



The State of Industry-First Nations Relations in B.C. – Part II: RECOMMENDATIONS

Context

The complexity of economic reconciliation with First Nations in British Columbia has increased considerably in recent years. This change in circumstances has brought with it both benefits and opportunities as well as risks and challenges. The opportunities and benefits include (generally) stronger relationships between parties, improved capacity within many First Nations, growing First Nation stability in the form of jobs and own-source revenues, and the *potential* for greater economic coordination and institutional alignment. The risks and challenges center around the real and perceived increases in uncertainty that flow from a combination of environmental concerns, issues related to the distribution of development benefits and a shifting governance framework that can create additional cost and risk to investments.

Government, and from a different perspective industry, has attempted to match the shifting landscape with more robust engagement, new policy tools and more resources. However, the situation in BC has become more difficult of late due to a series of factors, including: (1) the *Tsilhqot'in* decision from the Supreme Court of Canada; (2) the ongoing conflict around some key terrestrial projects; (3) the erosion of global commodity prices; and, (4) fallout from the Mount Polley tailings pond failure.

Corresponding to these factors, we are witnessing a commensurate increase in expectations within many First Nation communities – with a heightened awareness of title specific claims that could lead to legal challenges linked directly to a more expansive definition of title recently adopted by the Supreme Court of Canada. To date, collaboration and engagement remain the prevailing narrative; but there is potential for increased tensions in the province over resource development and the allocation of the economic benefits from such development.

While government, industry and First Nations have made progress on the road to reconciliation, drawing on an innovative set of agreements and financial tools, it is increasingly clear that further work is required to deal with outstanding challenges and address new realities.

Through our series on the state of industry-First Nation relations in B.C., the Business Council has sought to document and take stock of the economic reconciliation process in the province. The results of this work have highlighted a number of important and mainly positive trends: 1) increased aboriginal business formations; 2) a proliferation of economic agreements between industry, government and First Nations; 3) growing own-source revenues and capacity improvements at the community level; and 4) a generally positive outlook for the future of economic reconciliation. However, the research has also identified

some areas of concern that have the potential to constrain the ability of all parties to move further down a reconciliation path that maximizes collective economic opportunities.

In the sections below we look more closely at six areas that will require action in order to make further progress on economic reconciliation that benefits all British Columbians:

1. Capacity and resourcing
2. Transparency and information sharing
3. Resolving tension between collaborative and adversarial approaches to consent
4. Dividing the resource rent and meeting accommodation requirements
5. Delegating consultation
6. Building more robust agreements between industry and First Nations

1. Capacity and Resourcing

- Based on the feedback from our members, as well as additional consultations with key stakeholders, it is apparent that resource constraints in First Nation communities and in key government Ministries are limiting the extent to which industry and government can engage in a more comprehensive, efficacious fashion on the ground with First Nations. While this situation cannot be resolved overnight through additional funding, steps must be taken without delay to accelerate capacity development that supports deeper and more proactive forms of engagement.
- As one example of this challenge, we find that the government's proponent consultation guides are well put together and offer useful, up-to-date information. However, the Crown does little to help First Nations and industry (particularly new entrants) to understand the protocols and provide more direct support. While some of these in person services eventually are made available, this tends to occur on a reactive or triage basis, after proponents have encountered difficulties in initial discussions and dealings with First Nations.
- Our research found that there is also an inconsistency across the province within the public service on how consultation requirements are understood and interpreted. Some of this is due to limited capacity and to the people involved having varying degrees of skill to undertake effective engagement. These significant differences and capability/skill/experience gaps foster an attitude of risk avoidance among both statutory decision makers and First Nations communities. In addition to more staffing resources, additional training and knowledge transfer is required to address this shared challenge. This issue should be addressed collaboratively with industry and First Nations.
- Opportunities exist to build capacity in a tripartite fashion, involving industry, government and First Nations. Innovative types of referral processing, such as mutually signed-off project agreements, can help to address referral overload and encourage stronger front-end engagement. More collaborative, cross First Nation

referral processing is also an area that has started to improve regional dynamics and provide the scale required to build strong capacity.

- Overall, a stronger set of financial incentives may be required to bring more capacity online in those First Nation communities that support or have a desire to participate in economic development.

2. Transparency and information sharing

- All parties require quality information to make informed decisions and to undertake economic development effectively. While government, industry and First Nations have invested considerable resources over the past decade to build out and improve the on-the-ground information available to make sound decisions, more must be done to enable the effective sharing of information and deal with the marked variances in information quality across the province.
- Data-sharing and information transparency is an area where both bilateral and tripartite negotiations can improve the flow of data and build shared data platforms to inform actions. Too often, industry proponents (and at times First Nations) are unable to access information relevant to project design at early stages. Meanwhile, First Nations can become immersed in project analysis driven by regulatory processes when more area-based information and data are ultimately required to make well-informed decisions.¹
- Both industry and government are confronted with varying challenges in providing information to First Nations at the community level. Initiatives that allow trusted and respected 3rd parties to supply information – such as academic institutions, credible 3rd party agencies, and trusted civic institutions – could help to build knowledge at the community level and create a more informed platform for decision-making and dialogue.
- The existing regulatory agency model has serious weaknesses in this regard and needs to be augmented by more sectoral, cross-project initiatives. While there are some useful initiatives under way in this area, progress has been slow and it is now time for stepped-up involvement and collaboration with First Nations. Consideration should be given to working on innovative pilot programs through the Natural Resource Transformation Secretariat, which has already initiated a pilot with a medium term objective to have the province's 400+ databases more integrated within the planning and permitting processes.²
- At the appropriate time, a bilateral agreement on how to share strength of claim analysis data would be an important development. The Tsliqoht'in decision does provide some important guidance on the extent and nature of aboriginal title, however it remains the case that this, and other decisions, can best be given meaning through negotiation, not litigation. The 'what next' question, almost by definition, involves collaborative approaches.

¹ This is particularly true in areas where cumulative impact challenges are increasingly a concern.

² The pilot project is on Haida Gwaii and is looking to share, and to the extent possible merge, data between the Haida Nation and the government.



3. Leverage vs principle-based negotiations – resolving tensions between collaborative and adversarial approaches to consent

- Clearly understood project consent requirements are critical for investment certainty. As things currently stand, while much of the legal framework and foundation for economic reconciliation is fairly well established, there is a gap on the precise means by which the expanded definition of title conveyed through the Supreme Court of Canada Tsilhqot'in decision will be put into operational practice by statutory decision makers. This is an important matter that warrants early action by the province.
- First Nations believe the recent Supreme Court of Canada ruling points to vastly expanded areas covered by title, and thus that significant changes are required for such areas. Other legal experts suggest that while there is unquestionably an expanded area of potential title in un-treatied lands, the rules in place around First Nation consultation and accommodation in BC are robust and need not be radically overhauled or jettisoned.³
- As part of the evolving legal landscape, there is some (understandable) dispute on what may constitute 'justifiable infringement' as set forth by the Supreme Court of Canada and, further, how this might be approached without triggering complex litigation between parties. That we do not have a good understanding of the nature and scope of consent requirements between governments is an ongoing concern for the business community, although it is noteworthy that the spirit of collaborative engagement and negotiation to achieve 'consent-like' agreements has been the predominant narrative in recent times. Greater understanding and certainty around consent requirements and the terms of determining 'justifiable infringements' should be shared objectives.
- An important issue that frequently effects negotiations is the issue of overlapping or shared territories. This is a historical challenge, dating back to pre-contact times and one that has been resolved between First Nations on a patchwork basis across the province. All governments will have to work at building better processes to address the various complexities for engagement and agreement-making that result from shared First Nation territories. This will necessitate, to a degree, government and First Nations resolving differences of opinion on the utility of Crown 'strength of claim' analysis and First Nations 'statement of interest' territorial assertions.
- Recognizing that there will be disagreements going forward, it is incumbent on all parties to work together to navigate through differences and pursue economic reconciliation.
- Government could consider a working group model to tackle some of the more systemic challenges that arise from the Tsilhqot'in decision, but that are not readily grounded in the day-to-day engagement between key interests.

³ <http://www.mcmillan.ca/Supreme-Court-declares-Aboriginal-title-in-Tsilhqotin-Nation-v-British-Columbia>

4. Dividing the resource rent and meeting accommodation requirements

- As our research series has shown, BC has been a leader in both resource revenue sharing with First Nations and in the development of First Nation–Industry Benefit Agreements. However, while there is now an understanding of the foundations for accommodation and the means by which the parties participate in constructive discussions, the dividing line between government-to-government and commercial industry-First Nation arrangements has not been well delineated.
- The challenge here is to meet rising First Nation expectations, while also ensuring broader (non-aboriginal) rent distribution continues and recognizing the pressures and imperatives of private sector competitiveness – this includes a relatively urgent need to encourage a more positive view of the BC investment landscape in the capital markets and among leaders in the Canadian corporate community.
- Looking ahead, frameworks that allow for a fair division of the resource revenues, consistent with legal precedents, will need to continue. As it stands now, there is only a very limited understanding of how the private sector fits within the overall obligations of government to fulfill accommodation requirements through revenue-sharing. In theory, it may be possible to continue to treat industry–First Nation agreements as an entirely different form of reconciliation. However, in practice there needs to be at least some understanding of the division of the resource rent.
- One means of dealing with the potential for further shifts in the distribution of resource rents would be to more fully engage First Nations in opportunities to increase returns through equity ownership and asset retention. Recent agreements with respect to Crown land dispositions in Metro Vancouver, and elsewhere, highlight the potential for more innovative and creative means to unlock the value of Crown assets that may, directly or indirectly, have First Nation title interests. The private sector can assist in this area with (ongoing) improvements and innovation in agreements with First Nations, including more creative means of advancing businesses in First Nations communities and building, directly and indirectly, equity (ownership) opportunities.

5. Delegating consultation; driving engagement certainty

- Industry and First Nations in BC have largely embraced the concept of delegated consultation – and the model of economic engagement that has evolved in the province has, with minor exceptions, brought benefits to all parties.
- Much of the front-end work of industry–First Nations consultation could be improved with a clear(er) understanding of expectations (from the Crown and First Nations) and better information (noted above) to engage effectively.
- All parties would benefit from a more clearly defined set of principles to guide the delegation of consultation. In this regard, proponent guides designed by the government have been generally well-received by industry; however they are not fulsome in terms of guiding proponents through all stages of engagement. There may be an opportunity for tripartite discussions to define a framework that the

various parties could support – build more transparency and coordination into the system.

- As we continue down the path of delegated consultation, there is an ongoing need to find additional resources that enable effective consultation through all stages of economic development. While some of the above recommendations can assist in developing this funding, having more (government, industry and First Nations) funds dedicated to directly assist First Nations outside of the modest allocations currently made through environmental assessment processes is required. In certain instances, industry proponents would also benefit from direct and ongoing forms of government assistance – particularly at early stages of development.

6. **Building Better Industry – First Nation Agreements**

- BC is ahead of many jurisdictions in achieving productive First Nation–industry partnerships. These relationships provide an opportunity to build on a comparatively large base of agreements and learnings that should be viewed as a strategic advantage for the province moving forward.
- Our research acknowledges that developing and implementing agreements is hard work for all parties – with both benefits and costs; risks and opportunities for all.
- While there are opportunities to simplify engagement and agreements over time, parties should understand that economic reconciliation through commercial agreements requires investments of time and capacity development – monetary solutions are sometimes not the right substitute. What this means in practical terms is that capacity development improves in First Nation communities, with better outcomes, when agreements are structured to ensure projects deliver a diverse set of benefits.
- To maximize the potential benefits of resource development, the parties need to build and sustain deeper economic relationships – contracting, business joint ventures, equity participation, work force development – all the components of economic reconciliation that enable stronger ties between First Nations and the economic activity in question.
- As the ‘green shoots’ of First Nations economic development continue to grow in BC, all parties will need to look at the mechanisms to sustain growth, build larger-scale enterprises, and more systematically embed economic development into First Nation–industry partnerships.



RECOMMENDATIONS SUMMARY

- I. Address reputational risk for BC with a higher level of engagement of First Nation leaders on key trade and investment missions. (For example: the Finance Minister’s annual tour of major Canadian and US financial centres.)
- II. Increase resourcing to build new, and strengthen existing, capacity within First Nations and the public service:
 - a. A compelling need exists for more resources in MARR and in resource ministries with front-line statutory decision-makers.
 - b. Target capacity funding lifts to First Nations in areas of the province with high levels of economic activity.
 - c. Ensure coordination and leveraging of the New Relationship Trust occurs.
 - d. Tripartite coordination of capacity funding should be made available to assist.
 - e. The federal government needs to step forward with additional funding, human resource capacity, and policy leadership.
- III. Accelerate multi-party data sharing agreements; prioritize integration of First Nations databases and improve access for all parties.
- IV. Deliver more information on resource development at community level through innovative educational partnerships.
- V. Develop a protocol on strength-of-claim information sharing (medium term objective).
- VI. Collaboratively engage with First Nations willing to negotiate versus litigate key aspects of title; consider the option of a legislative framework for addressing title and core aspects of Crown consultation and accommodation framework.
- VII. Work with industry and federal government to find new resource streams that build stronger economic development connections with First Nations through equity participation, business development opportunities, and broader capacity development.
- VIII. The federal government needs to improve its level of engagement and move forward with more innovative funding options, as outlined in the Eyford Report.
- IX. Ensure regulatory reform and outcome based performance measures for industrial activity are reviewed collaboratively, preferably in a tripartite fashion.
- X. Build a stronger understanding of economic opportunities and BC’s competitiveness challenges through more direct and sustained engagement among all parties.

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