The Squamish Nation Assessment Process: Getting to Consent

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Introduction

For centuries people of the Squamish Nation have lived in villages throughout their territory and managed their lands and waters. From the Nation's perspective the lands and waters of their territory have always been theirs, and they have always had the right to use and control these lands and waters, and enjoy their benefits. In *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (*Tsilhqot'in*) the Supreme Court of Canada confirmed that Aboriginal title, which Squamish claims throughout its territory, includes "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land, the right to the economic benefits of the land; and the right to proactively use and manage the land."[1] In addition, the Court found that the right to control land means those seeking to use title land must obtain consent of the title holders, or establish that the incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.

There are a number of major developments proposed in Squamish Nation territory, and the Crown has always presumed that it could proceed with the assessment of proposed projects, and fulfill its duties to consult Squamish, through established environmental assessment (EA) processes under the BC *Environmental Assessment Act* and the *Canadian Environmental Assessment Act*. However, in Squamish's view these processes fall short of what is required to fulfill the Crown's constitutional obligations to Squamish, and certainly do not provide a venue through which Squamish's consent for proposed projects could be secured. As a result, the Squamish Nation has developed and is now implementing its own independent assessment process for major projects proposed in its territory (the Squamish Nation Process). This paper outlines the background from which the Squamish Nation Process emerged, what the Squamish Nation Process is and how it may ultimately lead to the reconciliation of Crown and Squamish Nation decisions on major project proposals in Squamish territory.

[1] *Tsilhqot'in*, at para.73.

Background

The importance of consent

The importance of receiving First Nations' consent before undertaking activities that would adversely impact their rights, interests and territories is not a new concept. It was articulated by the Supreme Court of Canada in *Delgamuukw v British Columbia*, 3 SCR 1010 [1997] (*Delgamuukw*) almost 20 years ago, and was again set out in *Haida Nation v British Columbia (Minster of Forests),* 2004 SCC 73 (*Haida*) almost ten years later. Internationally, the concept of consent was clearly set out in the United Nations Declaration on the Rights of Indigenous Peoples in 2007.

Despite growing calls for free, prior and informed consent from First Nations in Canada, it was not until the *Tsilhqot'in* decision that the need for consent received significant attention not just from lawyers, but in the corporate boardrooms of project proponents, and in larger public discourse. First Nations' consent has become more than a legal concept, it has also become an important component of receiving social licence for a project from broader Canadian society, that is increasingly aware of historical injustices and the cultural genocide perpetrated by the Crown.[2]

In *Delgamuukw*, the Supreme Court of Canada contemplated that in some circumstances the content of the duty to consult would require the full consent of an aboriginal nation.[3] In 2004 *Haida* confirmed this, with the Court stating that the need for consent would "apply as much to unresolved claims as to intrusions on settled claims."[4] Of course, *Haida* also clearly established the Crown's duty to consult First Nations when it contemplated conduct that would adversely impact their rights and interests, and the general content of that duty. The content of that duty includes that consultation must be meaningful in order for the Crown to discharge its duty.

The UN Declaration on the Rights of Indigenous Peoples

In 2007 the United Nations Declaration on the Rights of Indigenous Peoples[5] (the Declaration) was adopted by the UN General Assembly. The Declaration was finally endorsed by the government of Canada in November 2010,[6] though with caveats. The Declaration enshrines the

[2] Sean Fine, "Chief Justice says Canada attempted "cultural genocide" on aboriginals" *The Globe and Mail* (28 May 2015).
[3] *Delgamukw*, at para. 168.
[4] *Haida*, at para. 24.
[5] The United Nations Declaration on the Rights of Indigenous Peoples (Mar13 September 2007), online: <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf > [the "UN Declaration"].
[6] AANDC, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" 12 November 2010, online: AANDC <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

rights that "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world"[7] and acknowledges both the inherent rights of indigenous peoples, and their contribution to the richness of civilizations and cultures of the world.

The rights recognized by the Declaration include indigenous peoples' right to self-determination, to autonomy and self-government,[8] and their rights to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.[9] States are directed to give legal recognition to these territories.

The Declaration establishes the importance of receiving free, prior and informed consent from indigenous peoples before their traditional lands are taken, occupied, used or damaged. Unless such consent is received, indigenous peoples have the right to redress including through restitution, and when that is not possible, just, fair and equitable compensation.[10] Further, states must consult and cooperate in good faith to obtain their free, prior and informed consent before adopting and implementing any legislative or administrative measures that may affect them.[11]

Tsilhqot'in

In the landmark decision *Tsilhqot'in*, the Supreme Court of Canada clarified the test for aboriginal title, and the rights title confers on First Nations. Importantly for the Crown and proponents seeking to develop aboriginal title lands, the Court stated that:

> The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982.*[12]

Even where Aboriginal title is unproven, the Crown owes a legal duty to consult, and if appropriate, accommodate the unproven interest. Where aboriginal title has been established, the

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[7] UN Declaration, at Article 43.
[8] UN Declaration, at Articles 3, 4.
[9] UN Declaration, at Article 26.
[10] Article 28 of the UN Declaration reads:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

[11] UN Declaration, at Article 19.
[12] *Tsilqot'in,*, at para. 76 [emphasis added].

Crown must obtain First Nation consent or justify the infringement. In order to justify infringement the Crown must show "(1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group".[13] However, as set out below, there remains significant uncertainty as to the situations in which aboriginal title can be justifiably infringed.

First, the question of whether the Crown's duty to consult and accommodate a First Nation is at play when a major industrial project (or any Crown conduct) is proposed in British Columbia. Disputes about the adequacy of Crown consultation regularly find their way into the courts. Protracted legal battles can delay projects by putting into question their legal and economic viability.

Second, while courts have set out the general principles of what constitutes a compelling and substantial objective, the application of these principles remains uncertain. It is infused with the Aboriginal perspective, including the reconciliation of Aboriginal prior occupation with the assertion of the sovereignty of the Crown. In *Delgamuukw* the court contemplated that the development of "forestry, mining, and hydroelectric power, and the general economic development of the interior of British Columbia, protection of the environment" and a number of other broader activities that could be compelling and substantial objectives that might justify infringement, but that justification must be determined on a case by case basis. Case law has not established the situations in which economic development activities can justify infringing aboriginal title. Notably, in *Tsilhqot'in* the Crown was unable to establish that the economics of the proposed forestry and the need to combat the mountain pine beetle were compelling and substantial objectives that justified logging activities that would infringe Tsilhqot'in title.[14]

Third, even if a major industrial development in the heart of a First Nation's territory was found to be a compelling and substantial objective, the incursion of title must also be consistent with the Crown's fiduciary duty to Aboriginal people. In *Tsilhqot'in* the Court clearly stated that "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land."[15] Further, the incursion must be necessary to achieve the government's goal, the government must go no further than necessary to achieve it, and the benefits expected to flow from the activity must not be outweighed by adverse effects.

The three legal concepts that are used to justify infringement, but particularly the latter two – compelling and substantial objective and consistency with the Crown's fiduciary duty – are fraught with complex legal questions. Significant uncertainty remains about the extent to which

[13] *Tsilhqot'in*, at para. 77.
[14] *Tsilhqot'in*, at paras. 125 to 127.
[15] *Tsilhqot'in*, at para. 86.

major industrial activities in First Nations' territories can justifiably infringe Aboriginal title, or survive once aboriginal title is established. These are complex questions that are unlikely to have clear answers for many years and without further direction from the courts that will undoubtedly be forced to grapple with these questions in the future.

Given the above, there is clear incentive for the Crown and project proponents to seek the consent of impacted First Nations before proceeding with major development projects that risk infringing established or asserted Aboriginal title and avoid protracted legal battles. There is no question that *Tsilhqot'in* sends a strong message that governments and others seeking to use the land should obtain the consent of Aboriginal title holders. If they fail to receive consent from Aboriginal groups who later establish title to the lands or waters impacted, and the infringement is not justified, permits may need to be withdrawn and projects dismantled.[16]

Beyond the clear legal ramifications of not obtaining First Nation consent when proposing to develop on aboriginal title lands, the Court emphasizes the practicality of receiving consent:

> Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.[17]

In increasingly competitive markets, receiving First Nation consent may be what gets projects built in British Columbia.

The Crown Environmental Assessment Process

Crown EA processes, both provincial and federal, review the potential impacts of major projects that fall within specific parameters set by regulation. An EA is essentially a planning and mitigation tool that provides Crown decision makers with information to determine whether the effects of a particular project (after mitigation measures have been established) are acceptable, when balanced against other, often competing, interests. The Crown also uses EAs to consider the issues and concerns of the public, First Nations and interested stakeholders and government agencies. Both the provincial and federal governments have relied heavily, and often entirely, on EA processes to fulfill their duty to consult First Nations.

The BC *Environmental Assessment Act*, SBC 2002, c 43 (the *EA Act*) and the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (*CEAA, 2012*) provide the legal framework for assessing impacts on environmental, social and economic values, and to some

[16] *Tsilhqot'in*, at para. 92.
[17] *Tsilhqot'in*, at para. 97.

extent First Nations interests. The *EA Act* does not include specific language regarding an assessment of First Nation interests, but rather assumes First Nations interests are the sum of biophysical measurements. *CEAA, 2012* goes a step further and includes reference to First Nation interests, but practically goes no further than the provincial *Act* in appropriately assessing First Nations interests. Therefore, many First Nations find that the provincial and federal EA processes are flawed when it comes to assessing First Nations interests. Some common complaints include:

- **Project Siting:** EAs begin with proponents proposing a project in an area often without considering First Nation land management objectives or designations for the lands in question or particular values that a project may put at risk. In failing to consult with an affected First Nation prior to submitting a project proposal to be assessed in an EA a project proponent takes the risk of a First Nation taking an immediate adversarial position against the proposal. With the EA authorities accepting a proposal without such consultation being conducted first, the EA process is not viewed by a First Nation as a legitimate process that meaningfully considers its aboriginal interests.

- **Spatial & Temporal Scale:** The existing EA process does not provide a meaningful account of impacts on a spatial scale or temporal scale relevant to First Nations communities. This may be another way to say that an EA does not adequately address cumulative impacts of a project in a First Nation's territory. For example, EAs assess impacts on a specific project area determined by the provincial or federal government without consultation with an affected First Nation. A First Nation perspective may view its territory in a more holistic way and potential impacts may occur beyond the designated project area. Further, an EA only considers project impacts on the current environment, rather than on a pre-industrial baseline that acknowledges that a First Nation's territory and resources have been subject to exploration and degradation since the assertion of British sovereignty. EAs also fail to explicitly consider the impacts of projects on future generations.

- **Cultural Values:** The focus of EA is overly narrow, favouring biophysical components that can be readily measured without input of the affected First Nation communities and often ignoring cultural values that are harder to measure.

- **Aboriginal Rights & Title Oversimplified:** Aboriginal rights and title are poorly assessed in EAs. In part, this is because of a habitual practice by proponents and government to use a reductionist approach that considers rights and title to be the sum of biophysical measurements; e.g. "there are still lots of fish in the territory as a whole; therefore, the right to fish is not significantly impacted". This approach is a gross over-simplification. For example, it ignores the fact that additional shipping traffic, noise, and

navigational barriers may make access to harvesting fish more difficult. First Nation's historical experiences with impacts on community health from contamination of traditional foods may mean First Nations members will no longer harvest fish within the vicinity of a major industrial project, even if they are considered "safe". These impacts are ignored in a typical EA.

- **Poor Information Collection:** Information in an EA is often unilaterally gathered by proponents from other project applications or from studies conducted for projects in different locations, which impact different rights and resources. The information in EAs is also presented in such a way that makes it impossible to accurately understand, let alone mitigate or accommodate, the nature of impacts on Aboriginal rights and title. This is typically the result of the wrong information being collected or the right information being packaged in an irrelevant fashion for First Nations rights and interests.

- **Reporting Style:** EAs are run on tight, legislated timelines and because of these short timelines First Nations are only expected to comment on information gathered by the project proponents. There are few two-way discussions and First Nations often feel they have invested significant time and resources into commenting on a flawed process where their concerns are rarely addressed or substantially integrated into the EA. Mitigation measures tend to be generic, and not at all specific to First Nations' concerns. This level of engagement is not at all commensurate with a duty to consult at the deep end of the *Haida* spectrum, and unlikely to result in First Nations consent to a project.

- **No Shared Decision-Making:** The decision to approve a project is ultimately made by responsible Ministers, from a provincial and/or federal perspective, rather from a local (and indigenous) perspective. The EAs that inform these decisions allow for First Nations participation in commenting on potential project impacts, but do not provide First Nations with the ability to make substantive decisions about a project regarding potential impacts a project on their rights and interests and whether a project is acceptable, or not, to the First Nation. The EA process certainly does not allow for shared decision making where the Nation gets to make a decision about whether or not a project is acceptable in accordance with indigenous laws.

Based on such concerns with EAs, the Squamish Nation has generally taken an adversarial position against the federal and provincial governments regarding its participation in EAs and the ability of the Crown to discharge its duty to consult the Squamish Nation through EAs, including going to court. For example, in *The Squamish Nation et al v The Minister of Sustainable Resource Management et al*, 2004 BCSC 1320 the Nation challenged the Crownainable Resource Management et alsarof the scope of the Garibaldi at Squamish Four Seasons Mountain Resort that was subject to an EA. This early expansion decision impacted the ability of the

Crown to meaningfully consult and accommodate project impacts on Squamish's asserted rights and title. The Squamish Nation was successful in challenging the decision and the Court directed the Crown and proponent to meaningfully consult with and accommodate the Squamish Nation.

Rather than continuing to challenge the Crown's EA process, the Squamish Nation has developed its own project assessment process that runs independent of the EA process. The objective is to provide the Squamish Nation with the ability to make an informed decision on a proposed project based on information it requires for such a decision and an opportunity to have government to government discussions to make a shared decision with the Crown on a proposed project.

The Squamish Nation Process

The Squamish Nation's relationship with the lands and waters in its territory is unique to the Squamish Nation. There are clear philosophical differences between how the Nation and the Crown manage the lands and waters.

Since British sovereignty the Crown has unilaterally exploited the lands and resources within Squamish territory in a way that is not consistent with Squamish Nation management values. However, the law has changed positively in recent years to allow for increased Squamish Nation participation in the decision-making process concerning Squamish lands and resources. Despite this change in law, and as discussed above, the Crown EA processes are not providing an opportunity for obtaining Squamish Nation consent. Because of this, the Squamish Nation has been frustrated when participating in EAs.

In order to get to consent, two key objectives must be met: an informed decision by the Squamish Nation and a shared decision-making process with the Crown. The Squamish Nation Process was designed to allow the Nation to make an informed decision about the impacts a proposed project may have on their lands and waters today, and for generations to come, and to assess whether those impacts are acceptable in light of the Nation's present and future goals and desires. It has also created an opportunity for the Nation and the Crown to discuss their respective decisions on a project and the conditions of potentially approving a project, which may lead to a shared decision on a project.

The Squamish Nation Process allows the Nation to make an informed decision based on the best information available from its perspective, feedback from its members, and advice from independent consultants and scientists. If a project is approved through the Squamish Nation Process proponents and the Crown will also have significant certainty that thorough consideration has been given to the proposed project, and the Nation's consent has been given for the project.

The result is a decision made by the Squamish Nation about whether a project's impacts on their rights and title interests, and the rights and interests of future generations, are acceptable. The Nation's decision will then be discussed with the Crown prior to its decision on the project. The objective is to reconcile any differences in opinion on the approval of the project and to make a shared decision on the project. This approach may be a step towards true reconciliation of Squamish's prior occupation of its territorial lands and the Crown's asserted sovereignty over these lands.

The following describes and discusses the Squamish Nation Process by providing an overview of the legal framework, procedure and methodology of assessment, and decision-making.

The Legal Framework

As mentioned, the federal and provincial EAs are authorized under legislation. The Squamish Nation has an inherent right to govern its lands, but does not have legislation to similarly authorize its assessment process for off-reserve projects. In order to create a process outside of the typical EA process that respects the inherent rights to govern, the Squamish Nation has to create a contractual arrangement with project proponents to set out the terms and conditions of participating in its legal process. The Squamish Nation has a standard framework agreement ("Framework Agreement") that sets out the terms and conditions of participating in the Squamish Nation Process. The Agreement has some flexibility to allow for differences in projects.

Notable deviations from "standard EA practice" that are terms under the Framework Agreement include:

- Squamish Nation will undertake their own independent assessment of the project, and make their own determination on impacts on the Nation's Aboriginal rights and/or title.
- The Squamish Nation Process is confidential. Proponents agree to not provide any information regarding Squamish Nation Aboriginal rights and title, or any other interests, in their EA submissions to provincial or federal governments unless the Nation consents.
- The Squamish Nation Process parallels, to the extent possible, the Crown EA to provide some certainty to proponents and the Crown.
- The Nation does not formally participate in the Crown EA, but agrees to use technical information submitted in the Crown process in its assessment of a project to avoid duplication of information and to make the Squamish Nation Process efficient and less costly. The Nation may send a technical consultant to attend EA Working Group sessions to get clarification on technical information. This also helps the Nation obtain as much relevant information that may be available and can use this information in its process in tandem with information it has collected through other means.

- The proponent agrees to provide supplemental information to the Squamish Nation through an information request process, even if this information is not required under the EA process.
- The Nation is able to fully consider the outcomes of an independent Traditional Use and Occupancy Study and how this information pertains to its understanding of the project rather than allowing the proponents and Crown to make those determinations based on their assumptions.
- The proponent agrees to pay process fees that will fully fund the Squamish Nation Process.
- If the conclusions of the Process point to approval, the Nation will issue an Environmental Certificate setting out the conditions of approval. This takes the form of a legally binding agreement, but is not the same as, and is separate from, any form of impacts and benefits agreement.

A key to the Squamish Nation Process is a cooperative proponent. Federal and Provincial legislation do not require a proponent to enter into a separate assessment process with a First Nation, so entering into the Process is voluntary to a certain extent. As discussed earlier, the risk of protracted legal battles and public awareness of the importance of obtaining First Nations' consent have provided some incentive for proponents to work cooperatively with the Squamish Nation by entering into this Process. The next question, then, is how does the Squamish Nation Process receive recognition from the Crown as a valid assessment process?

Coordination of the Squamish and Crown Processes

Typically the EAO issues a section 11 order to establish the overarching framework of the pre-application and application phases of an EA, including the various timelines for each step and the requirements to consult impacted First Nations. Part of the First Nation consultation process under an EA is collecting information from an affected First Nation regarding its Aboriginal rights and title and the potential impacts on those rights and interests and potential avoidance or mitigation measures to address the impacts. This information is to be reported on at defined time periods within the legislated timeline for the EA.

As the Squamish Nation Process requires the proponent to not provide such information to the federal and provincial EA authorities for use in the Crown EA process, and has different timelines for information sharing under its Process, the consultation process as set out under the section 11 Order is inconsistent with the terms of the Squamish Nation Process. Therefore, the Nation and the Crown have to agree on ways to coordinate their respective processes.

On one project subject to the Squamish Nation Process the provincial Crown amended its section 11 order to acknowledge that the Squamish Nation was conducting its own independent

assessment of the project and that the project proponent is participating in that process. Although the proponents and Crown established timelines for reporting on Squamish Nation Aboriginal interests under the amended section 11 order, this was viewed more as an ideal goal than a firm date. Once the goal date was close, the Squamish Nation notified the proponents that it was unable to meet the timeline and that it should, if it has obtained the information it needs to make a decision from the proponents, be in a position to discuss its interests at a time prior to the conclusion of the EA process. This was acceptable to both the proponents and the Crown.

With both the proponent and the Crown in agreement with the Squamish Nation Process, the Nation can begin assessing a proposed project. The following describes and discusses the procedures and methods of assessment under the Squamish Nation Process.

Assessment Procedures and Methods

As with any EA, the Squamish Nation Process has process steps and methods of assessment. However, there are differences between the Squamish Nation Process and the Crown EA process, such as how the project is defined, how issues are scoped, how impacts are measured and how a decision is made. The biggest difference is that the Squamish Nation Process relies heavily on community engagement to make these determinations. Community engagement is a cornerstone of the independent review process. It provides a two way flow of information between the community and the review team. It provides focus to issue scoping and reveals potential (or certain) impact pathways.

The following outlines the six steps the Squamish Nation takes when assessing a proposed project and how it determines whether a project is acceptable or not and, if it is, under what conditions. It should be noted that many of these steps are iterative and each step does not necessarily end where the next begins.

Step 1: Introduce Proposed Project

The first step in the Process is for the proponent to introduce the project to the community. It should not be assumed that all community members know what the proposed project is, the natural resources it will be extracting and selling, or the business that company is engaging in. It is very important to present to the community what the industry is generally (i.e., mining for gold, processing liquid natural gas for sale to export market, etc.) and to provide neutral information on the industry to members so that they have the basic understanding of the industry before presenting on the specific project proposed in the territory. At such a meeting, members will likely provide initial views on what their perceived concerns are or potential benefits may be. These are all logged to help inform the next stage in the process: defining interests and scoping assessment. It is also an opportune time to set out the steps in the Squamish Nation Process so that members understand the steps going forward.

Step 2: Technical Information Collection

Given that the Squamish Nation Process is an evolving assessment process, the Nation is in a position to require information that is being submitted and assessed in the Crown EA process to make an informed decision on a project. Therefore, rather than make duplicative information requests of a project proponent, and to make coordination of the Crown and Squamish Nation Process more efficient and less costly, the Squamish Nation participates in the Crown EA processes on a purely technical level. The Nation does not share information regarding its Aboriginal rights and title in the EA process.

Squamish's participation in the EA is done through an independent consultant who participates in a strictly technical capacity. The consultant in no way represents or speaks on behalf of Squamish Nation's Aboriginal rights and title, or culture in general. Participation in the EA is largely limited to obtaining studies and seeking clarity from the proponent on these studies.

In addition to collecting relevant information from the EA process, Squamish also reviews the proponent's reasoning to determine whether the Nation agrees or disagrees with their conclusions. In some cases, the Nation may agree with the proponent's assessment of potential effects. In other cases, the Nation may find that conclusions are not supported by the data presented; the proponent may not have made a strong argument; or the proponent may not provide supporting evidence for their conclusions. Where the latter is the case, the Nation will make an information request under the Squamish Nation Process to get clarification or supplemental information. This is where the Nation shifts from the EA process to the Squamish Process, with the information is shared on a confidential basis. The objective of the Squamish Process is to have confident conclusions one way or the other, as opposed to an assessment that the proponent's conclusion could be right or wrong, but we simply don't have enough information to know.

It is not the responsibility of the Squamish Nation to prove that the project will or will not have significant adverse effects on the environment. Rather, the burden of proof is on proponents to prove that a project will not have adverse effects on the environment and Squamish' interests.

Step 3: Defining Interests and Scoping Assessment

To create the framework for the assessment the Squamish Nation review team collects information to begin determining which Squamish Nation values may be impacted by the proposed project. The Squamish Nation has adopted the valued component (VC) concept that the Crown uses in its EA process, but has defined it in its own unique way to reflect its perspective of land management. Generally, the Squamish Nation has developed a single VC - Aboriginal Rights and Title - which is an umbrella to a number of interconnected guiding topics (GT) that

make up the whole VC. One reason for adopting the VC concept is to keep language consistent when making a shared decision with the Crown on a project.

Defining the values that make up the VC is heavily influenced by community input. A number of community hall meetings are held (with comment sheets available for submission to the review team), focus group meetings are held, email and phone accounts are set up for members to submit project specific comments to, and there is direct dialogue with interested community members (coffee, lunch, etc.). All community questions and comments are recorded and integrated into the Squamish Nation Process. Other sources include land use plans, past files related to the area in question, ethnographies and traditional use and occupancy studies (TUOS).

The TUOS plays an important role in the Squamish Nation Process. The use of a TUOS is not new in an EA, but what is unique to the Squamish Nation Process is how the TUOS is used. The TUOS shows distinct areas where Squamish members have and continue to exercise Aboriginal rights in areas impacted by a project. However, the scope of traditional and current use is often not the primary message that emerges from a TUOS. The history of use and occupancy is more complex than a list of specific sites or even trails, which could potentially be avoided by project design or construction practices. Rather, the TUOS reveals a hugely complex tapestry of uses, in which Squamish Nation members exist as part of the land base. The most important message of the TUOS is often that Squamish members rely, and have always relied upon, the territory in its entirety. For example, use and occupancy of a project area and the surrounding lands and waters requires freedom of movement and intact natural resources. Specific use of the land will shift based on what is available and what is needed; the natural environment is dynamic and so too is the human reliance on it. In a typical EA process a TUOS is used to list specific impacts and identify ways impacts can be mitigated, however conclusions are often based on assumptions made by the proponent's consultants and not in direct dialogue with the First Nation. Given the complexity of traditional use and occupancy, avoiding a specific site does not necessarily mean that the use is not impacted.

Through early internal team discussions, community meetings, meetings with leadership and targeted focus groups with elders and knowledge holders with particular knowledge about a specific project area, GTs are determined for each assessment that goes through the Squamish Process. The Process uses the GTs, which collectively could be a proxy for Aboriginal rights and title, are used to focus the assessment of a project. Also, the Process uses the GTs to define the scope of the assessment, both spatially and temporally.

Examples of some GTs used as a proxy for Aboriginal rights and title in a Squamish Nation Process include:

- Impacts to marine environment;
- Impacts to terrestrial and freshwater environment;
- Impacts to lands in which Squamish has formal governance and/or defined management objectives;
- Impacts to use and occupancy in the impacted region;
- Impacts to transmission of culture and history; and
- Impacts to growth and revitalization of the Squamish language.

Based on these examples, one can see that the scope of the Squamish Nation's assessment is likely to exceed the spatial and temporal scope of a typical EA project area, the type of issues to be assessed and the past and future impacts on Squamish interests. Using the technical information obtained in the EA process and the information collected from the community, the review team will identify gaps in the proponent's information relating to the potential impacts on the Squamish Nation VC. The review team then has the opportunity to make information requests of the proponent, which will likely go beyond what information a proponent is required to submit in the EA process.

It is, however, very important to stress that this set of GTs, and more importantly the way they are assessed, may be a compromise solution given the limited time available when conducting such an assessment. Future applications of the Squamish Process may allow a more detailed approach, particularly if engagement between the Nation and proponent occurs early in the project assessment process. Early engagement allows the Nation to be involved in the design of baseline studies needed to inform the Squamish Nation Process. Such early involvement has been precluded in some cases, causing problems down the road for project approval when the Nation does not have sufficient information to assess the impacts of the project in the face of information deficiencies.

Step 4: Assessment

The Squamish Nation Process has revealed a deep conflict between the traditional EA process and the desired outcomes from the community on the topic of significance determination. Significance determination is a cornerstone of the traditional EA process. In a typical EA Step 1 is defining the impacts on environmental receptor "A"; and Step 2 is defining the significance of those effects. If an effect exists but is not significant, very little attention is paid to it for further consideration. If it is significant, then at least in theory, mitigation options are explored to lessen some attributes of the effect until it is not significant. The definition of "significant" is

subjective, even when dealing with technical and easily measured topics. In essence, the objective of defining significance is to ensure that the ecosystem can bear whatever impacts might occur due to the project. The death of a single fish from a stable population is not a significant loss in this context. Conversely, the death of a single female grizzly sow in Squamish territory likely is significant in this context. Populations are so stressed already that the loss of a single female could have a measurable, long-lasting effect on the population.

When it comes to interpretation of environmental changes on human values – and Aboriginal rights and title fall into this category – things are more difficult, and this is where the conflict is evident. Depending on individual values (or collective community values), the death of a single fish from a single population may still be very significant, for the simple fact that it is still a loss that would not otherwise happen if the project was not built; and that the fish would die in a way that does not reflect community values (e.g., thanks to Creator, honour to ancestors). This is further exacerbated if the loss of a fish is perceived as entirely unnecessary. In other words, the proponent may not demonstrate that a particular part of the project is a necessary part of the project, even if the environmental impacts do turn out to be small. For this reason, the assessment report that sets out the results of the Squamish Nation Process avoids the use of definitive terms for the importance of impacts, but does express what the review team understands to be the impacts of highest concern.

Squamish's internal process to assess impacts on the Squamish Valued Component incorporates the technical information provided through participation in the EA process, along with the information gathered through community engagement and the TUOS. Community knowledge, concerns and cultural history are integral to providing a review that can effectively address Squamish's unique point of view. These inputs also, importantly, inform the guiding topics of the Squamish Nation Process.

Project impacts on each of the GTs (discussed above) are then undertaken. The assessment of impacts on each topic (or subcomponent of the Squamish Nation VC) aims to provide a balanced assessment of the impacts of the project, and discussion of the significance of those impacts based on the assessment team's understanding of cultural priorities. It is important to understand that each GT is considered, but the impact on one GT usually means an impact on the whole of the VC because of the interconnectedness of the GTs.

The assessment is undertaken with a philosophy that it is not the role of the Squamish project review team to determine what constitutes a significant impact on Squamish Nation's interests. The review team attempts to describe the potential impacts, identify potential mitigation to make the project as "good" as it could possibly be, and to summarize the review conclusions. The Squamish leadership makes the final determination on how significant those impacts may be.

It should be noted that determinations of significance are, in large part, subjective. There are some viewpoints that a proposed project will always be incompatible with Squamish interests because, for example: any risk to human health and safety is unacceptable; any impact to the environment and Squamish territory is unacceptable; and, there must be a guarantee against unexpected consequences. These points of view are usually provided by some members during the Process and these views are acknowledged in the assessment report that goes to Chiefs and Council so that Council can consider this point of view with the other conclusions determined in the report.

Step 5: Present Results to Community and Chiefs and Council

The results of the Squamish Nation Process are presented to the Squamish Nation community for their review and consideration at an open community meeting. The community has the opportunity to develop with the review team the potential conditions of project approval.

Chiefs and Council then have an opportunity to review the report, consider the feedback from the community meeting, and ask questions of the review team for any issues requiring clarification. The information provided by the community and Council are used by the review team to draft revisions to the assessment report and the conditions for potential project approval.

Step 6: Final Squamish Decision Making and Conditions

The impacts on the Squamish Nation VC (and its GTs) are set out in an Assessment Report submitted to Chiefs and Council. Draft conditions on potential project approval are provided to leadership as well for consideration.

It is critical to note that after reviewing the Assessment Report and meeting with the community, Chiefs and Council may be of the view that the proposed project is not acceptable because of the significance of impacts posed to Squamish rights and title, risks posed by the project to community health or safety, or the intergenerational impacts on the community.

Chiefs and Council will vote to either reject or accept the recommended draft conditions on a project. If Council approves the conditions, the proponent will be required to enter into a legally binding agreement that sets out the process to satisfy the conditions, mechanisms for enforcing compliance and remedies for non-compliance. If the Council rejects the conditions, the Squamish Nation will either re-engage in discussions with the proponent and Crown to improve on those conditions or will pursue legal options available to it. It is the conditions that become the basis for discussion among the Nation and the Crown regarding a shared decision on the project and reconciliation of interests.

Reconciling Crown and Squamish Decision Making Processes

Once the Nation has had the opportunity to make an informed decision on the project, it is then in a position to have a meaningful discussion with the Crown on what the potential impacts of the project are on its Aboriginal rights and title and other interests. Ideally, the EA authorities will not have made their recommendations to the Minister yet so as to allow discussion on how the Squamish decision - whether an approval with conditions or a rejection - could be incorporated into those recommendations. Provided the decision is an approval with conditions, the proponent will also play a role in how to implement the Squamish conditions through private agreements.

Discuss Mitigation & Conditions with the Crown

Once the Nation has made a decision with respect to a project, the Crown and Nation will meet to discuss Squamish's decision. This is the first point of engagement between the Crown and the Nation regarding Aboriginal rights and title. The importance of beginning the discussion at this stage is that under the EA process the Nation would have been required to provide information regarding its Aboriginal rights and title at a point in time when it did not have the opportunity to fully collect information it required to assess the project, which then creates a situation where the EA authorities are having to make assumptions on incomplete information. We can view this stage, after the Nation has made a decision on potential conditions of approval, as the start of meaningful Crown consultation.

If the Nation decides to approve a project, the Crown and Nation will discuss the conditions prior to the Crown's decision. The Crown may choose to adopt certain Squamish mitigation measures and conditions into the EA Certificate or federal Environmental Assessment Decision Statement. Discussions will focus on the demonstrable integration of Squamish conditions into the EA Certificate and/or Decision Statement.

For Squamish Nation conditions that do not fit squarely within the scope of the EA Certificate or federal Decision Statement, the Crown and Nation may enter into an accommodation agreement that addresses higher level concerns – for example, depending on a project's contribution to cumulative effects, it might include a commitment from the province to engage in Government to Government discussions about land or marine use planning and monitoring cumulative effects on Squamish rights and title interests. For projects with the potential to expand, accommodation agreements are likely to stipulate that the project will not expand without the explicit consent of the Nation.

Discuss Mitigation & Conditions with the Proponent

Provided the Nation approves the recommended conditions of project approval, the Nation and the proponent will enter into a private legally binding agreement on those conditions of approval, called an Environmental Agreement. The Environmental Agreement allows the Squamish Nation to enforce compliance, and should the proponent fail to comply, the Nation would have the opportunity to seek damages, an injunction or specific performance of obligations. This is a very important distinction, as the Nation could take the proponent to court to require specific performance if the proponent breached a particular term of the agreement. If the Squamish Nation does not approve the Environmental Agreement, there is no conditional approval of the project. If approved, the Nation will issue to the proponent a Squamish Nation Environmental Certificate, which sets out the detailed conditions on which project approval is granted. The Environmental Certificate is conditional on the Squamish Nation and proponent coming to an agreement on economic benefits to address the socio-economic impacts of the project on the Nation'ion and proponent coming to an

Conclusion

The basis for the Squamish Nation Process is emerging law, both Canadian and International, around the concept of Indigenous consent. The Squamish Nation Process attempts to bridge the gap between the emerging law and current Crown legislated EA processes. The Squamish Nation Process allows the opportunity for the Squamish Nation to provide its "free, prior and informed consent" to projects proposed in its territory. The Squamish Nation Process creates space for the Nation to collect information it finds relevant and necessary for the review of a project in order to make an informed decision prior to the Crown's decision without being coerced by the Crown or proponent to provide incomplete information on its interests. Consistent with the *Tsilhqot'in* decision, the Process creates an opportunity for the Squamish Nation to manage its Aboriginal title lands in a way that is consistent with its laws and community aspirations. The Process also provides an opportunity for the Nation and the Crown to engage in "meaningful consultation" as contemplated in the *Haida* case.

Currently, the Squamish Nation does not have a legislative framework to implement its inherent right to govern its lands. Although it does not have legislation, it has found a creative way to develop a project review process that has legally binding terms of participation and enforceable remedies for the non-fulfillment of conditions of approval. The key to making the Process successful is a cooperative project proponent that understands the importance of obtaining the Squamish Nation's consent, ensuring project impacts on the environment and on Squamish lands are fully understood so they can be avoided and minimized as appropriate, and avoiding protracted legal battles. Obtaining the Nation's consent is also an important aspect of social license and the goal of reconciliation, which courts have recognized as the purpose of the Crown's duty to consult and accommodate.

The Squamish Nation Process is evolving and should be considered an iterative process right now. Lessons will be learned as the Nation continues to assess major projects under this Process, but the Nation is proud to be doing its part in exploring ways to get to consent and true reconciliation of its prior occupation with the asserted sovereignty of the Crown.