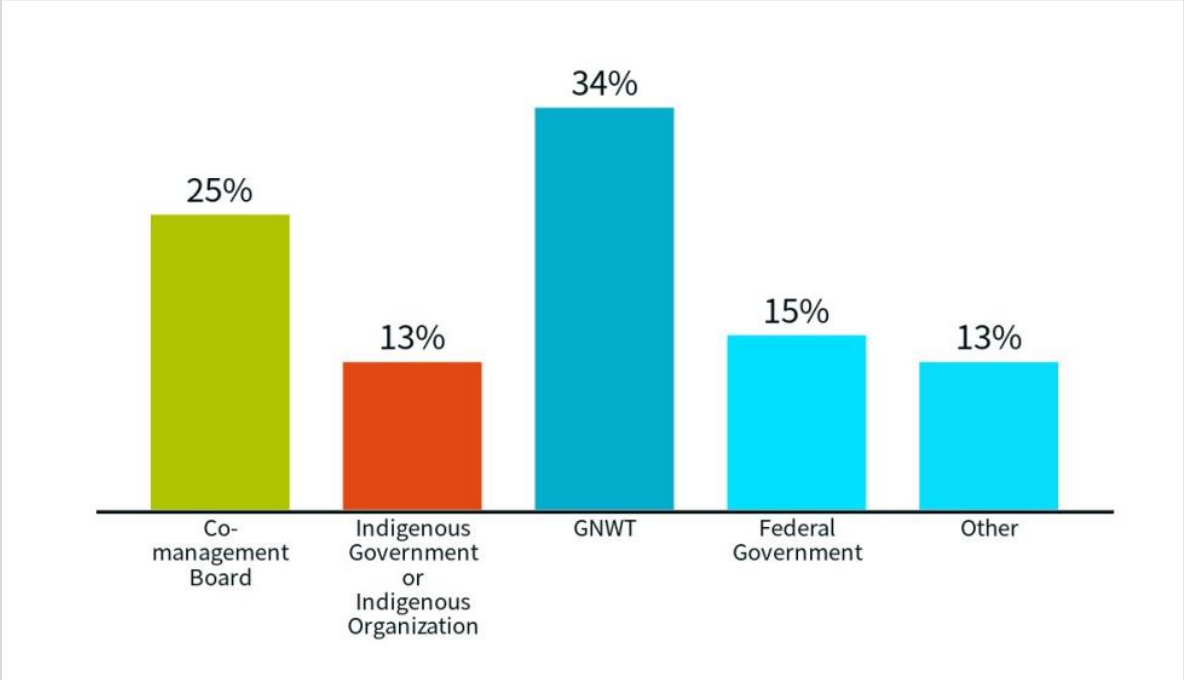
What description best fits your role?

(77 responses)



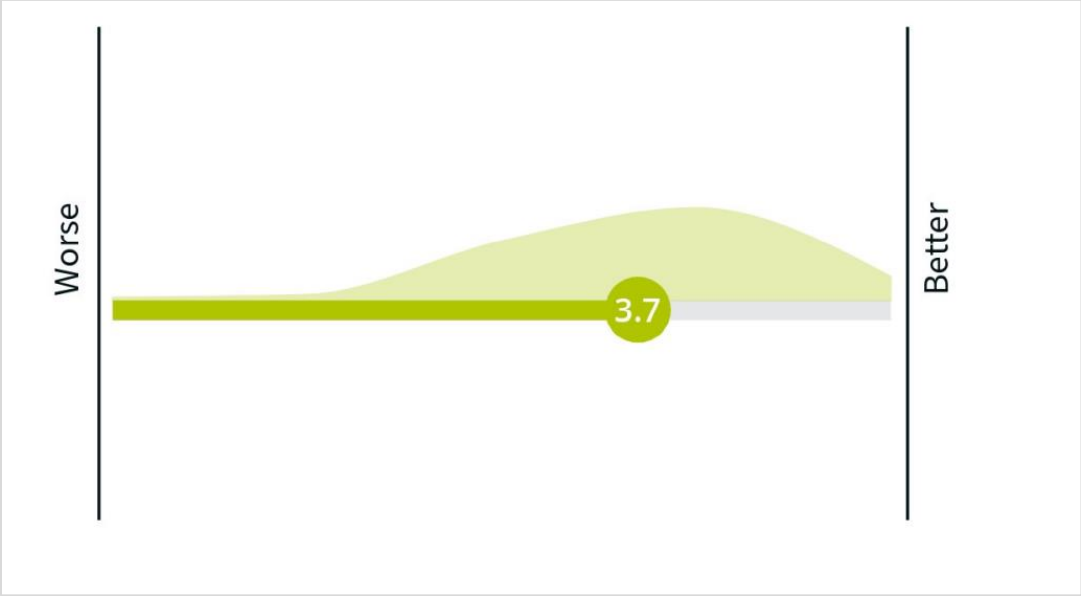
What type of organization do you work with?

(87 responses)



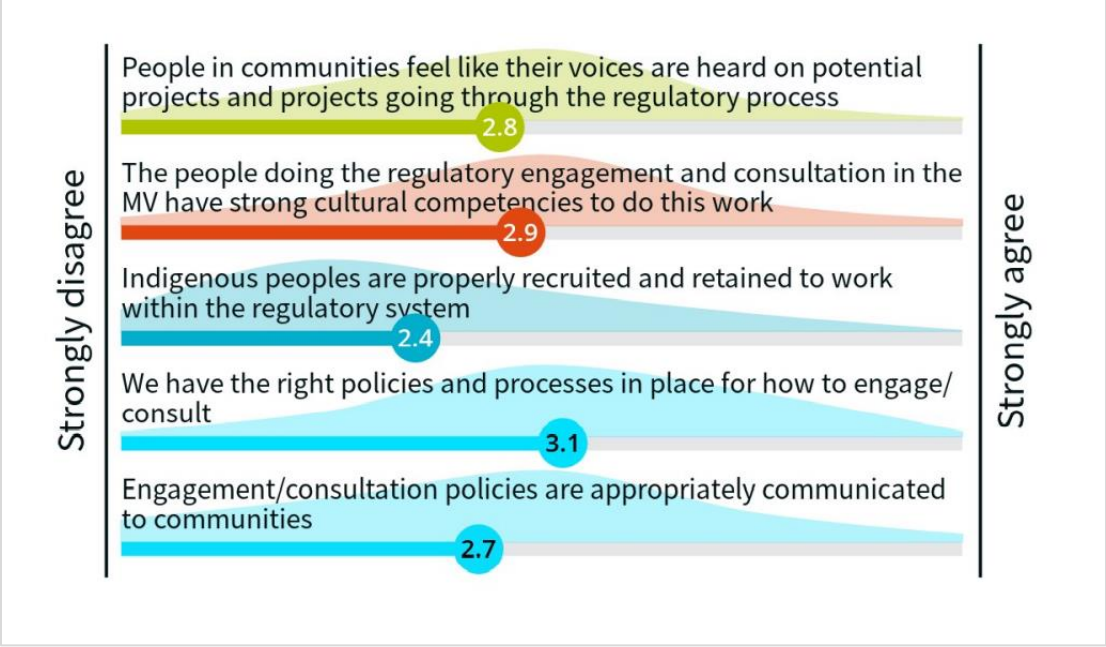
In your perspective, when it comes to engagement and consultation with the MVRMA regulatory system, what direction are we going?

(71 responses)



How much do you agree with these statements?

(71 responses)



DAY TWO

After the breakout groups, individuals were invited to use Menti (the online engagement tool) to share key insights from their conversations.

What were some key actions that came up in your groups?

(37 responses – participants could submit up to 3 responses each)

connecting and maintaining relationships	get outside of your organization (physically and mentally), get away from the paperwork, talk to people and listen. and listen some more.
Develop indigenous inclusion policy for workplace.	when booking flights and hotels, don't forget to break bread and authentically connect out on the land
participant funding	Documents in plain language/translated
ask communities how they wish to be engaged and build processes around that	More time in communities.
participant funding	Improving communication through addressing the language barrier by having one on one meetings/workshops with interpreters about the project/presentation material
Build consistent relationships.	The north does a pretty good job and needs to be responsive and transparent with stakeholders
- GNWT, Feds, Boards - work together to create and keep a calendar of key community events to help with planning engagement/consultation	Get out to communities more and build relationships. Report more often and more widely on progress (e.g.: strat planning) ... Educate as to what MVRMA is and Boards are to youth and public. Recruit more northern talent/build interest in co-management
visual representation of key messages	participant funding - hold workshops with Indigenous Governments and communities on how to apply for funding, and what to apply for.
Translation of language.	Tlicho Government is developing and Engagement Guidelines - this would be great to support other communities to do this. Perhaps GNWT/Fed funding to help support this.
Follow-up Get into communities Build relationships	Funding to travel to the communities
Improving participation of indigenous women	more in persons meetings. monthly letters sent to members or concerned people.
In person meetings - focus on conversation rather than presentation	community to dictate proper way to consult
funding for travel	make sure that NWT curriculum includes co-management system and history of the MVRMA so the youth understand
update the guidelines to avoid consultation exhaustion and streamline engagement requirements	Engagement efficiency and reducing fatigue
training and capacity building	Monthly letters to members

open and transparent communication and decision making	propose on-the-land community meetings rather than at the community hall.
- tailor community engagement to the community - radio ads are good approach, rather than social media	post consultation reflection "what we heard" reporting back. Helps with relationship building
Improving Interpretation and reducing language barriers	Government should not be afraid to go beyond their narrow mandates. Communities want broad discussions.
Are we helping to achieve well-being of communities?	reducing the bar in hiring Indigenous people, respecting others in workplaces, making use of feedbacks, talk less and listen more, reaching out to communities, communication, providing awareness/education to IGs on funding opportunities
Follow up on commitments made during engagement	plain language
Provide visuals	More inclusion and participation of indigenous peoples in the regulatory system
Collaborative work	Get out of the office
meaningful engagement ... once you start the process you must maintain communications for duration, transparency is key, consider language and approach to engagement to develop trust	Have discussions outside of formal events
invest the time required to build the relationship to then have a platform from which to consult from develop alternatives to volumes of text	don't underestimate what you can achieve with Facebook
use conversations, not presentations	Have the youth involved
Do some homework on the community - history, what other issues are they currently facing, how would they like to be engaged?	Train Indigenous northerners in regulatory review, not just as operators and monitors.
funding/support to create own engagement protocols	more funding for IGs to participate in regulatory processes
Government has major role in engagement and consultation (set out in law) and as such should do more/better.	avoid helicopter engagement
Indigenous women participating and working in the system is the best indicator of ensuring that we're meeting a lot of our objectives to improve engagement and consultation	Tie engagement to community events
Good translation	improved northern board staff hiring practices
indigenous cultural competency training within organizations and capacity building on all fronts for Indigenous Governments and/or organizations	have community tours and in-person communication with community members and leadership; make plain language and visual materials; reduce consultation fatigue by hosting annual meetings about smaller projects; codevelop legislation and policies
Participation of experts outside of the proponent, i.e., bringing an ENR biologist to explain possible impacts from a project to a community	get information sessions from the GNWT and the boards so that we don't only hear the perspectives of developers about their projects and what impacts they think will happen
less printed material, more visuals/video for	Let's be sure to acknowledge the excellent work happening in

engagement to broaden audience and make it more accessible	the Mackenzie Valley. While there is room for improvement, we are MUCH better off than Ontario, Alberta, etc.
use the traditional language and place names	Participant funding! Also supports for developers of small projects!
improving hiring practices in governments to increase indigenous representation - capacity building	Are we asking the appropriate questions to the right people?
understand why communities are not providing comments to LWB public registries. For example, is this due to capacity, the nature of the process, concerns being communicated through other methods, or other reasons?	Accountability to engagement and consultation outcomes!
find a way to communicate in the language of the people, directly, without needing to translate	Communities want to speak holistically. Engage that way., not in narrow subjects
Annual meetings that cover existing and future applications for work in the Community/boundary area. Not specific; but general conversation of - what is working, what is not working, what do you want to see happen, etc.	Community liaisons and engagement/ outreach staff from the communities working for government and the boards!
Find out how the community needs information to be communicated?	Better coordination!
Communities do not necessarily see themselves reflected in the engagement process. If people don't understand topics**,** they won't be interested in attending and participating?	Use and market new technologies to get a range of voices heard better.
capacity will address competency	Need RECURRING engagement to build trust
proponents should support culture camps whenever possible	More early work done by government and the Boards to deal with issues outside of the control of developers, such as social, health, cultural and economic issues.
Increasing Community resident participation in engagement events such as community meetings held by proponents and/ or public hearings held by Boards. Streamlining the scope of EA requirements on proponents - more Government direct involvement to inf	We discussed more of the previously used EA measures post implementation assessment and also asking those affected/impacted by development how they would like to see "accountability" - how do they measure accountability? Did the process work?
Need regular lessons learned, plus the ability to try new things, even if we make mistakes on the way.	Evolving the indigenous people in all activities of the projects (planning, capacity building, employment, monitoring and closing, ...etc.)

How can we be held accountable?

(25 responses - participants could submit up to 3 responses each)

Workshops like this one are one way	Hold sessions like these. This session was great to build capacity amongst partners (helps us strive and make improvements) and make time to reflect on the processes.
Build in time/funding for translating documents	must provide up to date engagement contact lists (names, phone numbers, addresses and email addresses). Also identify persons accepting engagement contact on behalf of key individuals.
focus on the human aspect, not just the logistics	Bringing it back to the reason for why we do this: people and environment.
Accountability comes naturally with relationship building	Improve outreach to communities
The Boards are held accountable by virtue of a completely public process.	Explain decisions in plain language, in the communities
require plain language, visual presentations, and translation summaries	ensure staff are trained in cultural competency
provide written reasons in shorter documents that describe how the views of communities were included/concerns were addressed	follow-up with communities on what you heard during community meetings or other engagement, and report back on any actions you made based on what you heard - or, what did you do about it
once you start engagement, DO NOT STOP, as it damages relationships!	Honesty and transparency to help build trust, continual follow up on communications, info packages
NWT Environmental Audit is an accountability mechanism built in to the MVRMA.	make sure local people work for them; they can help the boards make better decisions AND give feedback about what is/is not working
Make sure you have a shared understanding of what accountability looks like.	transfer staff capacity to IGs
Go to communities and directly ask the question: are we meeting your needs? Address the issues transparently.	Social, environmental, and behavioral accountability.
Again, thru regular reporting publicly (such as strategic planning tools and progress tracking). but also communication outwards... Getting into communities, .. Sharing what the MVRMA and Land Claims were about and where the Boards are today....	Understand what the community needs to help the board improve
ask the people how they would like to be engaged	Ensure that all organizations within co-management hire indigenous DENE.
Let the communities know how much power they have, request meetings/more outreach	Ensure that everything is as public as possible so everyone can see what is going on in a timely manner and have input as and when they wish.
Transparency in decision making	remove unnecessary board process steps
Build and maintain relationships - people will hold	create process for iteration and multilaterally agreed upon

themselves and others accountable to maintain it.	timelines
recognize and break down technology and language barriers	control LWB inconsistencies
frequent updates	Good engagement takes time. Spend the time to do it respectfully.
Ensure relationships are maintained to understand if a community is concerned about a project and to maximize participation	Engage at the right pace for communities. This is not always the pace developers wish for.
protocols for when engagement isn't satisfactory	improve LWB management leadership
When developers complain about timing, because they can't complain about respectful pace for engagement, it can be manipulative.	Internal barriers in risk-averse government make it hard for staff to conduct frequent community visits, but those are needed to build trusting relationships.
Try new approaches, even if it risks making mistakes. No mistakes = no learning = no growth. Need lessons learned after.	Survey community participants after EACH stage of an EA or regulatory process about how it went and ask for suggestions to make the engagement process better.

Appendix D: Presentation Slides

What is consultation and engagement under the MVRMA?

A brief overview presentation

MVRMA Virtual Workshop

September 28-29, 2022

Mark Cliffe-Phillips – Executive Director

Mackenzie Valley Review Board

What does the MVRMA say about the purpose of the Boards?

(S.s. 9.1) The purpose of the establishment of boards by this Act is to ***enable residents of the Mackenzie Valley to participate in the management of its resources for the benefit of the residents and of other Canadians.***

Why do the Boards consult and engage?

Consultation and engagement is the best way to hear about things that the Boards need to consider, like:

- the concerns of Indigenous people and the public
- the protection of the environment
- the protection of the social, cultural and economic well-being of people and communities in the Mackenzie Valley and
- the importance of conservation to the well-being and way of life of Indigenous people

Let’s take a step back- What is consultation?

- **Crown Consultation** refers to the legal obligations of the Crown (Government) when Aboriginal interests (rights and title) may be adversely affected by a Crown decision. **This is not the role of the Boards**
- **Governments rely on the Boards’ processes** to help fulfill their duty to consult
- In addition, there are specific consultation requirements laid out in the land claims and the MVRMA that the Boards’ and others must follow.

Who is being engaged/consulted?

- Land claims organizations
- Indigenous Governments
- Indigenous organizations
- Federal and territorial governments
- Any other person or group who might be affected by a development

In general, when engaging or consulting it's best to cast a wide net and seek to hear from as many voices as possible of those who may be impacted by a decision.

What is Engagement?

- Engagement is different than consultation.
- Engagement aims to build relationships and trust by exchanging information in the absence of legal consultation obligations.
- Engagement is done by applicants, Government and the Boards to help:
    - Inform
    - Gather feedback
    - Respond to concerns
- Engagement **can help fulfill consultation** requirements.

The Evolution of Consultation Law and Mackenzie Valley Boards' Consultation Practice

John Donihee

Of Counsel

This presentation provides general information and is not intended to provide legal advice.

2022 Virtual *Mackenzie Valley Resource Management Act* Workshop Series: Engagement and Consultation Workshop
September 28, 2022

Willms & Shier | Environment Indigenous Energy Law

Overview

- **Review of boards' statutory consultation requirements under land claims and MVRMA**
- **Trace the evolution of consultation case law and particularly the boards' roles in Crown consultation**
- **Make brief mention of consultation in relation to UNDRIP and FPIC**
- **Respond to questions**

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The Importance of History and Context

- **Consultation is about relationships and an understanding consultation practice in the Mackenzie Valley requires context**
- **Consultation is not a "product" it is a process intended to lead to accommodation and reconciliation**
- **Current MVRMA consultation practice is unique – it blends land claim, co-management, statutory and case law requirements**

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Influences on Consultation Practice in the NWT

- **Resource development and communities**
- **Land claims**
- **Co-management**
- **Implementation legislation**
- **Evolution of case law and board roles**
- **Boards' leadership, policies and processes**

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Land Claims and Statutory Consultation

- **Negotiators included a definition of consultation in land claims and specific provisions in the resource management chapters require consultation by governments and boards before decisions are made**
- **“consultation” definition is in MVRMA, s. 3 – it requires little more than administrative law fairness**
- **MVRMA and regulations require more, particularly in relation to MVEIRB**

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Land Claims and Statutory Consultation

- **Simply meeting statutory requirements would NOT satisfy the Honour of the Crown – the courts have gone much farther**
- **Co-management tribunals bring the community context and expectations to the environmental and regulatory decision-making process**
- **This workshop is an excellent example of the boards' commitment to improving consultation and engagement practices**

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The Evolving Case Law

- **Driven by s. 35 of the *Constitution Act, 1982***
- ***Sparrow* (1990), *Delgamuukw* (1997) governments' obligation to consult emerges**
- ***Haida* (2004) set out the foundation for modern Crown consultation law**
  - Consultation requirements proportionate to strength of claim and seriousness of potential adverse impact on the exercise of a s. 35 right
  - Honour of the Crown cannot be delegated

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The Evolving Case Law

- ***Haida* (2004) cont.**
  - But the consultation exercise can be delegated
  - A duty to accommodate may arise depending on the circumstances but consultation is not a veto over regulatory decisions
- **From 2004 to 2010 it is unclear what the role or responsibilities of administrative tribunals was in consultation – it was clear they could/should be involved – but their actual decision-making authority in consultation process was unclear**

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2010 *Beckman* and *Rio Tinto*

- ***Beckman* was the first consultation case brought in the context of a modern land claim**
  - "The Crown cannot contract out of its duty of honourable dealing with Aboriginal peoples"
- **In *Rio Tinto*, SCC confirmed that administrative tribunals *can* play a role in procedural consultation and/or assessing the adequacy of consultation**
  - Role depends on statutory authority of tribunal to decide questions of law

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2017 *Clyde River* and *Chippewas of the Thames*

- **Cases involved National Energy Board (now the Canadian Energy Regulator or CER)**
- **Crown can rely on a tribunal to fulfill its duty to consult**
  - BUT – tribunal or agency must possess both the "powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests"
  - Tribunal needs both procedural powers and remedial powers – this depends on tribunal jurisdiction

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Boards' Consultation Policies

- **LWB Consultation and Engagement Policy finalized in 2013 after *Rio Tinto* – almost 10 years of operational experience**
- **Rethinking and revision began after *Clyde River* and *Chippewas of the Thames* decisions**
- **MVEIRB adopted the policy in 2019 on a interim basis as a collaborative effort was initiated to address board consultation obligations**
- **LWBs' and MVEIRB's roles and decision-making authorities are different**

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Boards' Consultation Policies

- **Public consultation on LWBs updated policy has been completed**
- **MVEIRB still considering its approach**

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United Nations Declaration on the Rights of Indigenous Peoples

- **Free, Prior, and Informed Consent (FPIC)**
  - State obligation to consult and cooperate with Indigenous peoples to obtain FPIC
  - Many different interpretations of FPIC
- **Federal government's position**
  - FPIC "builds on and goes beyond the duty to consult"
  - Federal legislation in place to implement UNDRIP does not "immediately change Canada's existing duty to consult Indigenous groups, or other consultation and participation requirements set out in legislation…"

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Takeaways about Boards' Roles in Consultation

- **The Boards are not the Crown which always holds ultimate responsibility for ensuring adequate consultation**
- **MVRMA boards are not the CER or BC Utilities Commission which are vested with extensive legal procedural and remedial powers**
- **Powers can vary with the decision required**
- **The case law must be applied in the proper context and with an understanding of what a board can and cannot do based on its statutory jurisdiction – the courts are clear on this**

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Coming Back to Context

- **MVRMA tribunals operate in a unique context – they are the negotiated outcome of settled land claims as well as statutory creations**
- **Co-management makes a difference – board members are community members – they share the historical knowledge, cultural experience and often the Indigenous languages of affected s. 35 rights holders in their proceedings**
- **The boards' are continuing to work on improvements to consultation – improvements are possible and necessary since the "consultation landscape continues to evolve**

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Coming Back to Context

- **In practice, consultation issues are worked out when they arise – there have been no legal challenges to boards' consultation practice since the *Ka'a'Gee Tu* cases in 2007**
- **The collaborative and consensus driven nature of environmental and regulatory decision-making in the Mackenzie Valley is a feature of this unique context**
- **Consultation and engagement are central components of this framework**

Willms & Shier | Environment Indigenous Energy Law

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Willms & Shier Environmental Lawyers

- **Established over 40 years ago**
- **Environmental, Indigenous, and Energy law**
- **17 lawyers**
  - seven lawyers are certified as Environmental Law Specialists and one lawyer is certified as an Indigenous Legal Issues Specialist by the Law Society of Ontario
  - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, Nunavut and the Yukon
  - offices in Toronto, Ottawa, Calgary, and Yellowknife

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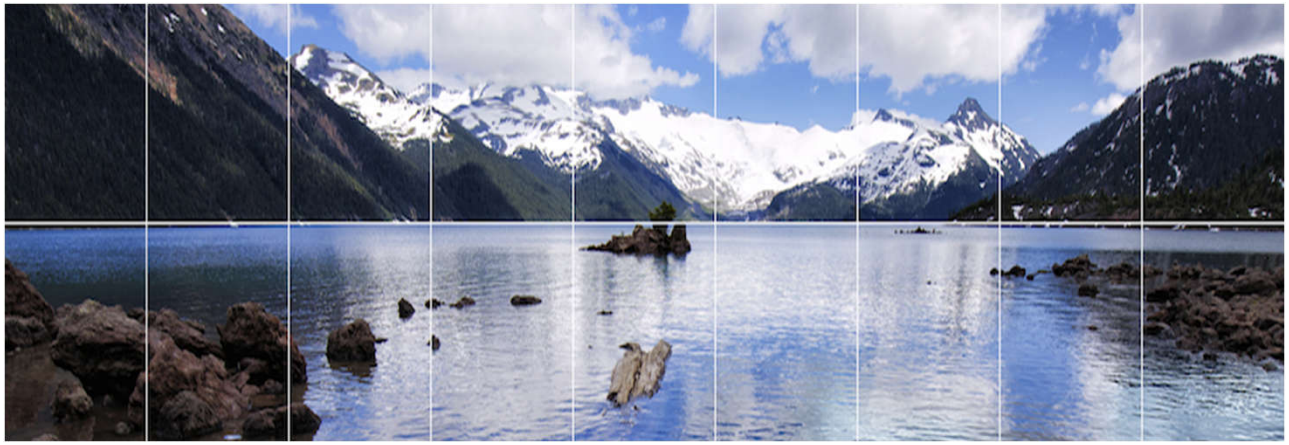
Canada Energy Regulator | Régie de l'énergie du Canada

Canada

Reconciliation, Engagement and the TMX-IAMC



Tracy Sletto
Executive Vice President Transparency and Strategic Engagement
Canada Energy Regulator (CER)

Chief Marcel Shackelly, TMX-IAMC member
(Mid-Fraser/Thompson)

INDIGENOUS
Advisory and Monitoring Committee
Trans Mountain Expansion and Existing Pipeline

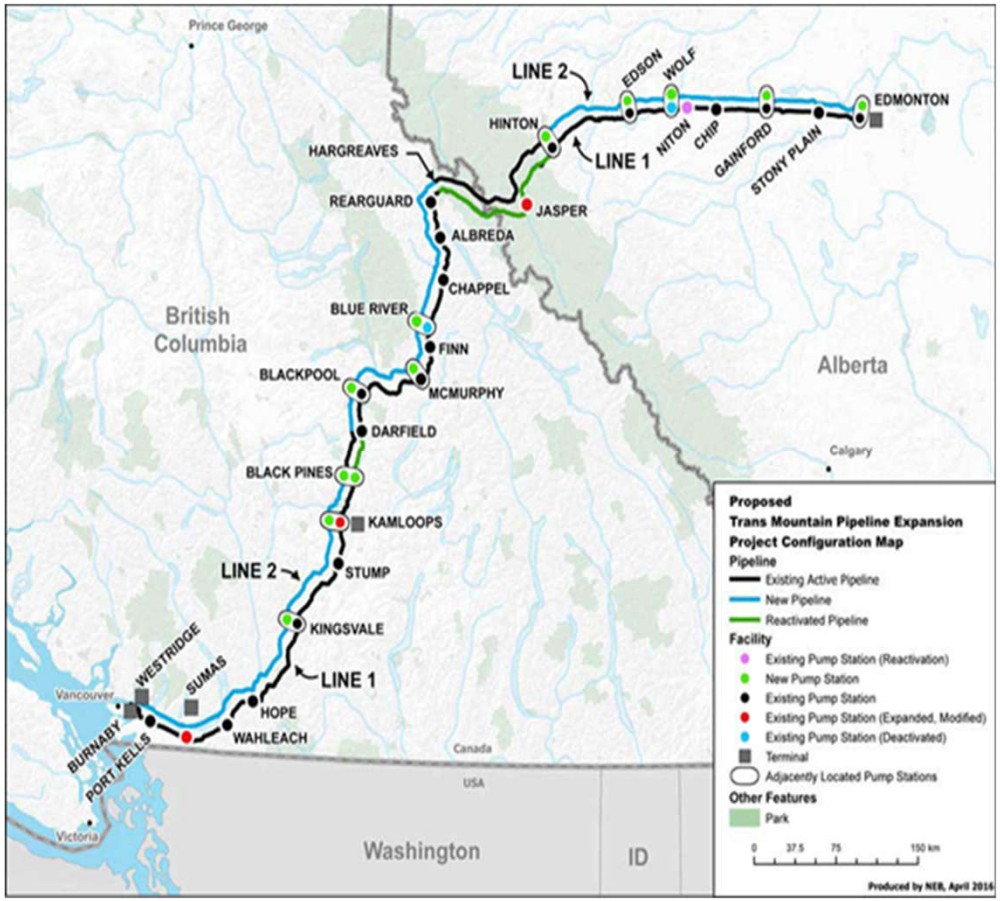
September 29, 2022

Overview of Presentation

- The Canada Energy Regulator (CER)
  - Role and mandate
  - Strategic Plan, including Reconciliation Strategic Priority
  - United Nations Declaration on the Rights of Indigenous Peoples Act (*UN Declaration Act*)
- The TMX-IAMC
  - Overview of the Committee
  - Key highlights and accomplishments
  - Look ahead - what's next

CER's Reconciliation Strategic Priority

IAMC-TMX Committee

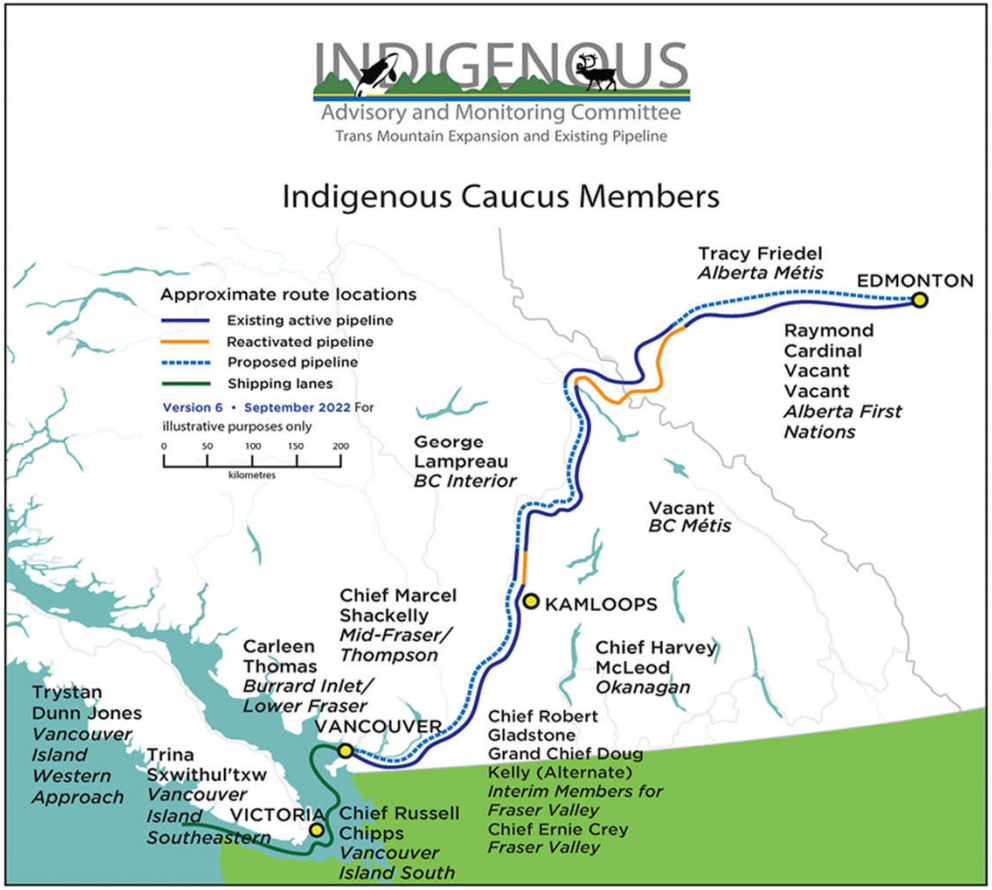


Canada Energy Regulator | Régie de l'énergie du Canada

Canada

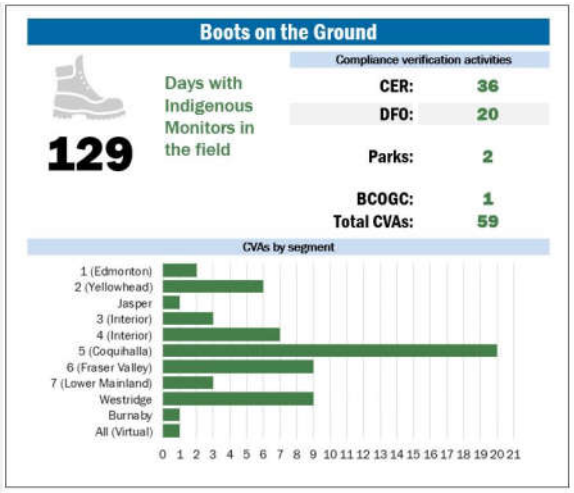
TMX-IAMC Snapshot

Operator:	Trans Mountain Corp.
Status:	Active Construction
Indigenous Nations:	129
Membership:	13 Indigenous and 6 Government seats
Indigenous Co-Chair:	Ray Cardinal(Alberta First Nations)
Gov't Co-Chair:	Joanne Pereira-Ekström, NRCan
Gov't Members:	Tray Sletto, CER Ian Chatwell, Transport Canada Chad Stroud, Canada Coast Guard Alice Cheung, Fisheries & Oceans Saul Schneider, Environment & Climate Change Canada
Indigenous Members:	13-member Indigenous Caucus

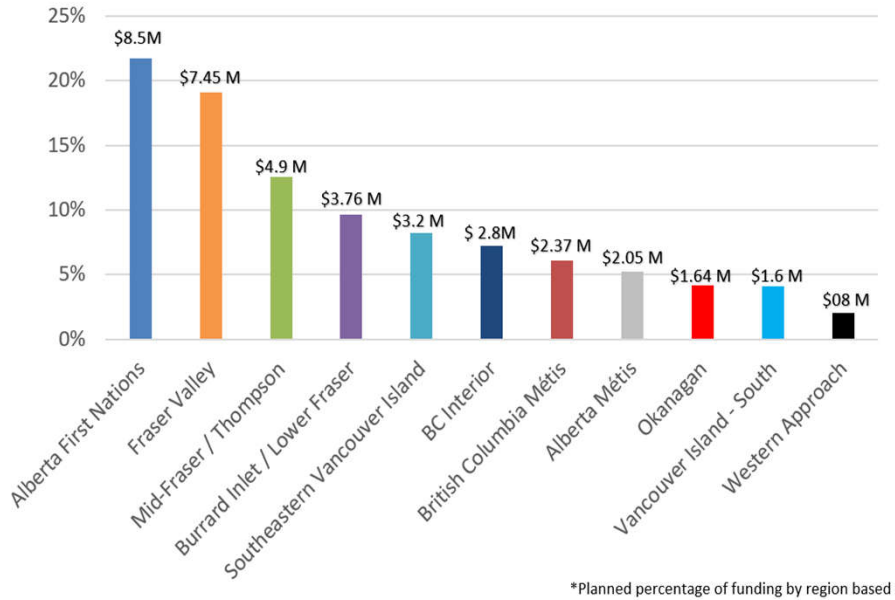


Key Accomplishments

2021 CVAs

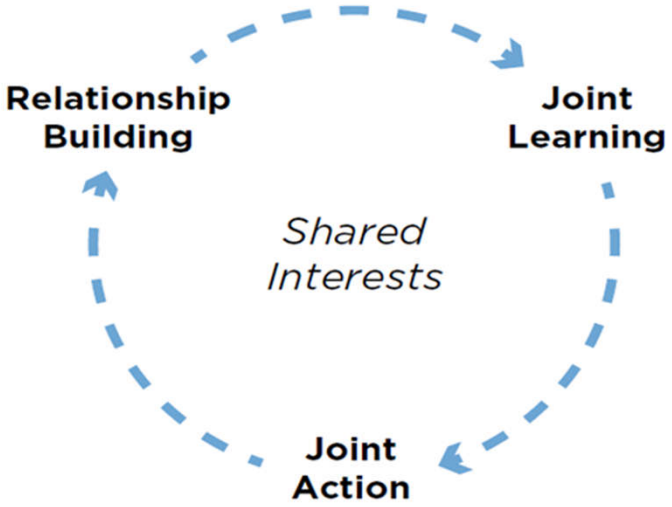


Indigenous Communities (129) – Funding Distribution per Region



*Planned percentage of funding by region based on applications received

Look-Ahead and Next Steps



Questions or Comments

Land and Water Boards of the Mackenzie Valley

LWB Engagement and Consultation Policy and Initiatives Update

MVRMA Workshop – September 28 & 29, 2022

Land and Water Boards of the
Mackenzie Valley

Engagement and Consultation Policy

June 5, 2018

Land and Water Boards of the
Mackenzie Valley

Engagement Guidelines for Applicants and Holders of Water Licences and Land Use Permits

June 5, 2018

LWB Engagement and Consultation Policy/Guideline Update Process

Policy Update

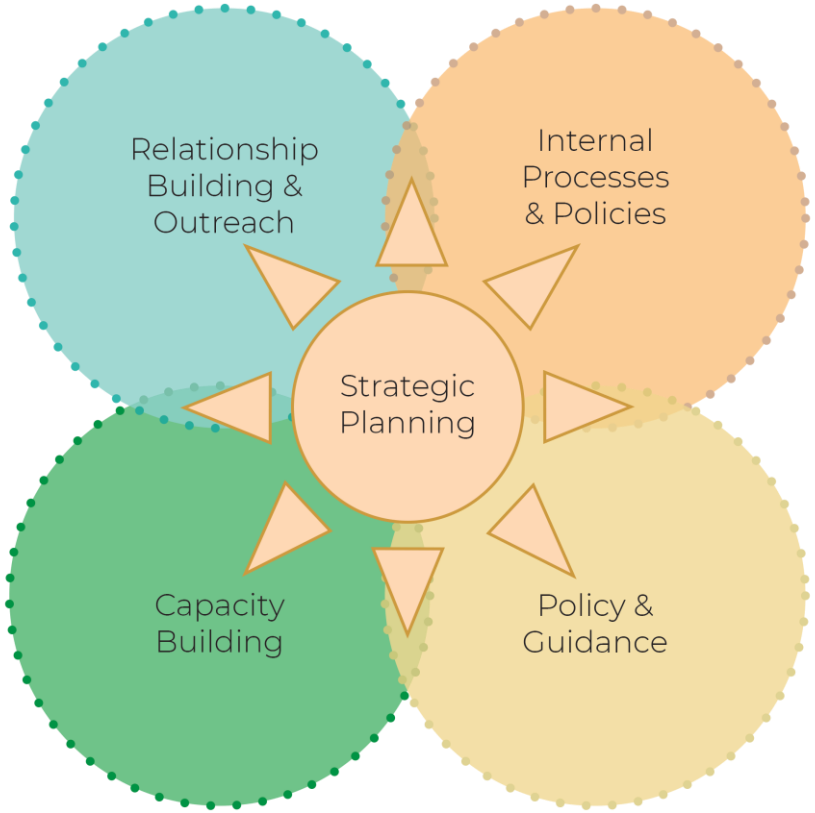
- Engagement commenced August 2019
- One-to-one meetings Fall 2019 to Summer 2021
- Open, virtual workshops June 9&10, 2021
- Public review of draft update from June 15 to Sept. 8, 2022
- Anticipated Board consideration December 2022

Guideline Update

- Engagement process similar to Policy update process, anticipated to commence in 2023 following Board approval of Policy

Relationship Building and Outreach

Focuses on initiatives that engage stakeholders in the work of the LWBs and helps satisfy the spirit of inclusive and integrated co – management system



Community Outreach Strategy: Overarching Key Messages

1. Improve on building relationships and trust
2. Increase effort and focus to build Indigenous Capacity
3. Increase general knowledge of the regulatory system in Communities
4. Promote accessibility for communities to be able to participate

Marsi cho

Consultation during environmental assessment in the Mackenzie Valley: GNWT-Canada joint consultation process

September 29, 2022

Canada

Government of Northwest Territories

- The GNWT and Canada encourage any Indigenous Government or Indigenous Organization, as well as the public, to participate in the Review Board's process.
- The process is the best way to have your voice heard.
- Government relies on the Board's process as the primary means to fulfill its duty to consult with Indigenous peoples

Government of Northwest Territories

Mahsi

Questions?

Melissa Pink
Manager, Project Assessment, Department of Lands
Government of the Northwest Territories
Melissa_pink@gov.nt.ca

Boyan Tracz
Manager, Consultation, CANNOR
Government of Canada
Boyan.Tracz@cannor.gc.ca

Engagement Improvements

Mackenzie Valley Review Board

MVRMA Workshop - Engagement

September 28-29, 2022

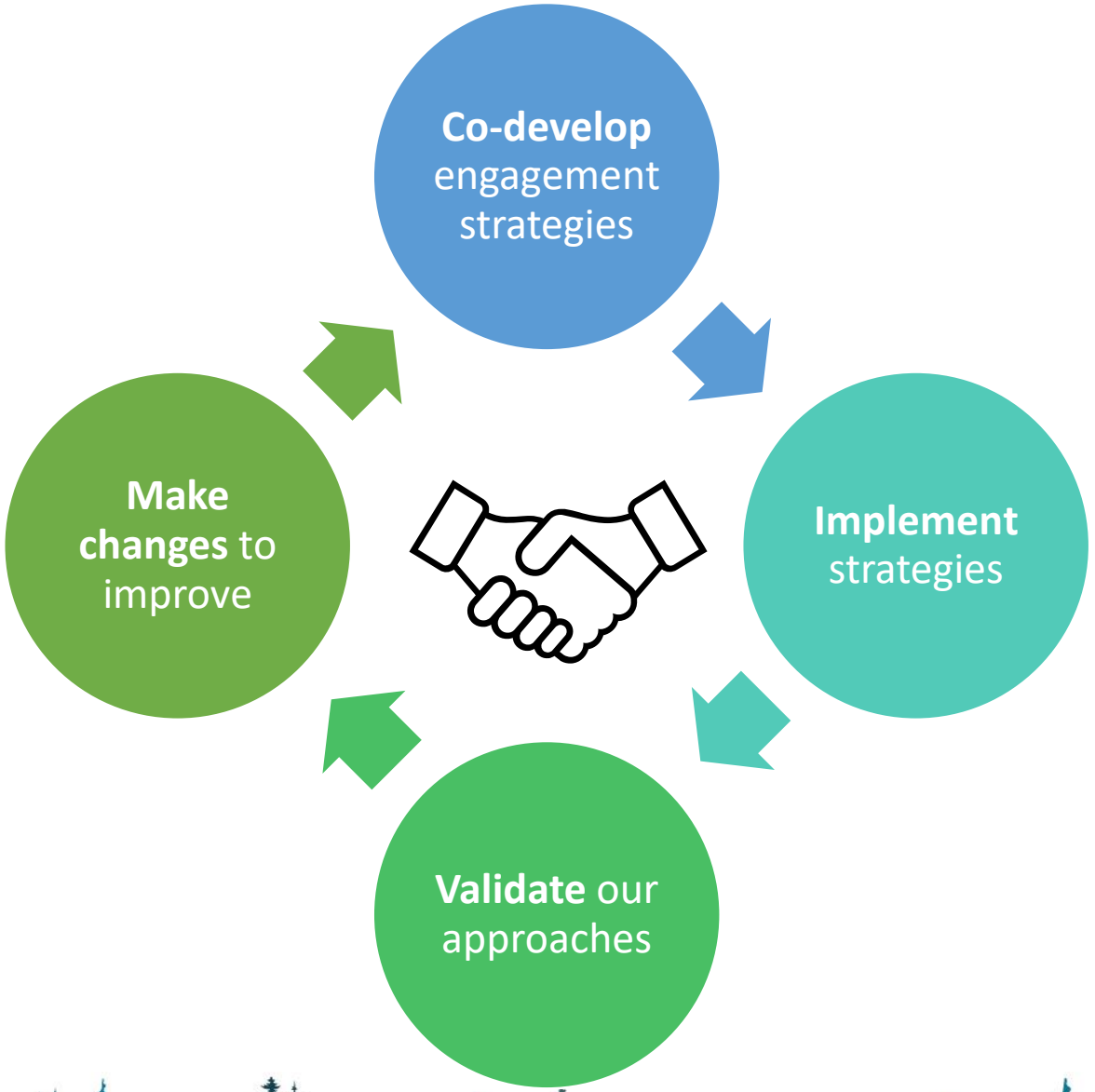
The Review Board's processes are rooted in consultation and engagement

- The Review Board understands its consultation obligations laid out in the land claims and the Act
- We want to go above and beyond these minimum requirements by:
  - designing processes that ensure meaningful participation and engagement and
  - providing opportunities for communities and IGs to share their concerns about developments
- good, strategic and meaningful engagement helps us fulfill our consultation obligations and leads to better decisions

Review Board's Approach to Engagement

Work together respectfully	Start early and engage throughout	Respect and consider local contexts	Reduce the burden of engagement	Support capacity building initiatives
• Co-develop engagement strategies • increase Indigenous representation at a staff level	• Include Indigenous governments and organizations in planning. • New guidelines promote collaborative project planning	• Language & translator workshops • Efforts to visit communities and meet people.	• collaborative initiatives • coordinated processes • Education & outreach activities to build relationships & strength local understanding	• everyone's job • advocating for participant funding

What's next?


Co-develop engagement strategies
Implement strategies
Validate our approaches
Make changes to improve

Marci Cho (*thank you*)

Appendix E: Speaker Bios

JOHN DONIHEE

Keynote

John Donihee holds graduate degrees in both Environmental Studies and Law. He practices law in all three northern territories. Between 1997 and 2004 John was a Research Associate at the Canadian Institute of Resources Law and Adjunct Professor in the Faculty of Environmental Design at the University of Calgary. He also taught Natural Resources Law in the first Akitsiraq law program in Nunavut. He is currently of counsel with Willms & Shier Environmental Lawyers LLP.

John's work includes advising co-management tribunals about land, resource, and environmental aspects of land claim implementation, including environmental impact assessment and land and water regulation. He has advised co-management tribunals in all three territories, been counsel to the Joint Secretariat tribunals for over two decades and is the past Chair of the Environmental Impact Review Board under the *Inuvialuit Final Agreement*. John has worked for co-management tribunals established by the *Mackenzie Valley Resource Management Act* since before the legislation came into force. A recipient of the NWT Premier's award for collaborative law in 2014 and repeatedly recognized as one of Canada's top Indigenous Law practitioners John's work focusses on problem solving and developing pragmatic solutions for northern environmental protection and resource development.

TIM HERON

Panelist

Tim Heron comes from a family of 11 and completed his schooling in Fort Smith. He worked for the Northwest Territory Métis Nation (NWTMN) for 24.5 years where he started out as their Land Use Mapping Coordinator and then became Fort Smith Community Negotiator. After 2.5 years in this position, Tim was asked to become the NWTMN Lands and Resources Manager. While in this role, he sat on various committees, including the NWT Protected Areas Strategy Development Committee, the NWT Water Stewardship Strategy Development Committee, the NWT/Alberta Bilateral Management Committee. Tim also spent a short time as NWT Climate Change Committee Chair before retiring this past January. He recently joined a committee to help develop a Draft Traditional Knowledge Framework for the Alberta/NWT Transboundary Water Agreement.

JANET BAYHA MCCAULEY

Panelist

Janet Bayha was born and raised in Deline and out on the land. She moved to Tulita 20 years ago, got married, and now has four beautiful children. She serves on many community/outside boards and committees, and volunteers for various recreation activities in the community. Janet is currently Vice President of the Tulita Land Corporation.

NURI FRAME

Panelist

Nuri Frame is co-managing partner of Pape Salter Teillet LLP. He specializes in Indigenous rights law, with an emphasis on litigation and dispute resolution, governance, and treaty negotiation and implementation. Nuri's litigation practice focuses on a range of areas impacting Indigenous peoples, including constitutional law, administrative law, environmental and regulatory law, treaty and self-government issues and disputes concerning implementation of impact benefits agreements. Nuri has appeared before numerous courts and regulatory tribunals in both Canada and the United States. Nuri appeared before the Supreme Court of Canada on behalf of interveners in the Behn, Keewatin, and Chippewas of the Thames cases. In addition to his litigation practice, Nuri also provides advice on a range of other legal issues affecting Indigenous communities, including governance, treaty negotiation and implementation, environmental and resource protection and negotiation and consultation with governments and resource developers. Nuri has worked extensively with Indigenous governments in Ontario, Alberta, British Columbia, Yukon and the Northwest Territories. In his practice, Nuri aims to provide his clients with legal and strategic advice that permits them to access the full range of options available for effectively resolving the issues they are presented with.

SARA MAINVILLE

Panelist

Sara Mainville has been called to the Ontario bar since 2005. Sara has a Management degree (Lethbridge) and a LL.B. (Queen's). She has earned an LL.M (Toronto) which has engaged her in a lifetime of study working with the Anishinaabe Nation in Treaty 3 and with Anishinaabe (Indigenous) law and legal orders. She has practiced law as a solo practitioner, and taught jurisprudence to undergraduate students at Algoma University, after being an Associate for a well-known Anishinaabe-led law firm in Ontario. In 2014, Sara was elected Chief of Couchiching First Nation after her friend, mentor, and long-term Chief had suddenly passed away. She returned to law in 2016 by joining a national law firm in Toronto, becoming partner in 2018. Sara has been honoured to work with the Chiefs of Ontario in creating First Nation Sovereign Wealth LP and assisting leadership in understanding emerging legal issues such as

the UNDRIP Act. Sara has worked on cannabis law with First Nations in many different provinces, her focus is on creating a legitimate and pragmatic legal framework that protects customers and respects Indigenous sovereign approaches to economic development and trade. Sara has been Lexpert® ranked as "Most Frequently Recommended" in Aboriginal Law since 2018, as one of the Best Lawyers in Aboriginal Law in Best Lawyers in Canada in 2021 and 2022. Sara has been a friend of JFK Law and is happy to join this prestigious law firm in 2022.

TRACY SLETTO

Presenter

Ms. Sletto joined the Canada Energy Regulator (CER) in 2011 with extensive experience strategic planning, policy development, finance, strategic communications, and public administration. She is responsible for the CER's Energy Information programs, Indigenous, Stakeholder and Northern engagement, Data and Information Management, and Communications. Before joining the CER, she worked with Western Economic Diversification Canada in Calgary and the Government of Saskatchewan in a variety of leadership roles.

CHIEF MARCEL SHACKELLY

Presenter

Chief Shackelly was re-elected for his second term as Chief of Nooaitch Indian Band in November 2016. Chief Shackelly studied at Simon Fraser University (Bachelor's in Economic Development); Nicola Valley Institute of Technology (Business Administration and Management); and the British Columbia Institute of Technology (Computer Systems).

JENNIFER DUNCAN

Presenter

Jennifer A. Duncan, B.A. (Hons), LL.B., is a sole practitioner specializing in Indigenous law with a primary focus on governance, corporate, regulatory, and international law. She has a Bachelor of Arts in Native Studies from the University of Alberta graduating with honours in 2000. Jennifer obtained her law degree from the University of British Columbia, graduating in 2004. She is member of the Law Society of British Columbia and the Law Society of the Northwest Territories. Jennifer is Dehla Got'ine from the Ts'oga Got'ine, and a member of the Behdzi Ahda" First Nation and the Ayoni Keh Land Corporation, located in the Arctic, Northwest Territories, Canada.

Willms & Shier | Environment Indigenous Energy Law

APPLICABILITY OF UNDRIP/FPIC TO RESOURCE CO-MANAGEMENT IN THE MACKENZIE VALLEY

Willms & Shier Environmental Lawyers LLP John Donihee & Raeya Jackiw, with assistance from Amanda Spitzig, Student-at-Law

January 30, 2020

This paper is being shared for background in the Virtual MVRMA Workshop Series: Engagement and Consultation Workshop 2022.Please note that the paper is two years old andhas not been updated for distribution.

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Willms & Shier Environment Indigenous Energy Law

APPLICABILITY OF *UNDRIP*/FPIC TO RESOURCE CO-MANAGEMENT IN THE MACKENZIE VALLEY

1 INTRODUCTION

Co-management regimes in the North are premised on collaborative decision-making in land use planning, environmental assessment and impact review ("EA/EIR") and regulatory processes. In the Makenzie Valley, co-management is implemented through the *Mackenzie Valley Resource Management Act*[1] ("*MVRMA*") and regulations, and is constitutionally protected by land claim agreements.

This paper considers the extent to which the rights set out in the *United Nations Declaration on the Rights of Indigenous Peoples*[2] ("*UNDRIP*"), including the right to Free, Prior and Informed Consent ("FPIC"), are integrated into and recognized by the Mackenzie Valley co-management regime.

Based on a review of *UNDRIP* rights and commentary by Indigenous organizations on the scope and content of FPIC, we suggest that the existing Mackenzie Valley co-management regime fulfills several substantive and procedural elements of *UNDRIP*, and FPIC in particular.

2 THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

UNDRIP was adopted into international law by the UN General Assembly in 2007. *UNDRIP* is considered

> the most comprehensive international instrument on the rights of Indigenous peoples… it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous peoples.[3]

UNDRIP addresses both individual and collective Indigenous rights, including rights to education, identity, health, employment, culture, and language. *UNDRIP* also affirms the right of Indigenous peoples to self-determination, and the right to pursue their own priorities in economic, social, and cultural development.[4]

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1 SC 1998, c 25 [*MVRMA*].

2 GA Res 61/295, 61st Sess, UN Doc A/RES/61/295 (2007) 1 [*UNDRIP*].

3 United Nations Department of Economic and Social Affairs: Indigenous Peoples, "United Nations Declaration on the Rights of Indigenous Peoples" (n.d.), online: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous- peoples.html>.

4 *UNDRIP*, *supra* note 2.

Many of the rights contained in *UNDRIP* relate directly to natural resource development on Indigenous lands. For example, *UNDRIP* provides that Indigenous peoples have the right to

- own, use, develop and control their lands, territories and resources (Article 26)
- the conservation and protection of the environment (Article 29)
- participate in a fair, independent, impartial, open, and transparent process to recognize and adjudicate the rights pertaining to their lands, territories, and resources. The process must give due recognition to Indigenous peoples' laws and traditions (Article 27)
- participate in decision-making in matters that would affect their rights through their own chosen representatives in accordance with their own procedures (Article 18)
- free and informed consent prior to the approval of any project affecting their lands, territories, or resources, i.e., FPIC (Article 32).

The full text of each Article referenced above can be found at **Appendix A**.

3 ADOPTION AND IMPLEMENTATION OF *UNDRIP* IN CANADA

UNDRIP is an international instrument, and is not legally enforceable unless and until its principles are incorporated into Canadian law by domestic legislation or other means (e.g. through a treaty with an Indigenous government).[5]

Canada was one of four states that initially voted in opposition to *UNDRIP*.[6] Canada had significant "concerns with respect to the wording of the current text, including provisions on lands, territories and resources [and] on free, prior and informed consent when used as a veto."[7]

Canada initially gave a qualified Statement of Support of *UNDRIP* under Stephen Harper's minority Conservative government in November 2010. In 2016, following the election of Justin

[5] *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 at para 69: "International treaties and conventions are not part of Canadian law unless they have been implemented by statute" and para 79. See also:Kerry Wilkins, "Strategizing UNDRIP Implementation: Some Fundamentals" in *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Waterloo: Centre for International Governance and the Wiyasiwewin Mikiwahp Native Law Centre, 2018) 121.

[6] United Nations Department of Economic and Social Affairs, "United Nations Declaration on the Rights of Indigenous Peoples – Historical Overview" (2007), online: United Nations <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>. The United States, Australia, and New Zealand also voted in opposition to *UNDRIP*.

[7] UNGAOR, 61st Session, 107th Plen Mtg, UN Doc A/61/PV.107 (2007).

Trudeau's Liberal government, Canada announced its adoption of *UNDRIP* with no reservations or qualifications.[8]

3.1 FEDERAL IMPLEMENTATION OF *UNDRIP*

Prime Minister Trudeau has asked the federal Minister of Indigenous and Northern Affairs to implement *UNDRIP* in Canada. However, the federal government has not yet incorporated *UNDRIP* into domestic Canadian law.[9]

In April 2016, the New Democratic Party MP Romeo Saganash introduced Private Member's Bill C-262, the *United Nations Declaration on the Rights of Indigenous Peoples Act*,[10] in the House of Commons. Bill C-262 would have required the Government of Canada, in consultationand cooperation with Indigenous peoples, to "take all measures necessary to ensure that the laws of Canada are consistent with the *UNDRIP*" and would have recognized *UNDRIP* "as a universal international human rights instrument with application in Canadian law."[11] Bill C-262 would have also required the Government of Canada, in consultation and cooperation with Indigenous peoples, to "develop and implement a national action plan to achieve the objectives of *UNDRIP*."[12] Bill C-262 received support from the federal Liberal government in November 2017.[13] However, Bill C-262 died on the order paper before receiving royal assent.

The federal government has also considered *UNDRIP* in the context of environmental assessment. In August 2016, the federal Minister of Environment and Climate Change convenedan Expert Panel to provide recommendations to the federal government on how to improve the federal environmental assessment process.[14] In its report, the Expert Panel addressed how FPICcould be integrated into the then proposed changes to federal environmental assessment. The Expert Panel noted in its report that "[p]articipants expressed the view that [FPIC] is not

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8 Tim Fontaine, "Canada Officially Adopts UN Declaration on Rights of Indigenous Peoples," CBC News (10 May 2016), online: <www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272>.

9 Indigenous and Northern Affairs Canada, "United Nations Declaration on the Rights of Indigenous Peoples" (2017), online: <https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>.

10 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016, (as passed by the House of Commons 30 May 2018).

11 *Ibid*, cl 3 and 4.

12 *Ibid*, cl 5.

13 John Paul Tasker, "Liberal Government Backs Bill that Demands Full Implementation of UN Indigenous Rights Declaration," CBC News (21 November 2017), online: <www.cbc.ca/news/politics/wilson-raybould-backs- undrip-bill-1.4412037>.

14 Government of Canada, Expert Panel Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa: Canadian Environmental Assessment Agency, 2017), online: <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>. This report was prepared to assist federal decision-making about Bill C-69 (relevant portions are now the *Impact Assessment Act*). This report has no legal authority.

necessarily a veto but a process of mutual respect, trust and collaborative decision-making grounded in the recognition of Indigenous Peoples as equal partners."[15]

However, the new federal government ultimately did not adopt many of the Expert Panel's recommendations on FPIC and *UNDRIP*. Notably, the federal government did not integrate FPIC into the new federal *Impact Assessment Act*. [16] The new Act simply states that the federal government "is committed to implementing [UNDRIP]."[17]

3.2 PROVINCIAL IMPLEMENTATION OF *UNDRIP* – BRITISH COLUMBIA

British Columbia is the first province to implement *UNDRIP* through provincial legislation. Bill 41, the *Declaration on the Rights of Indigenous Peoples Act*,[18] was passed by the BC government in November 2019. The purpose of the Act is to affirm the application of *UNDRIP* to the laws of BC, contribute to the implementation of *UNDRIP*, and support the affirmation of, and develop relationships with, Indigenous governing bodies.[19] The legislation requires the BC government to prepare and implement an action plan to achieve the objectives of *UNDRIP*.[20]

BC's new *Environmental Assessment Act*[21] also supports the implementation of *UNDRIP* by recognizing the right of Indigenous nations "to participate in decision making in matters that would affect their rights, through representatives chosen by themselves."[22] In limited cases under the new Act, Indigenous nations have the final say on whether a project will receive final approval. Specifically, the Act states that a reviewable project may not proceed without the consent of an Indigenous nation where a treaty or final agreement with the Indigenous nation requires consent.[23] The Act also requires the chief executive assessment officer to achieve consensus with participating Indigenous nations in certain circumstances.[24]

4 DISCUSSION OF *UNDRIP* BY CANADIAN COURTS

Canadian courts have not yet explored the scope or content of the rights set out in *UNDRIP*, including the scope and content of FPIC. However, Canadian courts have provided limited commentary on how *UNDRIP* intersects with domestic Canadian law, including the Crown's constitutional duty to consult Indigenous peoples under s. 35 of Canada's *Constitution Act, 1982*.

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15 *Ibid* at p 28.
16 SC 2019, c 28, s 1.
17 *Ibid*, Preamble.
18 SBC 2019, c 44.
19 *Ibid*, s 2. "Indigenous governing body" is defined as "an entity that is authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by section 35 of the *Constitution Act, 1982*."
20 *Ibid*, ss 3 and 4.
21 SBC 2018, c 51.
22 *Ibid*, s 2(2)(b)(ii).
23 *Ibid*, s 7.
24 *Ibid*, s. 16.

In *NunatuKavut Community Council Inc. v Canada (AG)*,[25] the NunatuKavuk Community Council ("NCC") argued that the Crown's duty to consult and accommodate should be read in light of *UNDRIP*.[26] The Federal Court explained that

> …UNDRIP may be used to inform the interpretation of domestic law. As Justice L'Heureux Dubé stated in *Baker*, values reflected in international instruments, while not having the force of law, may be used to inform the contextual approach to statutory interpretation and judicial review (at paras 70-71). In *Simon*, Justice Scott, then of this Court, similarly concluded that while the Court will favour interpretations of the law embodying UNDRIP's values, the instrument does not create substantive rights. When interpreting Canadian law there is a rebuttable presumption that Canadian legislation is enacted in conformity to Canada's international obligations. Consequently, when a provision of domestic law can be ascribed more than one meaning, the interpretation that conforms to international agreements that Canada has signed should be favoured.
>
> That said, in *Hupacasath*, Chief Justice Crampton of this Court stated that the question of whether the alleged duty to consult is owed must be determined solely by application of the test set out in *Haida* and *Rio Tinto*. I understand this to mean that UNDRIP cannot be used to displace Canadian jurisprudence or laws regarding the duty to consult, which would include both whether the duty to consult is owed, and, the content of that duty (emphasis added).[27]

However, the Federal Court noted that NCC's case

> does not identify an issue of statutory interpretation. Rather, it submits that UNDRIP applies not only to statutory interpretation but to interpreting Canada's constitutional obligations to Aboriginal peoples. No authority for that proposition is provided. Nor does the NCC provide any analysis or application of its position in the context of its submissions. In my view, in these circumstances, the NCC has not established that UNDRIP has application to the issues before me, or, even if it has, how it applies and how it impacts the duty to consult in this case.[28]

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25 2015 FC 981 [*NunatuKavut*].
26 *Ibid*, para 96.
27 *Ibid*, paras 103-104.
28 *Ibid*, para 106.

NunatuKavut Community Council Inc suggests that while *UNDRIP* may not apply to interpreting the Crown's duty to consult, it can be applied to interpret the *MVRMA* and the consultation obligations of co-management boards under the *MVRMA*.

In *Ross River Dena Council v Canada (AG)*,[29] the Ross River Dena Council ("RRDC") and Canada agreed "that UNDRIP can be used as an aid to the interpretation of domestic law, however, there may be an issue about whether UNDRIP can be used to interpret the Constitution."[30] The Supreme Court of Yukon did not have to resolve this issue, and instead considered whether Canada has failed to "implement" *UNDRIP*. The Court noted that:

- Minister of Indigenous and Northern Affairs, Carolyn Bennett endorsed *UNDRIP* at a meeting of the United Nations Permanent Forum on Indigenous Issues in New York City.[31]
- Minister of Justice, Jody Wilson-Raybould, gave a speech in Vancouver, British Columbia, where she acknowledged that Canada had endorsed *UNDRIP* without qualification.[32]
- Canada issued a press release announcing the creation of a working group of Ministers on the review of laws and policies related to Indigenous peoples.[33]

On the basis of these facts, the Court held that "it cannot fairly be said that Canada is refusing to implement *UNDRIP*."[34]

Overall, Canadian court cases provide little clarity on what is required to fulfill FPIC or other rights provided for by *UNDRIP*.

5 INTERPRETATION OF *UNDRIP* BY INDIGENOUS ORGANIZATIONS

Many Indigenous communities and organizations assert that Canada should implement *UNDRIP* and require FPIC of Indigenous parties prior to approval of development.

Some Indigenous organizations have provided their own interpretations of the scope and contentof *UNDRIP* rights, and specifically FPIC.

29 2017 YKSC 59 [*RRDC*].
30 *Ibid* at para 303.
31 *Ibid* at para 308.
32 *Ibid* at para 309.
33 *Ibid* at para 310.
34 *Ibid* at para 311.

5.1 ASSEMBLY OF FIRST NATIONS

The Assembly of First Nations ("AFN") set out its interpretation of FPIC in a submission to the United Nations' Expert Mechanism on the Rights of Indigenous Peoples, for consideration in the Expert Mechanism's study on FPIC.[35]

AFN interprets FPIC as "more than consultation" and specifically as:

> protection from duress and coercion; disclosure of all necessary information; honesty and fair dealing on the part of government andother proponents; as well as capacity to deploy [the Indigenous Group's] own knowledge and values through the application of [the Indigenous Group's] own laws and to conduct, for example, assessments of the potential impacts; and assurance no actions will be taken until First Nations have had time and opportunity to cometo a decision according to [the Indigenous Group's] own processes and traditions.[36]

In its submission, AFN explicitly references northern co-management regimes as examples of situations where Indigenous groups' exercise of FPIC is "accommodated within the Canadian legal structure."[37]

AFN explains that

> agreements negotiated through the comprehensive land claims or 'modern Treaty' process set out areas where First Nations now exercise exclusive jurisdiction or participate in decision making through co-management and joint decision-making structures. For the most part, these processes have supported proposed resource development activities brought before them, albeit with conditions, and final approvals have subsequently been issued by the federal, provincial and territorial governments. However, there are also examples where decisions through these mechanisms to reject proposals for resource development activities within the governed territories have subsequently been upheld.[38]

[35] Assembly of First Nations, "Submission of the Assembly of First Nations (AFN) on Free Prior and Informed Consent (FPIC) for the Expert Mechanism on the Rights of Indigenous Peoples" (n.d.), online: <https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/FPIC/AssemblyFirstNations_Canada.pdf.>

[36] *Ibid* at p 1 and 4.

[37] *Ibid* at p 15.

[38] *Ibid*.

AFN cites a decision of the Mackenzie Valley Environmental Impact Review Board ("MVEIRB") as an example of FPIC in operation.[39] In 2004, MVEIRB recommended that a proposed diamond exploration project in the Drybones area not proceed after the Yellowknives Dene raised serious concerns about the impact of the proposed exploration on Drybones Bay, an important cultural site.[40] The Federal Government adopted the Board's recommendation and rejected the proposal without EIR.[41] AFN also cites cases where the Nunavut Impact Review Board and panels appointed under the federal *Canadian Environmental Assessment Act* rejected proposed projects.

5.2 UNION OF BC INDIAN CHIEFS

The Union of British Columbia Indian Chiefs ("UBCIC") issued an open letter to Prime Minister Justin Trudeau in 2015 on *UNDRIP* and FPIC.[42] The UBCIC's open letter states that

> FPIC is the right of Indigenous Peoples to say 'no' to the impositionof decisions that would further compound the marginalization, impoverishment and dispossession to which they have been subjected throughout history. FPIC is also the power to say 'yes' to mutually beneficially initiatives that can promote healthy and vital Indigenous Nations for the benefit of present and future generations.[43]

The UBCIC called on the federal government to ensure that federal laws, regulations and policies – especially those dealing with resource development – are reformed to ensure that the FPIC of Indigenous Peoples is required for any decisions that have the potential for serious impacts on the environment and on Indigenous Peoples' rights.[44]

5.3 INUVIALUIT REGIONAL CORPORATION

The Inuvialuit Regional Corporation ("IRC"), in its intervenor factum before the Supreme Courtof Canada in *Clyde River (Hamlet) v Petroleum Geo-Services Inc*,[45] put forward its opinion on the scope of the Crown's obligations when engaging in "deep consultation."

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39 *Ibid* at p 15-16.

40 See MVEIRB Online Registry re Drybones Bay Mineral Exploration at: MVEIRB, "Drybones Bay Mineral Exploration – EA03-004" (2020), online: <http://reviewboard.ca/registry/ea03-004>.

41 *Ibid* at p 15-16.

42 The Union of British Columbia Indian Chiefs, "Joint Open letter: Prime Minister Justin Trudeau - United Nations Declaration on the Rights of Indigenous Peoples & Free, Prior and Informed Consent" (2015), online: <https://www.ubcic.bc.ca/pmtrudeau_undrip_fpic>.

43 *Ibid*.

44 *Ibid*.

45 SCC 2017 40 [*Clyde River*].

The IRC submitted that "where deep consultation is required, the international legal principle of FPIC as outlined in *UNDRIP* offers an incremental, logical and necessary clarification of the scope and content of deep consultation in Canada in the context of a modern treaty."[46]

The IRC argued that the process required to achieve FPIC in situations of deep consultation includes six key elements:

1 *Freedom from force, intimidation, manipulation, coercion or pressure by a proponent*: if this element is not met, consent will not be valid.

2 *Mutual agreement on a process for consultation*: this includes accommodating the needs of the participant Aboriginal group, for example by setting a schedule for consultation that provides for different harvesting seasons or days of importance.

3 *Robust and satisfactory engagement with the Aboriginal group prior to approval*: this must take place before the government authorizes or commits to undertake any activity related to the project within Indigenous territory.

4 *Sufficient and timely information exchange*: this requires a demonstrated understanding of the Aboriginal right at stake and the specific nature of the potential impacts on the Aboriginal interests in question. The Crown also has a responsibility to receive and understand project concerns, including those based in Traditional Knowledge, from the rights holders.

5 *Proper resourcing, both technical and financial, to allow the Aboriginal group to meaningfully participate*: attention must be given to the implications of power imbalances. The Crown must also provide the Aboriginal people with a reasonable amount of time commensurate with the significance of the possible impacts.

6 *Shared objective of obtaining the reasonable consent of the Aboriginal group*: consent is a complex process of building a relationship, exchanging information, conducting analysis, and fully integrating an Aboriginal community in the process of discussion, analysis and decision-making. Consent is not a veto for rights holders.[47]

The IRC further argued that if the Crown has diligently pursued the requirements of FPIC and the Indigenous party withholds its consent

- unreasonably, then the approval may proceed

[46] *Ibid* (Factum of the Intervenor Inuvialuit Regional Corporation at para 6).
[47] *Ibid* at paras 23-30.

- reasonably, then the Crown may either accept the decision and not proceed with the project, or the Crown may proceed with the project without consent if the Crown can justify the infringement of the Aboriginal interest under the *Sparrow*[48] framework.[49]

6 RELEVANCE OF *UNDRIP*/FPIC IN THE MACKENZIE VALLEY RESOURCE CO-MANAGEMENT REGIME

The *MVRMA* obligates co-management boards to consider the impact of projects and approvals on Indigenous peoples, and provides for significant Indigenous involvement in both board hearing processes and in decision-making. Indigenous involvement in co-management is constitutionally protected through land claim agreements.

In the table below, we list *UNDRIP* rights and elements of FPIC, as articulated by Indigenous organizations and discussed above. We then compare these elements to the processes and rights provided in the Mackenzie Valley co-management regime. Specifically we consider the processes of MVEIRB and the Mackenzie Valley Land and Water Board ("MVLWB") and its regional panels.

Given the significant and constitutionally protected involvement of Indigenous peoples in board decision-making, we suggest that the existing Mackenzie Valley co-management regime fulfills several substantive and procedural elements of *UNDRIP*, and FPIC in particular.

***UNDRIP* Rights**	**Mackenzie Valley Co-Management Regime and Land Claims**
Right to own, use, develop and control their lands, territories and resources (Article 26)	Land claim organizations own and therefore control and can develop large areas of land owned in fee simple (i.e., settlement lands). Beyond that, land claim organizations participate in co-management regimes covering the entirety of their respective settlement areas, through which the organizations are able to participate in decision-making about the use and development of land.

[48] *R v Sparrow*, [1990] 1 SCR 1075 at 1113.

[49] *Clyde River*, *supra* note 45 (Factum of the Intervenor Inuvialuit Regional Corporation at paras 36-37).

***UNDRIP* Rights**	**Mackenzie Valley Co-Management Regime and Land Claims**
Right to conservation and protection of the environment (Article 29)	Pursuant to the *MVRMA*, MVLWBs must, in exercising their powers, consider "the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley."[50] The *MVRMA* also provides that the EA/EIR process must have regard to the importance of conservation to the well-being and way of life of aboriginal peoples.[51] Both the MVEIRB and MVLWB must ensure that the parts of the EA/EIR process for whichthey are responsible meet these objectives (preliminary screening for MVLWB, EA and EIR forMVEIRB).
Right to fair, independent, impartial, open and transparent process to recognize and adjudicate rights to territory. Processes must recognize Indigenous peoples' laws and traditions (Article 27)	Co-management boards, as administrative tribunals, are required by law to be procedurally fair (i.e., impartial and independent). Where boards fail to ensure procedural fairness, board decisions are subject to judicial review by courts. MVEIRB and the MVLWBs are required by law to engage with s.35 rights-holders and land claim organizations during decision-making, and to consider any views raised during consultation "fully and impartially."[52] The *MVRMA* also requires members of MVEIRB and the MVLWBs to be free of any conflict of interest relative to proposed projects.[53]

50 *MVRMA*, *supra* note 1, s 60.1(a).
51 *Ibid*, s 115(1).
52 *Ibid*, s 3.
53 *Ibid*, ss 16(1), 123.2(1), 144.33.

***UNDRIP* Rights**	**Mackenzie Valley Co-Management Regime and Land Claims**
Right to participate in decision-making in matters that would affect their rights through representatives chosen by Indigenous peoples in accordance with their own procedures (Article 18)	The Mackenzie Valley land claims and the *MVRMA* mandate Indigenous involvement in decision-making. The appointment processes and membership of *MVRMA* Boards ensures Indigenous representation among decision-makers.[54] Indigenous self-governments are final decision-makers in some circumstances.[55]
Right to FPIC prior to approval of project affecting territory (Article 32)	
• Robust and satisfactory engagement prior to approval (IRC)	The level of engagement and consultation required prior to project approval in the Mackenzie Valley is unparalleled in Canada.
• Protection from duress and coercion (AFN) • Freedom from force, intimidation, manipulation, coercion or pressure by a proponent (IRC) • Honesty and fair dealing on the part of government and other proponents (AFN)	Mackenzie Valley co-management boards facilitate a public and accountable decision-making process with respect to resource development. Boards are required to consult with Indigenous decision-makers, and the parameters of consultation are clearly defined in the *MVRMA*.[56]

54 *Ibid*, ss 54(2), 56(2), 57.1(2), 99(4), 112(1).
55 See: MVRMA, *ibid*, ss 131.1(1) and 137.1.
56 *Ibid*, s 3.

***UNDRIP* Rights**	**Mackenzie Valley Co-Management Regime and Land Claims**
• Disclosure of all necessary information (AFN) • Sufficient and timely information exchange (IRC)	Indigenous peoples can and do request and receive additional information from project proponents and the Crown about proposed developments via information requests. Indigenous peoples also make presentations, ask questions, and comment on the Crown and project proponents' presentations at public hearings. In the EA process, once the co-management processis complete, the Minister re-contacts all s. 35 rights-holders and asks whether MVEIRB's recommended mitigation satisfies their concerns. If the rights-holders are not satisfied, the Crown conducts a second round of consultations where rights-holders can request additional mitigation or accommodation.
• Proper technical and financial resourcing to allow meaningful participation (IRC)	Co-management boards have technical staff who ensure that the requirements of the *MVRMA* and land claims are addressed before an EA or other regulatory decision-making occurs. Board resourcesgo towards making a fulsome and properly analyzed decision. Fulsome and properly analyzed decisions benefit all parties. Further, the federal government (Crown-Indigenous Relations and Northern Affairs Canada) has recently implemented an intervenor program for EIA. It would be beneficial if that funding were available forlarge technical Type A Water Licencing proceedingsas well.

UNDRIP Rights	Mackenzie Valley Co-Management Regime and Land Claims
• Capacity to deploy Indigenous knowledge and values through the application of Indigenous laws and to conduct assessments of potential impacts (AFN)	MVEIRB and MVLWBs must, in exercising their powers, consider traditional knowledge as well as other scientific information where such knowledge or information is made available to the Boards.[57] MVEIRB in particular has developed detailed guidelines for incorporating traditional knowledge into EIA.[58] Where MVLWBs make decisions they are required to seek and consider the advice of the relevant Renewable Resource Boards to ensure such decisions are consistent with the knowledge base of those boards, which includes traditional knowledge about wildlife and wildlife habitat.[59]

[57] *Ibid*, ss 60.1 and 115.1.

[58] Mackenzie Valley Review Board, "Guidelines for Incorporating Traditional Knowledge in Environmental Impact Assessment" (July 2005), online: <http://reviewboard.ca/upload/ref_library/1247177561_MVReviewBoard_Traditional_Knowledge_Guidelines. pdf> [MVEIRB TK Guidelines].

[59] *MVRMA*, *supra* note 1, s 64: Section 64 requires boards to seek and consider the advice of the renewable resources board established by the land claim agreement applicable in its management area respecting the presence of wildlife and wildlife habitat that might be affected by a use of land or waters or a deposit of wasteproposed in an application for a licence or permit.

***UNDRIP* Rights**	**Mackenzie Valley Co-Management Regime and Land Claims**
• Mutual agreement on a process for consultation, including accommodating the needs/schedule of the participant Aboriginal group (IRC)	The co-management consultation process is the result of negotiated agreements between Indigenous Governments and the federal and territorial government. Workplans prepared by co-management tribunals are designed to meet all legislative obligations. The Crown is ultimately responsible for the adequacy of consultation, although the Crown can rely on Board processes to fulfil its duty to consult in certain circumstances.[60] The MVLWB currently operates under its *Engagement and Consultation Policy*[61] and *Engagement Guidelines*.[62] MVEIRB does not have an official consultation and engagement policy, but has adopted the MVLWB Engagement Policy on an interim basis.[63] MVEIRB applies elements of the MVLWB Engagement Policy to EIA processes as applicable.[64] The MVLWB Engagement Policy requires proponents to consult and engage with affected Indigenous groups as a part of a complete application. The Boards provide translation services at hearings and frequently require participants to translate key documents into Indigenous languages.[65]

[60] *Clyde River*, *supra* note 45; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 4.

[61] The MVLWB Policy was originally released in 2013, and updated in 2018. See: Land and Water Boards of the Mackenzie Valley, "Engagement and Consultation Policy" (5 June 2018), online: <https://wlwb.ca/sites/default/files/mvlwb_engagement_and_consultation_policy_-_nov_25_19.pdf> [MVLWBEngagement Policy].

[62] Land and Water Boards of the Mackenzie Valley, "Engagement Guidelines for Applicants and Holders of Water Licences and Land Use Permits" (5 June 2018), online: <https://wlwb.ca/sites/default/files/mvlwb_engagement_guidelines_for_holders_of_lups_and_wls_-_october_2_19.pdf>.

[63] Mackenzie Valley Review Board, "Interim Policy Statement: Engagement and Consultation in Environmental Assessment and Impact Review" (2013), online: <http://reviewboard.ca/reference-library-page/policies-and-standards>.

[64] *Ibid*.

UNDRIP Rights	Mackenzie Valley Co-Management Regime and Land Claims
• Right to say 'no' to decisions that would further compound marginalization and power to say 'yes' to mutually beneficially initiatives that (Union of BC Indian Chiefs) • Assurance no actions will be taken until Indigenous communities/organizations have had time and opportunity to come to a decision according their own processes and traditions (AFN) • Shared objective of obtaining reasonable consent (a complex process of building a relationship, exchanging information, conducting analysis, and fully integrating Indigenous community in the process of discussion, analysis and decision-making, **not** a veto) (IRC)	Indigenous organizations in the Mackenzie Valley have negotiated rights to particular processes set out in land claims. The Supreme Court has held that processes established in land claims must be respected.[66] Where decision-making processes have been formalized in the context of a land claim, those processes must be followed. As land owners, Indigenous organizations that own settlement lands in fee simple under land claims are in a position to reject development proposed on their settlement lands. Section 35 rights-holders that are not land claim beneficiaries still have the benefit of the co-management process negotiated by Indigenous land claim organizations. Section 35 rights holders have the option of negotiating a different process with the federal and territorial government.

65 MVEIRB TK Guidelines, *supra* note 58 at p 25; Mackenzie Valley Review Board, "Rules of Procedure for Environmental Assessment and Environmental Impact Review Proceedings" (1 May 2005), online: <http://reviewboard.ca/process_information/guidance_documentation/rules_of_procedure>; MVLWB,"MVLWB Rules of Procedure Including Public Hearings" (December 2018), online: <https://mvlwb.com/sites/default/files/lwb_rules_of_procedure_-_dec_17_18.pdf>.

66 *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58.

APPENDIX A
KEY ARTICLES FROM UNDRIP

ARTICLE 18:

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

ARTICLE 19:

States shall conduct and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

ARTICLE 26:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

ARTICLE 27:

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

ARTICLE 29:

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

ARTICLE 32:

2. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

3. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

4. States shall provide effective mechanism for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environment, economic, social, cultural or spiritual impact.

ARTICLE 38:

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration