



# First Nations Engagement in the Energy Sector in Western Canada

Prepared for Indian Resource Council



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## First Nations and the Energy Sector in Western Canada

Two scenarios, equally compelling but seemingly worlds apart, reflect the reality of First Nations engagement in the Western Canadian energy sector. The first, and the best known, shows First Nations protesters, particularly in British Columbia, opposing the Kinder Morgan Pipeline, criticizing Enbridge's Northern Gateway project, and challenging the construction of the Site C hydro dam in northern British Columbia. The second, much less well-known, captures images of thousands of Aboriginal people working in the industry, First Nations' equity investments in oil and gas fields, hundreds of Indigenous-owned service and supply companies, and long but typically successful negotiations of impact and benefit agreements with Indigenous companies.

Canada struggles to reconcile these two apparently contradictory realities. On the one hand, the natural resource sector is the largest employer of highly-paid First Nations workers in the country, has supported a dramatic expansion of Indigenous entrepreneurship and has empowered dozens of First Nations communities through major financial and engagement agreements. At the same time, pipelines and the complexities of petroleum exploration and development have created numerous flashpoints and conflicts between Aboriginal communities, companies and governments.

Which is it? Is the natural resource and energy sector the frontlines of reconciliation in Canada, the single most important point of constructive and positive collaboration between First Nations and other Canadians? Or is the energy sector the present and future battleground between First Nations and national aspirations for sustained economic development and national prosperity?

The answer, at present, is simple; it is both. First Nations people, remembering the many broken promises and flawed resource developments on Indigenous territories over the past century, are rightly concerned about the environmental, social and economic benefits of major projects. But when they are drawn into the sector as real partners, both in terms of appropriate consultation and active participation, First Nations have been able to strike a balance between protecting local eco-systems, ensuring responsible development on their territories, and creating economic space for their communities in a sector that, until recently, left them on the outside looking in. Even as local and regional debates over natural resource development seemingly put First Nations at odds with government, industry and the public at large and heading for further conflict, First Nations engagement in the industry has create models of collaboration, trust and partnership that hold nation-changing promise for Indigenous peoples and the country at large.

From the outset, it is vital to note that differences of opinion about natural resource and energy development create divisions across ethnic, regional and party lines. At one extreme, a space inhabited by some environmentalists and organizations and some Indigenous groups, further resource development contributes to climate change, carries major ecological risks, and marginalizes First Nations on their traditional territories. Others argue that responsible resource development holds the promise of jobs, business opportunities, revenues for First Nations communities and other governments, and

the prospect of a substantial improvement in prosperity of all Canadians. From this perspective, properly managed and environmentally sound resource development can provide First Nations with business opportunities, local jobs, and financial autonomy. The current debates in Canada occur along these lines, with a deeply divisive conversation that has not left a great deal of room for compromise or collective understanding.

First Nations' participation in the energy sector is at a crucial point, as is the state of oil and gas development across Canada. Half a decade ago, oil and gas was viewed as an assurance of long-term national prosperity. With massive investments underway in the Athabasca oil sands, promising developments in Saskatchewan, large natural gas discoveries in the Mackenzie River Valley, the Yukon and Northwest Territories, and vital oil fields off Newfoundland, Canada seemed destined to benefit from the extensive and carefully managed use of the country's natural resources. But the confidence of the 2010s evaporated quickly. In rapid order, the decline in global demand for oil and gas, improvements in conservation measures, international climate change accords targeted at carbon production, and environmental concerns about oil, gas and pipeline development combined to challenge the expansionary plans and expectations and to put Canada's resource-based economy at considerable risk.

As a starting point, it is vital to appreciate that many – but not all – First Nations in Western Canada are either supportive of properly managed resource development or are open to conversations about the possibilities. Some First Nations are strongly opposed to oil, gas and pipeline development on their territories, although even some of these communities are still willing to engage with company and government officials. Conversely, dozens of First Nations communities have signed agreements with pipeline firms. Many other First Nations, including some whose leadership are publicly critical of energy development, participate economically in the sector. There is considerable room for First Nations agreement and collaboration – and significant barriers and concerns about the path forward.

## **First Nations' Investment and Engagement with Energy Development**

Forty years ago, First Nations had a minimal presence in the Western Canadian energy sector. A few Indigenous people worked in the oil and gas fields and on pipeline construction, but the legal and political system required no such participation. Indigenous communities had little engagement with the resource sector and governments and corporations gave only passing attention to First Nations concerns. In the context of 2016 realities, it is actually difficult to recall the earlier marginalization and lack of concern about Indigenous participation in the Western Canadian natural resource sector. Much has now changed. First Nations are actively involved across the industry, from employment and direct investment to project approval processes and environmental evaluation. There are hundreds of Aboriginally owned companies active in the sector, thousands of Indigenous employees, and dozens of collaboration agreements with First Nations communities. The engagement spans the whole energy field, from uranium mining to hydroelectric projects, oil and natural gas exploration to pipeline development.

That this has occurred is due, in large measure, to consistent and aggressive efforts by First Nations across Canada to gain recognition of their Aboriginal and treaty rights under British and Canadian law.

## Legal Decisions, Politics and First Nations' Participation

Before the 1960s, First Nations lived under the Indian Act and had few recognized rights beyond their limited influence over the management of reserve and band affairs. Faced with a legacy of paternalism, government control and an ill-advised 1969 proposal by the Government of Canada to eliminate Indian status and Indian reserves, First Nations realized that they had to capitalize on the more liberal times and the rights debates of the 1970s to advance their collective interests.

In a series of major Supreme Court of Canada decisions, the country's legal foundation shifted dramatically. It started with the recognition of the Aboriginal right to hunt for food (White and Bob), to pursue Aboriginal title (Calder), to fish for food and ceremonial purposes (Sparrow), and to fish for commercial purposes (Marshall). First Nations, particularly those in British Columbia who had never signed a treaty, fought for the recognition of their rights to the land and their right to have greater control over their traditional territories. In the Prairie provinces, the First Nations fought for the full recognition and a broader interpretation of their rights under the historic treaties, signed in the late 19th and early 20th centuries. The First Nations fought against documented historical injustices, including the mistreatment of First Nations communities during the construction of hydroelectric dams in Manitoba and the under-allocation of reserve lands at the time of treaty signing.<sup>1</sup>

First Nations made a particular effort to gain some measure of control over resource development on their traditional territories. Two Supreme Court decisions – Haida and Taku, both in 2004<sup>2</sup> – led to the Court's definition of the government's "duty to consult and accommodate" with Indigenous peoples before proceeding with development on their lands. These decisions, only a dozen years old, quickly became part of the basic vocabulary of resource development in Canada. The court required that governments and, implicitly, companies consult with affected Aboriginal communities before proceeding with development activities. The consultations were expected to produce appropriate accommodation, including compensation for the disruption of wildfire, lifestyles or the land. Some companies had been making agreements with Indigenous communities before being compelled to do so by the courts, under the emerging rubric of corporate social responsibility and the slowly emerging realization that stronger relations with First Nations could improve business operations and profitability.

First Nations have been on a legal roll of late. A long series of court victories by First Nations convert them into what one writer described as "resource rulers."<sup>3</sup> These have been capped by recent successes, including the transformative Tshilqot'in decision in 2014<sup>4</sup> and the 2016 Daniels judgment,<sup>5</sup> which addressed the legal status of Metis people. Looming over these legal successes is the prospect of further challenges, particularly the First Nations' threatened case on the Natural Resources Transfer Acts of 1930, and literally hundreds of resource-related

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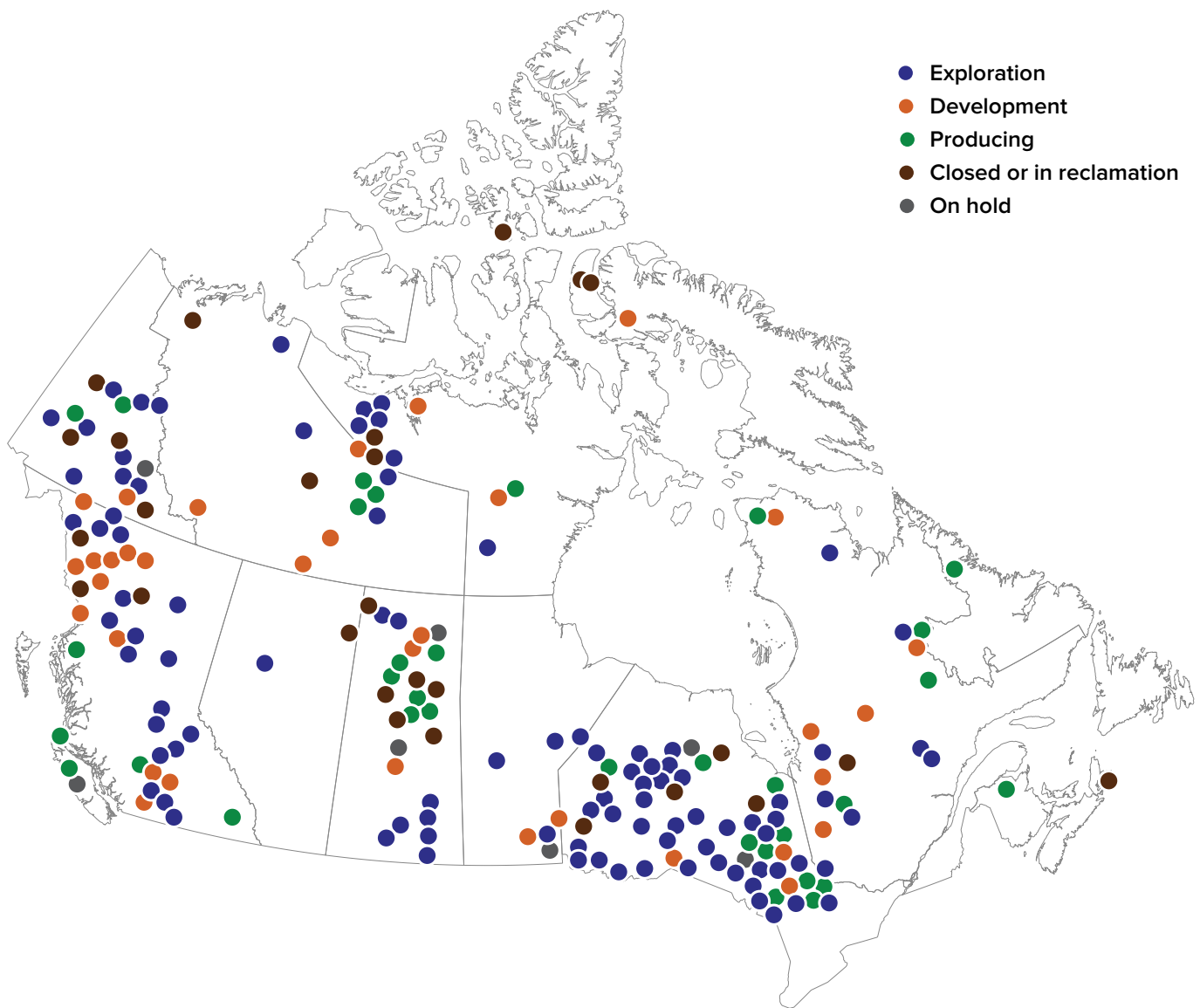
<sup>1</sup> For an overview of historic relationships, see J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 2000).

<sup>2</sup> *Taku River, Tlingit First Nation v. British Columbia*, 2004, *Supreme Court of Canada* 74; *Haida Nation v. British Columbia (Ministry of Forests)*, 2004, *Supreme Court of Canada* 73.

Bill Gallagher, *Resource Rulers: Fortune and Folly on Canada's Road to Resources*. (Toronto: Gallagher, 2012).

<sup>4</sup> Ken Coates and Dwight Newman, *The End is Not Nigh: Reason over alarmism in analysing the Tshilqot'in decision* (Macdonald-Laurier Institute, 2014).

<sup>5</sup> *Daniels vs Canada* (Department of Indian Affairs), 2016, *Supreme Court of Canada*, 12.



*Agreements between Aboriginal organizations and resource extraction firms, 2011*

matters currently before the courts. Governments and corporations, starting from the shallow base of corporate social responsibility and forced by the courts to shift towards duty to consult and accommodate, adapted to the new legal realities. But adjustments have been made and corporate-First Nations relationships improved dramatically in subsequent years.

The ground underneath the natural resource economy continues to shift. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), passed by the UN General Assembly in 2007 and belatedly endorsed by Canada in 2010, raised the stakes further. UNDRIP included several references to the right of Indigenous peoples to express their “free, prior, and informed consent,” including on the approval of resource projects on their traditional territories. When Prime Minister Stephen Harper’s government endorsed UNDRIP, it declared (with considerable Aboriginal agreement) that the UN document was “aspirational” and therefore not a challenge to Canadian law and current practise. In 2015, Liberal Party leader Justin Trudeau indicated his party’s support for UNDRIP. Alberta NDP leader Rachel Notley

made a similar commitment before the 2015 provincial election. In May 2016, the Government of Canada addressed the Permanent Forum on Indigenous Issues at the United Nations and formally committed itself to implementing UNDRIP.

Interpretations of UNDRIP range widely, from Indigenous leaders who treat the Declaration as Canadian law and who believe that the concept of “free, prior and informed consent” creates an Indigenous veto over resource development. Others argue, like before, that UNDRIP is “aspirational” and does not convey specific legal rights and authority over development. The Government of Canada has yet (as of June 2016) to define what “implementation” means in the context of the Declaration, but Minister Carolyn Bennett has indicated that she believes the country’s commitment to “duty to consult and accommodate” meets the requirement to respect the Indigenous right to “free, prior, and informed consent. While the debate remains unresolved, the political reality is that First Nations believe their rights and influence have expanded greatly under UNDRIP, giving them an effective veto over major resource developments, including pipeline construction.

The expansion of Indigenous power has occurred at a critical time. With energy prices and demands down, the Fort McMurray fires harming the oil sands sector, and national and international environmentalists pressing for a large-scale reduction in Canadian energy production, pipelines have taken on great significance. Only a few years ago, companies were actively pursuing the Keystone XL pipeline to the United States, the Northern Gateway bitumen pipeline to the West Coast, the Kinder-Morgan pipeline to south-west British Columbia, the refurbishing and expansion of the Enbridge pipeline to Eastern Canada, and were beginning consideration of the Energy East project linking the West and the Maritimes, natural gas pipelines connected to Liquefied Natural Gas processing plans, among other projects. If some of all of these pipelines had been built, Canada would have had expanded access to markets in the United States, East Coast, and East and South Asia. Had this occurred, particularly without the recent decline in prices and demand, governments would have secured substantial revenues, employment would have skyrocketed, and corporate investments would have continued.

Only a few years ago, the anticipated flurry of pipeline construction promised to extend Western Canada’s prolonged economic boom. Instead, the conjunction of a global economic downturn, plunging oil and gas prices, and resistance to planned pipelines took the edge off the region’s resource economy. Companies and governments looked to pipelines for a quick and sustained boost. Environmentalists, emboldened by the climate change sentiments that peaked in the December 2015 Paris Accord, challenged the pipeline strategy and claimed a major victory when U.S. President Barack Obama rejected the Keystone XL Pipeline in November 2015. The Liberal government strengthened the opposition when prominent politicians spoke of a moratorium on NW coast tanker traffic and a review of pipeline regulatory and environmental approval processes. Some First Nations, particularly those along the routes of the Northern Gateway and Kinder-Morgan pipelines, participated in the protests against these projects at the same time that other First Nations governments were negotiating collaboration arrangements with pipeline companies.

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<sup>6</sup> Dwight Newman, *The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector* (Macdonald-Laurier Institute, 2014).



First Nations have moved from the periphery to the centre of natural resource development in Canada and have, in addition, emerged as major players in the national debate about approval processes related to pipeline construction. Canada and the provinces have a great deal at stake, given the fiscal importance of getting oil and gas to world markets and the potential benefits in terms of employment and economic benefits. First Nations, with strong memories of earlier marginalization on resource projects, are equally concerned about what lies ahead.

## **Impact of Legal Arrangements on Aboriginal Communities**

Evolving case law and the establishment of new doctrines and principles (including the clarification of pre-existing ones) has resulted in varying consequences for Aboriginal communities and Aboriginal organizations. Dwight Newman notes, “The duty to consult doctrine has reawakened tensions among different levels and organizations of Aboriginal representation.”<sup>6</sup> An example of this is the tension between the Assembly of First Nations (AFN) and the Congress of Aboriginal Peoples (CAP) over whether the CAP is a legitimate Aboriginal representative body that the duty of consult applies to. AFN argues the doctrine does not apply to them while CAP, naturally, argues it does.

The aftermath of the establishment of the duty to consult sparked many communities to develop their own consultation policies. In Alberta, for example, the Horse Lake First Nation created a detailed consultation policy, designated an authorized representative to manage consultations, and even offered to help other interested First Nation communities in developing their own policies. Thunderchild First Nation went as far as proactively sending a copy of their consultation policy to key stakeholders and government officials.

Newman makes an important point regarding if government’s need to follow community consultation policies and, if so, to what extent. He notes:

*Government and industry stakeholders have tended to be clear that they will not necessarily defer to the entirety of such policies but would, rather, follow parts of the Aboriginal communities’ policies where they were not inconsistent with the doctrinal law or their own policies, several suggesting that this would be for the sake of good relations with Aboriginal communities.*

Newman also notes that how community based consultation policies “interact” with the duty to consult is unknown. However, in *Xats’ull First Nation v. Gibraltar Mines Ltd*, a dissenting member of the appeal board noted the “government’s failure to look at the consultation guidelines elaborated by the Xats’ull tribal council as one of the factors in her decision that the government had failed to carry out adequate consultation with the First Nation.”

## **Impact of Legal Changes on Industry**

Industry reaction to the duty to consult, and evolving case law, has been equally as swift as the Aboriginal reaction. Junior resource development firms typically have access to

fewer resources in ensuring government consultation obligations are satisfied so as to not impact their activities. Since legal responsibility for consultation ultimately rests with the Crown, government bodies have taken steps to ensure industry has access to a minimum set of resources particularly on the duty to consult. For example, the Saskatchewan Mineral Exploration and Government Advisory Committee created a set of guidelines for the resource development industry.

Likewise, industry groups have taken their own steps forward. The Saskatchewan Mining Association established its own “Best Management Practice to serve as a practical guide on working relations with Aboriginal communities.” Other examples regarding the impacts and aftermath of recent resource develop case law on industry, includes an Enbridge Inc.-negotiated memorandum of understanding with five Dakota First Nations in Manitoba for a pipeline expansion project that crosses their traditional territory, and the clarification by investment fund holders for Enbridge on the potential risk for project non-approval due to Aboriginal rights.

For both First Nations and resource companies, legal challenges have radically transformed the development landscape in Western Canada. UNDRIP and the potential downstream impacts of this sweeping United Nations’ document, has created short-term uncertainty and, potentially, long-term changes in commercial and political arrangements in the field.

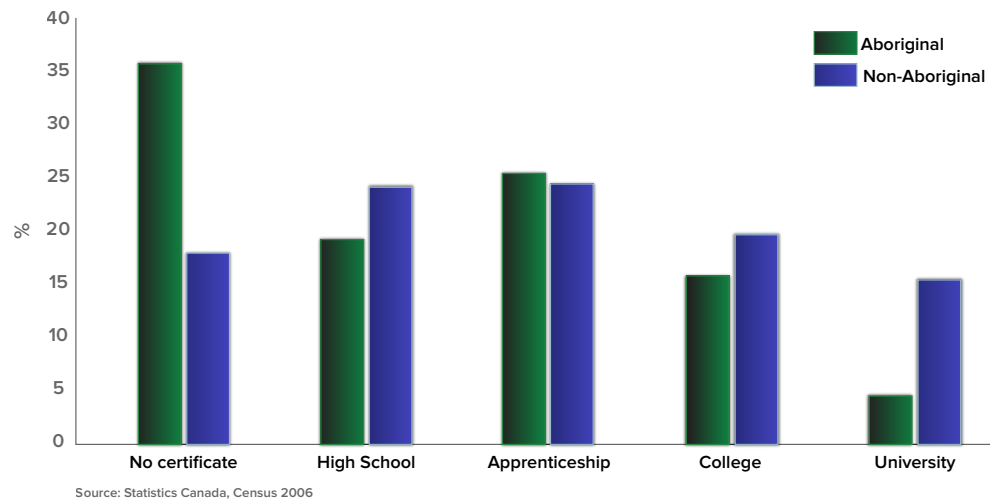
## **The State of First Nations Engagement in Western Energy**

The cumulative impact of court decisions and political processes has been considerable. First Nations must be consulted on developments planned for their traditional territories. Companies and governments, in order to secure First Nations participation and acceptance, have made substantial agreements with Indigenous communities, providing jobs, business opportunities and substantial financial commitments. Separately, Aboriginal people, businesses and communities have created space for themselves within the energy sector, supporting increasing Indigenous entrepreneurship and producing jobs and community benefits for First Nations across the West.

The results have been dramatic. Over the past two decades, First Nations people have found considerable employment in the oil and gas sector. The major companies, led by the oil sands firms in the Fort McMurray area, have hired several thousands of Indigenous workers directly. The service companies that support the industry have likewise sought First Nations workers. This mirrors the experience in the national resource sector, which is the largest employer of Aboriginal people in the Canadian economy. Because of low levels of educational completion among First Nations, the workers tend to be concentrated at the unskilled to low-skilled end of the employment spectrum. Indeed, to a degree that surprises most observers, the natural resource economy has emerged as the front lines of reconciliation in Canada, both in terms of the serious debate about development projects and the degree to First Nations collaboration and engagement with industrial partners.

*“For both First Nations and resource companies, legal challenges have radically transformed the development landscape in Western Canada.”*

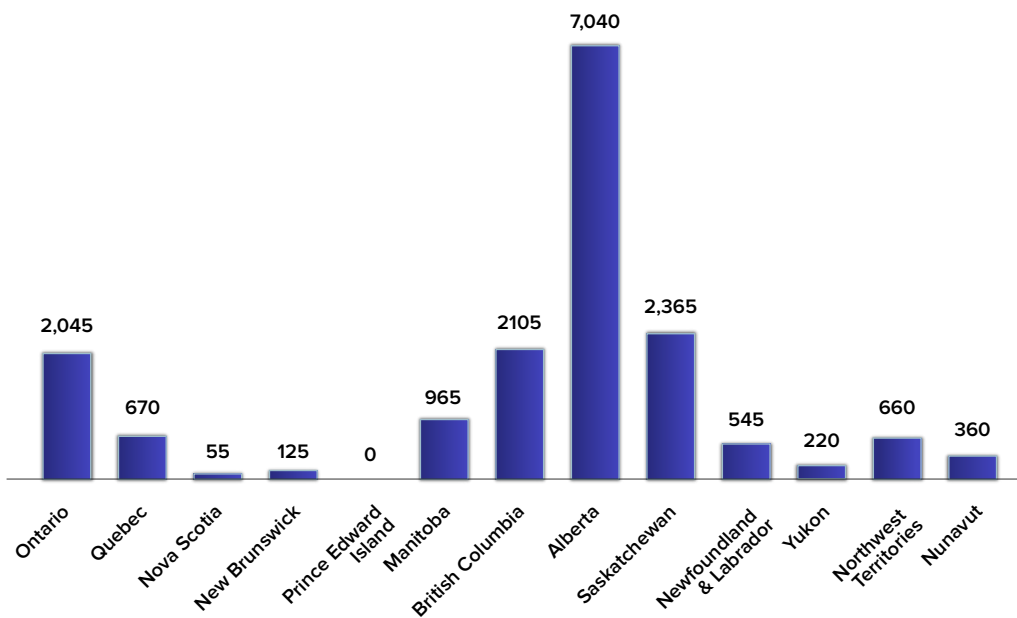
### Low Educational Attainment and Aboriginal Workers in Mining



*Source: Ken Coates, Greg Finnegan, Craig Hall and Kelley Lendsay, **Unearthing Human Resources: Aboriginal Skills Development and Employment in the Natural Resource Sector.***

Similarly, and to a degree that is not well recognized nationally, First Nations entrepreneurship has expanded dramatically over the past two decades. Hundreds of Aboriginally owned companies, again with the oil sands economy at the forefront, play active roles in the sector. Whereas twenty years ago, the First Nations firms operated at the unskilled and entry levels, more recent corporate engagement has included more highly skilled and high value-added work. Fort McMurray, before the regional economy was ravaged by the 2016 wildfire, hosted over a dozen millionaires who earned their money in the oil and gas sector. These Indigenous firms range from Doug Golosky’s privately-held service company, that he sold for over \$400 million, to the extensive holdings of community-owned enterprises like the Kitsaki (La Ronge Indian Band), the Fort McKay First Nation (Fort McMurray) and the Mikisew Cree First Nation.

First Nations communities have signed numerous collaboration agreements with oil, gas and pipeline companies. Even in the most controversial areas – including the Northern Gateway and Kinder-Morgan Pipelines – companies have reached agreements with First Nations, typically providing job training, employment, business ventures and community benefits. The large oil sands firms, likewise, have extensive partnerships with First Nations, greatly expanding Indigenous participation in the sector. Smaller firms, like Seven Generations (active in the Grande Prairie region), have constructive collaborations with First Nations that go well beyond the standard impact and benefit agreements. One of the most substantial examples involves Cameco, Canada’s largest uranium mining company, which has multi-year partnerships with First Nations and Metis communities in northern Saskatchewan, taking an expansive view of settlements affected by mining activity and making sustained commitments to Aboriginal people in the region.



Number of Aboriginal Workers in NAICS 21 by Jurisdiction, 2011

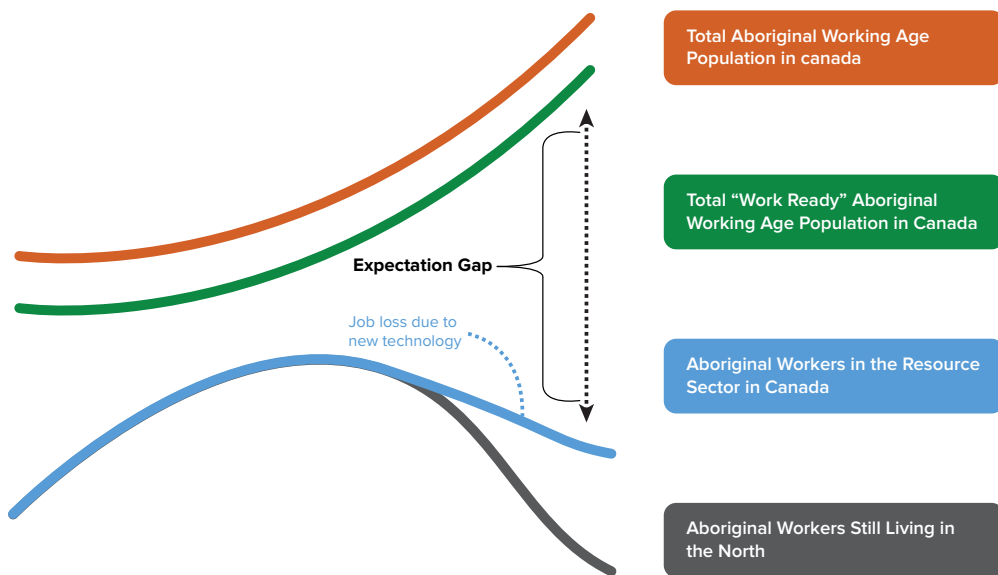
Source: **Ken Coates, Greg Finnegan, Craig Hall and Kelley Lendsay, *Unearthing Human Resources: Aboriginal Skills Development and Employment in the Natural Resource Sector*.**

Financial engagement has broadened in recent years to include, in some jurisdictions, resource revenue sharing. British Columbia, which long-resisted participating with First Nations on land and resource matters, has project-specific resource revenue sharing arrangements. Areas with modern treaties, including the Yukon and Northwest Territories, have treaty-based revenue agreements. These arrangements produce millions of dollars in own source revenue for the First Nations. Similarly, Treaty Land Entitlement settlements, providing compensation for improperly allocated reserves at the time of treaty making, provided several hundred million dollars to First Nations, principally in Manitoba and Saskatchewan. This has provided First Nations communities with sizeable amounts of investment capital for the first time.

<sup>7</sup> Cameco, “Case Study: Collaboration Agreement in Pinehouse: One Year Anniversary,” 2013, [https://www.cameco.com/sustainable\\_development/2014/supportive-communities/aboriginal-peoples-engagement/case-study/](https://www.cameco.com/sustainable_development/2014/supportive-communities/aboriginal-peoples-engagement/case-study/)

English River First Nation, for example, used part of its funding to establish Tron Power/Des Nede Development, which in turn has become an active investor in various natural resource projects. English River has a \$600 million ten year collaboration agreement with Cameco, bringing benefits workforce development, business development, community investment and community engagement and environmental stewardship. The agreement resulted from lengthy negotiations and in response to lawsuit begun in 2008 over a plot of land under the proposed Millennium Project; the land had been acquired using ERFN's Treaty Land Entitlement settlement. As a result of its relationship with northern uranium producers and investment gains resulting from the economic development arm of Meadow Lake Tribal Council, ERFN's economic development corporation, Des Nedhe Development LP, developed a diverse portfolio of businesses and joint ventures across multiple sectors. Des Nedhe earns an estimated \$75-80 million annually and employs over 400 people, over 40% Aboriginal. The village of Pinehouse has worked extensively with the northern Saskatchewan uranium sector. The community reached a \$200 million Collaboration Agreement with Cameco in 2012, which brought workforce and business development, community investment and engagement and environmental stewardship. Between 2007 and 2013, Pinehouse Business North (PBN) and its joint venture partners did more than \$50 million in work at Cameco sites, including \$19 million alone in 2013, as a result of preferred vendor status in tenders and commitments within the agreement.<sup>7</sup> An event large regional agreement will be finalized in 2016.

When the oil and gas development occurs on First Nations land – Maskwacis (formerly known as Hobbema), Sawridge, Stoney Nakoda, Samson Cree, Onion Lake, among others – the returns rise dramatically, as the First Nation capture an even larger shore of the financial benefit from oil and gas extraction. Several communities, with small populations, have secured annual revenues in the tens of millions of dollars. The funds do not always bring immediate salvation to the communities. Maskwacis, which has generated substantial revenues over the years, struggled to convert cash into cultural stability, jobs and social security, but has made significant strides in recent years. (There is another, more complicated story that has been the focus for numerous court challenges. Under long-standing Indian Act regulations, the revenues derived from resources on reserve lands have been held in trust by the Government of Canada. The Government's management of these funds was far from ideal, as subsequent court settlements have demonstrated.) But other First Nations – Little Pine, Onion Lake and Thunderchild – have made conscious and deliberate decisions to invest in oil and gas development as a means of improving local economic opportunities and producing the funds necessary to support autonomy from Indigenous Affairs and the Government of Canada. Knowing that the resources are finite, First Nations government wrestle with the inevitable tensions between spending the funds on immediate needs (the approach generally followed by the Provinces) and setting money aside for long-term purposes (as Norway has done).



*The Expectation Gap in Aboriginal Employment in the Resource Sector  
Northern Aboriginal Workforce in the Resource Sector*

## Indigenous Equity Investments in the Resource Sector

The standard portraits of First Nations participation in the oil and gas sector, to the degree that it is discussed, emphasizes individual employment and Aboriginally owned companies. Much less attention is devoted to one of the most transformative aspects of Indigenous engagement: First Nations equity investments. The shift over the past twenty years – from minor players, to beneficiaries of settlement agreements, to active business engagement, to equity owners – has been substantial. Not all First Nations are involved in the energy sector on an equity basis, but there is more participation than is generally understood.

Consider an energy project that has stalled and that is, all likelihood, not going to proceed in the near and medium future. When the Mackenzie Valley Pipeline was proposed in the 1970s, sparking the Mackenzie Valley Pipeline Inquiry led by Thomas Berger, Aboriginal people spoke out against the plan and were instrumental in the Inquiry’s recommendations that the pipeline be delayed until the Indigenous communities were ready for proper engagement. When the pipeline resurfaced, conditions had changed. The Aboriginal Pipeline Group, owned by Aboriginal groups in the Northwest Territories, were scheduled to have a 33.3% equity investment in the project. This would have been one of the largest indigenous equity positions in Canadian history, and represented a dramatic shift from the situation only a few years earlier. This initiative, while stalled, is not yet dead. The project proponents have requested an extension on the environmental approval, which expired in 2015.

A USA example, the Ute Tribes in Southwestern Colorado is even more dramatic, with the American Indian s holding a combination of 100% ownership and joint venture

agreements with firms such as Red Willow Production, Panther Energy, Red Cedar Gathering, Aka Energy Group, Southern Ute Alternative Energy (incl. Boreas Wind) and Wheatgrass Ridge Wind. Collectively, the Southern Ute Tribes have some \$4 billion in equity investments, produce several hundred million dollars a year in revenues, ensuring substantial autonomy and providing the money needed to invest in community priorities. One analyst described the interesting manner in which the South Ute capitalized on their opportunity:

*The Southern Ute Tribe's success began, perhaps surprisingly, after it declared a moratorium on issuing new energy leases in 1974. The tribal council recognized that the Department of the Interior failed to negotiate appropriate compensation for leases on the reservation. The tribe also lacked the expertise needed to make good decisions about energy development. Following the moratorium, the tribe contracted with outside experts to map and interpret the extent of its undeveloped resources. In the process, the tribe learned the value of their energy resources—and just how undervalued they were by the federal government.*

*After the tribe lifted the moratorium, it continued to consult with outside experts to guide energy development decisions on the reservation. The tribe contracted with attorneys, auditors, petroleum geologists, and others to take advantage of changes in federal policy that allowed tribes to negotiate their own energy leases. The tribe was also awarded several court settlements for the historic federal mismanagement of tribal assets and used the funds to create Red Willow Energy, its first energy business. By operating its own energy companies, the Southern Ute Tribe established an expertise in resource development and a reputation for good business practices and management.<sup>8</sup>*

A Calgary-based firm, Crescent Point Energy, made a significant investment in the UTE operations in 2012, spending more than \$900 million to buy-into their large holdings.

British Columbia has been leading the way in equity and revenue-sharing agreements with First Nations since it announced the New Relationship Accord in 2005, which “discusses revenue-sharing to reflect Aboriginal rights and title interests, and to help First Nations with economic development.”<sup>9</sup> As of April 2016, the province “has signed a total of 62 pipeline benefits agreements with 29 of 32 eligible First Nations (more than 90%) that are located along four proposed natural gas pipeline projects: Pacific Trail Pipeline, Coastal GasLink Pipeline Project, Prince Rupert Gas Transmission Project, and the Westcoast Connector Gas Transmission Project.”<sup>10</sup> All of the agreements include a measure of revenue sharing between the companies and the First Nations. The Haisla, for example, had the option to purchase a 35% construction equity in the Kitimat LNG plan. (The Haisla sold the option and reinvested most of the profits derived from the sale).

The pattern is quite clear; projects have a better chance of proceeding with substantial First Nations involvement. The Pacific Trails Pipeline project, also in British Columbia, contains an option for the First Nations Group Limited Partnership, representing 15 First Nations, to acquire an equity stake in the project. The now stalled Northern Gateway \$7.9 billion project offered 10% equity stakes to Aboriginal communities

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<sup>8</sup> Shawn Regan, “Unlocking the Wealth of Indian Nations: Overcoming Obstacles to Tribal Energy Development,” *PERC Policy Perspective 1*, February 2014, p. 17. <http://www.perc.org/sites/default/files/pdfs/IndianPolicySeries%20HIGH.pdf>

<sup>9</sup> Government of BC, “New Relationship,” <http://www2.gov.bc.ca/gov/content/governments/aboriginal-people/new-relationship>

<sup>10</sup> Government of British Columbia, “Strong First Nations support for pipeline projects for LNG,” *BC Gov News*, 27 April 2016, <https://news.gov.bc.ca/releases/2016ARR0031-000665>

*“The pattern is quite clear; projects have a better chance of proceeding with substantial First Nations involvement.”*

along the proposed pipeline route, plus opportunities for job creation and business development associated with the construction. Enbridge reported significant Indigenous buy-in: “Almost 60 percent of eligible Aboriginal communities along the proposed right of way, representing 60 percent of the First Nations’ population (and 80 percent of the combined First Nations’ and Metis’ population) have agreed to be part owners of the proposed Northern Gateway pipelines. Half of the equity units taken up went to groups in British Columbia, and the other half to groups in Alberta.”<sup>11</sup>

(First Nations opposed to Northern Gateway said the environmental risks did not justify the project going forward. The BC government says it will oppose the project until all requirements outlined in the policy paper “Requirements for British Columbia to Consider Support for Heavy Oil Pipelines” are met, which include that it pass the mandated environmental assessment processes, achieve sufficient First Nations participation, and that BC receive a fair share of the fiscal and economic benefits of the project.<sup>12</sup> While Alberta Premier Rachel Notley seems to be relaxing her stance on the pipeline, BC Environment Minister Mary Polak stated that BC would maintain its opposition until all conditions are met.<sup>13</sup>).

Equity investment in oil and gas has become more commonplace. In some cases – Maskwacis (Hobbema), Sawridge, Stoney and Blueberry First Nation – the oil and gas is on the First Nations reserves, producing sizeable annual royalties for the First Nation. In other instances – Onion Lake, Thunderchild and Little Pine in Saskatchewan – the First Nations are actively purchasing oil and gas leases, expanding production and developing the technical and managerial capabilities to capitalize on opportunities. These groups secure both royalties from oil produced on their land by other production companies and the larger returns associated with ownership of the oil and gas rights and the production capabilities. Onion Lake was, in 2014, the largest oil producing First Nation in Canada, with some 400 oil wells and 14,000 barrels per year in production.<sup>14</sup> A partnership with Black Pearl Resources gives Onion Lake a 34.5 % royalty on each extracted barrel of oil, monies directed into a trust for future capital projects and to business development. A joint venture with Fogo Energy gives Onion Lake half of the oil royalties on each barrel sold and the option to buy out the company. As Chief Wallace Fox observed, “I think it’s time First Nations, especially in this sector, come to the table with no less than 50/50 with any joint venture. The pick and shovel days are gone for Onion Lake Cree. We are going to be in business and have demonstrated that and we are here to work with whoever wants to work with us.”<sup>15</sup>

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<sup>11</sup> Equity agreements and Northern Gateway, <http://www.gatewayfacts.ca/About-The-Project/Newsroom/First-Nations-Engagement/Equity-agreements-and-Northern-Gateway.aspx>

<sup>12</sup> Government of BC, “British Columbia outlines requirements for heavy oil pipeline consideration, BC Gove News, 23 July 2012, <https://news.gov.bc.ca/stories/british-columbia-outlines-requirements-for-heavy-oil-pipeline-consideration>

<sup>13</sup> Justine Hunter, “BC in no rush to approve Enbridge Northern Gateway oil pipeline,” *The Globe and Mail*, 21 April 2016, <http://www.theglobeandmail.com/news/british-columbia/bc-in-no-rush-to-approve-enbridge-northern-gateway-oil-pipeline/article29714892/>

<sup>14</sup> Nathan Elliott, “The Many Layers of Onion Lake Cree Nation,” February 2013, <http://www.onionlake.ca/news/many-layers-onion-lake-cree-nation>

<sup>15</sup> “Joint venture the right way to do oil, gas deals with First Nations,” *AMMSA*, 16/1, 2011, <http://www.ammsa.com/publications/saskatchewan-sage/joint-venture-right-way-do-oil-gas-deals-first-nations>.



Equity investments, past and future, in energy are not limited to the oil and gas sector. The Wuskwatim Generating Station (MB) emerged as a partnership between Nisichawayasikh Cree Nation and Manitoba Hydro, with NCN exercising its option to purchase 33% of the venture. Brookfield Energy provided equity loans of up to \$20 million to allow three participating Saskatchewan First Nations to secure an ownership state in the Pehonan Hydro project. Similarly, the community of Black Lake will hold 30% of the equity, with SaskPower controlling the rest of the Tazi Twe Hydro Project. There is a comparable partnership arrangement governing the Lower Mattagami in Ontario, with the Moose Creek First Nation to hold 25% equity in the generating capabilities. There is, in addition, a wind turbine power test project underway with the Cowessess Energy Storage Project in Saskatchewan. Meadow Lake Tribal Council is developing wood pellet plant, tied to heat and electricity generation for its nine member communities and using waste wood produced from their lumber operations. First Nations ownership is becoming more common in many sectors, from the Muskowekwan Potash Project in Saskatchewan<sup>16</sup> to a growing number of forestry operations across the country.

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<sup>16</sup> This is the first 100% on-reserve mine development, with 80% of projected resource under land acquired with TLE settlement. The agreement between Muskowekwan First Nation (MFN) and Encanto Resources includes equity, employment and business opportunities. The \$3 billion potash solutions mine project has already attracted \$40 M in investment; The project managers worked on \$800 million purchase agreement with India. Muskowekwan First Nation, defined as the owner of the mineral rights will receive revenues, estimated to be around \$80 million per year at 2012 potash prices. Through Muskowekwan Resources Limited (MRL), MFN will earn a share of project profits through equity interest. First Potash, "Muskowekwan Project: Project Description and Technical Proposal," prepared for Canadian Environmental Assessment Agency and Saskatchewan Ministry of Environment, December 2012, <http://www.ceaa.gc.ca/050/documents/p80025/83879E.pdf>.

Environmental Assessment Agency and Saskatchewan Ministry of Environment, December 2012, <http://www.ceaa.gc.ca/050/documents/p80025/83879E.pdf>.

First Nations ownership has emerged in a variety of forms, including:

- Equity loans, typically from the corporate investor;
- Loan guarantees, often managed by the First Nations Financial Management Board and First Nations Finance Authority;
- Accrual equity options, that provide for increased Indigenous equity over time;
- Revenue-sharing arrangements, that provide participating First Nations with access to an agreed-upon share of the royalties produced by the resource project;
- Equity arrangements as spelled out in impact and benefit agreements as part of the duty to consult and accommodate requirements. Ownership can come in the form of carried interest, in which the First Nation is granted ownership (e.g. percentage of shares) without paying anything for its equity share or the First Nation is given opportunity to purchase its share.

These models enable First Nations to participate, even if they are unable to put in the cash up front. If the project shares increase in value, the First Nation could see its equity share escalate dramatically in value. First Nations can borrow against its equity holdings or use the financial returns from the sale of its share to reinvest in economic development. Substantial equity ownership also enhances investor confidence in terms of participating in other First Nation economic development initiatives.

The current models, not surprisingly, have limitations. Equity ownership rarely includes First Nations representation of the corporate Board of Governors. Few First Nations have ready capital for a large-scale equity investment, which means that they have to borrow money to secure a partial ownership stake. Community members, who often have little

direct experience in equity investments, often struggle to balance the risks and benefits from partial ownership. Furthermore, as seasoned stock market players understand, equity shares are vulnerable to shifting market realities. In the case of a project failure, the First Nation ownership stake could evaporate in value as other debt holders are paid out before equity investors.

Pipelines present remarkably complex negotiating challenges, as they span multiple First Nations' territories, the number depending on the length and the cultural distribution of the Indigenous population. The Haisla Nation was instrumental in forming First Nations (PTP) Group Limited Partnership (FNLP) partnership that allows for collective negotiation. The FNLP is comprised of 16 First Nation stakeholders: Haisla Nation, Kitselas First Nation, Lax Kw'alaams Band, Lheidli T'enneh First Nation, McLeod Lake Indian Band, Metlakatla First Nation, Moricetown Indian Band, Nadleh Whut'en First Nation, Nak'azdli Band, Nee Tahi Buhn Indian Band, Saik'uz First Nation, Skin Tyee First Nation, Stellat'en First Nation, Ts'il Kaz Koh First Nation, West Moberly First Nations and Wet'suwet'en First Nation. The Impact and Benefit Agreement between the Province of British Columbia, PTPLP and FNLP provides \$200 million in financial benefits over the life of the project, business and training opportunities and the option for FNLP to acquire an equity interest in the project (Note that the Province of BC's separate benefit agreement also provides \$32 million in non-equity investment in the pipeline.) The arrangements allowed for a 30% equity stake, but financial institutions were not supportive, forcing the First Nations to accept a smaller equity stake.<sup>17</sup>

First Nations and project proponents overcame the logistical and political challenge to a much greater degree than is generally appreciated. In the case of the Coastal GasLink Pipeline Project, 17 of 20 affected First Nations signed pipeline benefits agreements with Government of BC. For the Prince Rupert Gas Transmission Project (BC), 16 of 19 affected First Nations agreed to terms. In the case of the Westcoast Connector Gas Transmission Project (BC), 14 of 19 First Nations along the route signed agreements.<sup>18</sup>

First Nations have also collected equity positions in other energy sectors, including hydroelectric generation. The Wuskwatim Generating Station (MB) is a 200 MW run-of-river project, operating since 2012 as a partnership between Nisichawayasikh Cree Nation and Manitoba Hydro. NCN took up an option to own up to 33% through accrual equity arrangement and this has already been achieved. The community is directing revenue from the project toward increasing economic development initiatives. Their Aboriginal Economic Development Corporation, Nelson House Development Corporation, earns the community between \$40 to 60 million per year.<sup>19</sup> The Pehonan Hydro Project is a proposed 250 MW hydroelectric project located on James Smith Cree Nation reserve land in Saskatchewan. It is a partnership between James Smith Cree Nation, Chakastaypasin Band of the Cree Nation and the Peter Chapman First Nation and Brookfield Renewable Power and Peter Kiewit & Sons. They have an equity loan agreement, financed by Brookfield, to permit First Nations investment.<sup>20</sup> The Tazi Twe Hydroelectric Project in Saskatchewan is a 42-50 MW water diversion project. The arrangement is based on a Power Purchase Agreement (PPA) with SaskPower, signed in 2013. It involves equity partnership between Black Lake First Nation (30%) and the Saskatchewan Crown utility, SaskPower (70%). It is the first hydroelectric project built in Saskatchewan in 33 years

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<sup>17</sup> Peter O'Neil, "BC proposal aims to have First Nations own chunks of major projects," *Vancouver Sun*, 18 January 2016, <http://www.vancouversun.com/business/proposal+aims+have+first+nations+chunks+major+projects/11662706/story.html>

<sup>18</sup> Government of British Columbia, "Strong First Nations support for pipeline projects for LNG," *BC Gov News*, 27 April 2016, <https://news.gov.bc.ca/releases/2016ARR0031-000665>

<sup>19</sup> Confirmed in conversation with David Kobliski, General Manager of Nelson House Development Corporation, 3 May 2016.

<sup>20</sup> James Smith Cree Nation, "Pehonan Hydro Project Update," *James Smith Cree Nation Newsletter*, November 2011, [http://pehonianhydroelectric.com/\\_Global/20/img/content/James%20Smith%20CN%20news%20nov%202011.pdf](http://pehonianhydroelectric.com/_Global/20/img/content/James%20Smith%20CN%20news%20nov%202011.pdf)

and the first facility in Saskatchewan built entirely on First Nations-owned land.

A similar pattern of Indigenous engagement and equity investment is emerging in the alternative energy sector. Meadow Lake Tribal Council has a major bioenergy centre under development that could supply its nine member communities with wood-pelt based on inexpensive electricity and heating. The Cowessess Energy Storage Project in Saskatchewan is a wind turbine and 400 KW/744 KW-hour lithium ion battery operation that went online in 2012. Project funding from came from the Government of Canada's Clean Energy Fund (\$2.8 m), Government of Saskatchewan's Go Green Fund (\$1.4 m), Cowessess First Nation \$1.8 m), Indigenous Affairs and Northern Affairs Canada and the organizational and technical support from the Saskatchewan Research Council.<sup>21</sup> This \$5.5 million demonstration project uses stored power to balance intermittent wind power and provide more continuous, predictable flow to the grid.<sup>22</sup>

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<sup>21</sup> "Cowessess First Nation's wind power project first of its kind, *LeaderPost*, 7 March 2013, <http://www.insightwest.ca/news/wind-insight/cowessess-first-nations-wind-power-project-first-of-its-kind/>

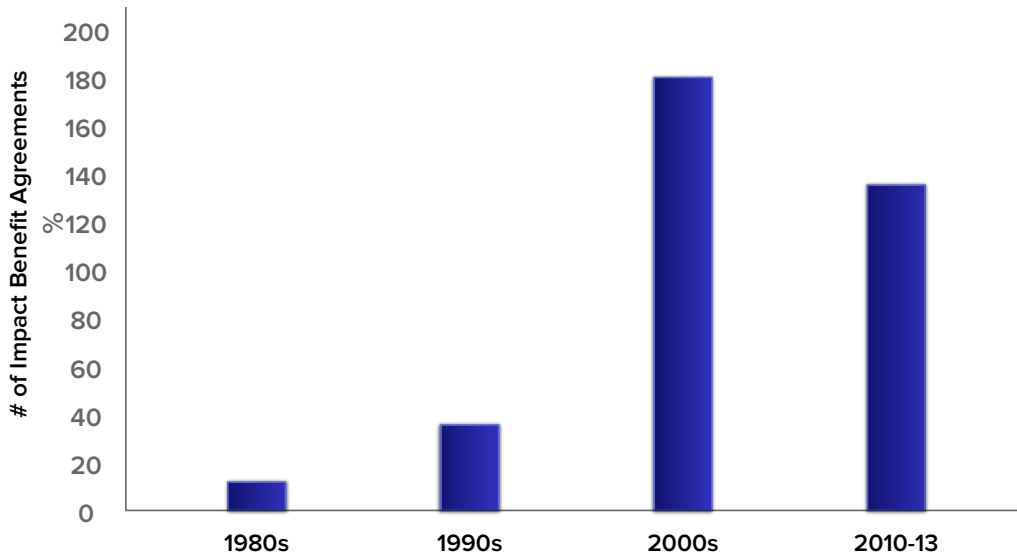
<sup>22</sup> "Wind and Storage Demonstration in a First nations Community: Cowessess First Nation," <http://www.nrcan.gc.ca/energy/funding/current-funding-programs/cef/4983>

<sup>23</sup> ABIC, HFN, <http://www.bcbic.ca/content/tahltan-nation>

<sup>24</sup> Government of British Columbia, "First Nations Clean Energy Business Fund," <http://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-clean-energy-business-fund>

<sup>25</sup> Peter O'Neil, "BC proposal aims to have First Nations own chunks of major projects," *Vancouver Sun*, 18 January 2016, <http://www.vancouversun.com/business/proposal+aims+have+first+nations+chunks+major+projects/11662706/story.html>

First Nations have been able to call on an increasing number of financial regulations and resources to support their equity investments. The Tahltan Resource Development Policy, created in 1987, requires that eight elements and principles be met before a resource development project could start on traditional territory. The sixth provision calls for substantial equity participation by Tahltans in the total project<sup>23</sup> Other Indigenous groups are drafting or implementing "resources laws" which spell out the parameters for their engagement with resource development. First Nations Clean Energy Business Fund (FNCEBF) provides capacity funding and equity funding to promote "increased Aboriginal community participation in the clean energy sector within their asserted traditional territories and treaty areas."<sup>24</sup> The First Nations Finance Authority (FNFA) is a statutory not-for-profit organization without share capital that operates under the authority of the First Nations Fiscal Management Act, 2005. The FNFA's purposes are to provide investment options and capital planning advice. It also access to long-term loans with preferable interest rates. The FNFA does not operate at the direction of the Crown corporation and is governed solely by its Borrowing Members. The First Nations Financial Management Board was also created through the First Nations Fiscal Management Act (FMA). It is designed primarily to provide participating First Nations with the ability to participate in long-term pooled capital borrowing, in much the same way as governments in Canada. There is also a First Nations Major Projects Coalition,<sup>25</sup> made up of 22 First Nations who hope that government will guarantee loans that will allow the to buy equity stakes in major projects.

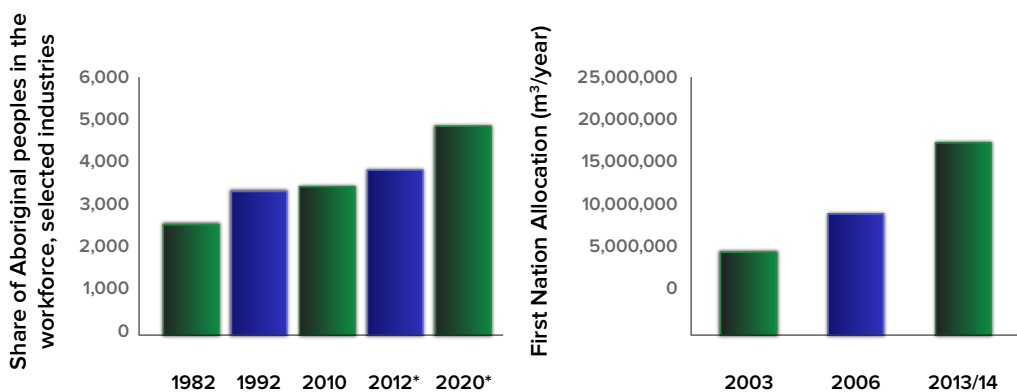


Source: Natural Resources Canada

*The use of Impact Benefit Agreements between industry and Aboriginal communities became an increasingly common practice in the mining sector during the 2000s.*

**Collaboration Agreements:** Indigenous engagement in the resource economy has been assisted by extensive collaboration with corporations, particularly through impact and benefit agreements. In the case of First Nations involved in the forestry sector, for example, 60% of Aboriginal communities have put into place treaties, agreements and/or MOUs while 58% have a contract or partnership with a forestry company.<sup>26</sup> Nationally, there has been a major increase in the number and scale of collaborative arrangements over the past three decades.<sup>27</sup>

There are other signs of rapidly expanding Indigenous engagement in the resource sector. For example, Indigenous land holdings and access to forestry permits has expanded dramatically in recent years

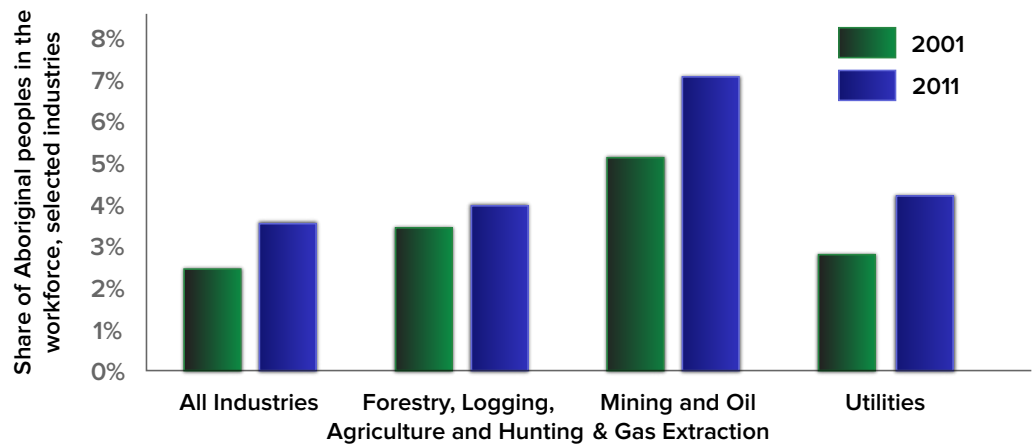


Source: Statistics Canada, National Household Survey 2001 and 2011

<sup>26</sup> National Aboriginal Forestry Association. *Third Report on First Nation Forest Tenure in Canada 2015*. 2015. [www.nafaforestry.org/pdf/2015/First%20Nation-Held%20Forest%20Tenure%20Report%202015.pdf](http://www.nafaforestry.org/pdf/2015/First%20Nation-Held%20Forest%20Tenure%20Report%202015.pdf)

<sup>27</sup> Natural Resources Canada. *Aboriginal Participation: Table of Agreements*. April 2014. Accessed June 15, 2015. <https://www.nrcan.gc.ca/mining-materials/aboriginal/14694>

The empowerment of Aboriginal people has resulted in extensive long-term arrangements across the country, covering mining operations, forestry and other resource fields.



Source: Statistics Canada, National Household Survey 2001 and 2011

*Natural resource industries have been increasing the share of Aboriginal peoples in their workforce.*

The empowerment of Aboriginal people has resulted in extensive long-term arrangements across the country, covering mining operations, forestry and other resource fields. The resource sector dominates in terms of the engagement of Aboriginal works. In 2011, 3.5% of the workers in all industries in Canada were Aboriginal. Forest, logging, agriculture and hunting were higher, at 4%. The utility sector had made inroads, with slightly more than 4% of the workforce being Indigenous. Firms involved with mining and oil and gas extraction counted a full 7% of their employees as Aboriginal, or twice the national average.

One result – and it is an important one – has been the substantial growth of Indigenous employment in the mining, oil and gas sectors. By the 2010s, Aboriginal engagement in the extractive industries is more than three times higher than the percentage of Indigenous employment in the Canadian economy.

### **Aboriginal Economic Development Corporations (AEDC)**

AEDCs have emerged as the major economic vehicle for Indigenous engagement in the resource sector. A quick review of several of the western Canadian AEDCs provides an indication of the diversity of their operations and the nature of their impact.

The Des Nedhe Development Corporation (est. 1991) is owned by the 1400 member English River First Nation in Saskatchewan and managed by the Chief and Council. It has a variety of assets, including Tron Construction & Mining, the Mudjatic Thyssen Joint Venture, Mudjatic Enterprises, Thyssen Mining, Minetec Industrial Supply, English River Enterprises and the English River Property Management. They are one of the First Nations owners of Athabasca Catering, majority owners of the Creative Fire publications relations firm, and 30% investor in JNE Welding.

Meadow Lake Tribal Council RDI is one of Saskatchewan's largest private equity investment managers with a very active interest in resource development. From a base in the forest sector, MLTC RDI has other holdings including MLTC Northern Trucking, Western First Nations Hospitality, Lac La Ronge Wild Rice, Ceres MLTC Fertilizers, Polar Oils, Norsask Transport, Red Eagle Cellular, Norsask Forest Products, Mistik Management, and Sakâw Astiy Management.

The Fort McKay First Nation, based northern of Fort McMurray, Alberta, is one of the most active in the resource sector. The 700 member First Nation, distributed on five reserves, owns the Fort McKay Group of Companies LP (est. 1986), which includes Fort McKay Logistics LP, Steep Bank Earth LP and Strategic Services LP. They have a large number of joint ventures, including Creeburn Lake Lodge and Barge Landing Lodge (with ATCO); First North Catering (with Compass Group Canada); Poplar Point Camp Services (with Athabasca Chipewyan First Nation and ESS Support Services); Caribou Energy Park (with Waiward Capital); Hammerstone Products, and Fort McKay Savanna Oilfield Rentals (partnership with Savanna Energy). The Fort McKay First Nations has over 4,000 employees and annual revenues of over \$700 million.

The Onion Lake Cree Nation, with over 5,500 members in Saskatchewan, is one of the largest oil producing First Nations in the country.<sup>28</sup> The Onion Lake Business Development Corporation operates a series of firms, including All Nations Building Supplies, Askiy Apoy Hauling GP Ltd. , Beretta Pipeline Construction Ltd., Makao Mail Developments GP Ltd. , Onion Lake Enterprises Ltd. and Onion Lake Gas Coop Ltd. They also have joint ventures with such oil companies as Black Pearl Resources. Collectively, the various ventures produced annual revenues of over \$40 million before the recent downturn.

These are but a few of the AEDCs that are re-writing the economic and commercial rules in Western Canada. As they expand their holdings and investable capital, they are gaining greater importance in the region. They have expanded their investment reach, are employing and training more Indigenous employees and are increasingly active in the resource sector.

## The Indigenous Politics of Pipelines and Energy in Western Canada

The politics of Indigenous participation in western Canadian energy are complicated and intense, to say the least. There are issues at the community level, as there are in all Canadian populations, between those who favour oil and gas development with sizeable First Nations participation, those who are undecided and those who strongly oppose further carbon-based projects. These debates happen away from the glare of public debate, for the most part, although the opponents of energy activities are not shy about making their opinions known. There are, as well, substantial issues between companies and First Nations, ranging from the financial terms involved in collaboration

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<sup>28</sup> Nathan Elliott, "The Many Layers of Onion Lake Cree Nation," February 2013, <http://www.onionlake.ca/news/many-layers-onion-lake-cree-nation>

*“When interests align, as they do more often than most people acknowledge, First Nations overcome local differences, strike agreements with companies and other governments, and get actively involved through direct employment, business contracts and equity investments.”*

agreements to disagreements over the degree of consultation and Aboriginal consent required. Federal and provincial authorities likewise have issues with First Nations, and vice versa, generally associated with approval processes, environmental regulations and monitoring, and reclamation. Because of the far-reaching hand of Indigenous Affairs, federal involvement also extends to other areas such as reserve land management and the oversight of Indian trusts, including through Oil and Gas Canada, an authority set up to: “To fulfill the Crown’s fiduciary and statutory obligations related to the management of oil and gas resources on First Nation lands [and] To further First Nation initiatives to manage and control their oil and gas resources (i.e. governance).”

Energy development is extremely politicized, as all levels of governance and business development. When interests align, as they do more often than most people acknowledge, First Nations overcome local differences, strike agreements with companies and other governments, and get actively involved through direct employment, business contracts and equity investments. In other instances, and pipelines are the best illustration of this, First Nations find themselves divided over the merits of proceeding. Some members, connected to broader environmental and climate change protestors, want to stop non-renewable energy investment and protect local and global eco-systems. Others, who are similarly cautious about environmental matters, see pipelines as inevitable and wish to ensure that the First Nations secure a decent return from developments on their traditional territories. There are additional members, more determinedly pro-development, who see the oil and gas sector and pipelines as being a unique opportunity to bring prosperity to their First Nation and who embrace participation more aggressively. This is, of course, a fairly good description of the attitudes of Canadians generally. The First Nations’ debates about oil and gas development, therefore, reflect widespread national and international perspectives on the current and future role of non-renewable resources in the world’s energy mix.

Uncertainty about political authority and legal rights complicates an already confusing situation. Having been locked out of formal decision-making processes for generations, First Nations have secured much greater recognition of their right to participate in project approval. As of 2016, however, the level of First Nation authority remains in dispute. At the minimum, governments and corporations are bound by the “duty to consult and accommodate” standards set by the Supreme of Canada in 2004; at the maximum, and only if the United National Declaration on the Rights of Indigenous Peoples is incorporate into Canadian law, First Nations would have the right to provide “free, prior, and informed consent” to any major resource project. While First Nations would like, as National Chief Perry Bellegarde has repeatedly said, “the right to say no” to development projects, there is no legal nor Aboriginal consensus as to the formal and sustainable level of political and legal authority.

First Nations are an integral part of the Western Canadian energy economy. The technical debate about the nature of Indigenous resource rights is somewhat moot. Strong and assertive First Nations protest, as has happened to date with Northern Gateway, can tie up regulatory and approval process, generate non-Indigenous support, add dramatically to the costs of proceeding, and effectively stop a project from proceeding. As is often the case, illustrated by the back and forth debate over the proposed Petrolinas Liquefied Natural Gas Lax Kw’alaams First Nation near Prince Rupert, B.C., a firm and decisive rejection by a Indigenous community can mean “not yet” rather than an outright ‘no.’

Over the last decade and more, First Nations have identified and occupied a wide variety of roles within the oil and gas sector in Western Canada. They have capitalized on additional legal rights to secure more jobs, improved deals and to undertake substantial investments in the energy fields. This extensive participation, however, has been put at significant risk due to the combined forces of widespread opposition to energy development and pipeline construction and the collapse in global prices for oil and gas. Having been largely shunned from the oil and gas sector for decades, First Nations worked their way into positions of prominence and substantial engagement in the Western Canadian energy sector. Then, in the midst of what is likely the fastest Indigenous entrepreneurial and employment growth in Canadian history, the floor appears to have fallen out of the First Nations’ plans for substantial and sustained participation in Canada’s oil and gas industry.

## **Still Not Full Partners: First Nations, the Economic Downturn and Prosperity Sharing**

Over the past decade or two, First Nations have taken thousands of personal, corporate and community decisions to participate in the oil and gas sector in Western Canada. These range from participating in company-sponsored skills development courses, working for oil and gas firms, owning and operating a service and supply firm, to investing in petroleum-bearing ground. At the community level, First Nations have signed impact and benefit agreements and secured revenue sharing arrangements that have directed tens of millions of dollars into Indigenous government coffers.<sup>29</sup> To use an eastern Canadian example, the development of Voisey’s Bay mine generated strong demands from the region’s Aboriginal people about sharing in prosperity from resource activity. After

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<sup>29</sup> *Indigenous and Northern Affairs Canada, “Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada,”* <https://www.aadnc-aandc.gc.ca/eng/1293647179208/1293647660333>



14 years of negotiation, the government of Newfoundland and Labrador, the Government of Canada and the Labrador Inuit Association signed the Labrador Inuit Land Claims Agreement, a modern treaty recognizing Aboriginal rights and title in and territory in northern Labrador. The agreement includes 25 percent of revenue from subsurface resources in Labrador Inuit Lands as well as an arrangement for resource revenue sharing on development on traditional territory.<sup>30</sup> From a modest start in the 1990s, First Nations have emerged as major players in one of Canada's most important industries. Now, before the First Nations engagement reached a sustainable and expanded level, the First Nations find themselves amidst a prolonged downturn in the oil and gas economy at precisely the time that major questions have emerged about the future of Indigenous participation in the sector.

### **Last In, First Out: First Nations and the Economic Downturn**

As First Nations became more extensively involved with the energy sector, they discovered themselves to be, within a span of a few years, beneficiaries of a substantial boom in the sector and the victims of an equally significant bust. The collapse in global commodity markets in 2014, particularly oil and gas prices, combined with increased government action on climate change, and unprecedented controversies over pipeline construction in North America, hit Western Canada very hard. The consequences of the resource downturn are well-known: high levels of unemployment in Alberta and, less pronounced, in Saskatchewan, a pronounced reduction in capital investment in the oil sands and the energy sector generally, flow-on dislocations that spread across the country, and sharp reductions in government revenues that caused immediate budgetary challenges for provincial and federal governments. If anything positive came out of the downturn, it was greater awareness of the national importance of Western Canadian energy and resource development.

Adding the industry-wide injury caused by global markets and regulatory disputes, a massive wildfire hit the Fort McMurray region in May 2016, causing a complete shut down of the largest city in the North, sharp reductions in oil sands operations, and near collapse of the remaining developments in the region, and the evacuation of some 80,000 residents and workers to safety. The combination of a general recession in the industry and the short-term catastrophe caused widespread economic and employment dislocations.

Similar employment and business crises hit across the North. Reduced uranium prices hit the northern Saskatchewan operations of Cameco and Areva. In May 2016, Cameco announced the closure of its Rabbit Lake Mine, the oldest and least efficient of its three regional operations. Cameco let 500 workers go while retaining 150 for maintenance and shutdown activities. The company has been one of the most successful firms in Canada at recruiting and retaining First Nations and Metis workers (although, as is standard in the sector, few progressed to management positions), with half of all northern workers hired from the Northern Administration District. Cameco has excellent relations with northern communities and extensive collaborations with Aboriginal-run and owned businesses. The simple fact of extensive engagement ensured that Cameco's Rabbit Lake shut down would hit substantially at its Aboriginal workforce, albeit with extensive company efforts to offset the dislocations. Although the details of Aboriginal lay-offs are unknown – and

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<sup>30</sup> *Indigenous and Northern Affairs Canada, "Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada,"* <https://www.aadnc-aandc.gc.ca/eng/1293647179208/1293647660333>

northern workers will likely have preference in retention and rehiring – it is likely that more than a hundred First Nations and Metis workers lost their jobs.

This situation has been repeated on the Northwest Coast, where the Haisla First Nations were handling a fair portion of the preliminary work on for an LNG plant near Kitimat. The plans stalled in 2015, with Chevron, AltaGas and Shell either postponing projects or delaying decisions. The Haisla, led by Chief Councillor Ellis Ross, had prepared the community well for the development of a natural gas pipeline and the LNG plant. Haisla workers were involved with set-up work, environmental activities and site preparation. With the cessation of activities, the Haisla workers lost their jobs and many of them left the community to find work. As Ross commented, “That’s what I was working on with natural gas, one of the reasons was to try to keep people home and bring people back home. So, it’s kind of bittersweet. It’s this waiting game.”

The situation is even worse in northern Alberta. The steady decline in the oil sands sector caused considerable difficulty for Aboriginal workers, many of whom lost their jobs, and Indigenous-owned companies, which employ large numbers of First Nations and Metis workers in the region. The evolving employment and economic challenges took a nasty turn in May 2016 when a massive forest fire ripped through the Fort McMurray area. First Nations communities were not as strongly affected as the City of Fort McMurray, but the shut down of the plants and related work exacerbated the already serious problems in the area.

Resource companies have been, understandably, reluctant to share detailed information on layoffs in the sector. Most Aboriginal workers in the oil, gas and pipeline industries work in Indigenous-owned service firms, which have assumed an increasingly important role across resource fields. The oil sands companies, among the largest in western Canada, have had to shut down most operations because of the Fort McMurray fire. The reconstruction process will absorb most of the unemployed workers from the energy downturn. In other firms, there are strong reasons to maintain their Indigenous workforce, many of whom were recruited aggressively by the companies and trained at considerable expense. While First Nations workers may have been buffered somewhat from the full impact of the economic crisis in the West, those employed directly by non-Aboriginal companies or working with Indigenous-controlled firms are nonetheless feeling the fall out from major reductions in investments and operations and from the delays and postponements of major pipeline projects.

## **Resource Revenue Sharing and Indigenous Peoples in Western Canada**

While First Nations in Western Canada secured substantial agreements from corporate partners, they also expected that governments would share their royalty revenues. Much as federal and provincial governments count on royalties from resource development to pay for government programs and infrastructure projects, First Nations have long hoped for a steady stream of financing, another kind of “own source revenue” that would further liberate them from reliance on government funding. First Nations in Western Canada believe that they are entitled for one of three things. In the case of First Nations



*Resource revenue sharing with Aboriginal governments in Canada, mining sector.*

*Source: Ken Coates, Sharing the Wealth: How resource revenue agreements can honour treaties, improve communities and facilitate Canadian development (Macdonald-Laurier Institute, 2015).*

without treaties, they believe that they are owed an appropriate percentage of royalty revenues. Secondly, if the First Nations has signed a modern treaty (as in the case of the Nisga'a in north-western British Columbia), the agreement spells out the appropriate return to the First Nation. Finally, the First Nation signed an historic treaty (Treaty 1 to 10), none of which mention or ensure a share of royalty revenue, they argue that the treaty only covers and alienation of Indigenous land "to the depth of a plow." In this latter formulation, the sub-surface rights issue remains resolved. In each instance, the First Nations believe strongly that they are owed a significant portion of the monies that flow to the government from resource development.

Canada has a variety of resource revenue sharing regimes, from the structured and formal arrangements introduced in the Northwest Territories to the constitutionally protected systems imbedded in modern land claims treaties. British Columbia, long a laggard on engaging with Indigenous peoples on resource development, has established resource revenue sharing on mining and other resource projects, establishing arrangements with

those First Nations closest to planned developments. In those parts of Canada not covered by modern treaties, revenue sharing regimes are either under discussion (Manitoba and Ontario) or are being considered (the Maritime provinces). The Government of Alberta, as of 2015, has indicated a new openness to some form of revenue sharing, an approach that is likely to prove crucial in securing support for additional oil, gas and oil sands development and for the construction of new pipelines. Saskatchewan remains an outlier. The Saskatchewan Party government under Premier Brad Wall has declared their outright opposition to resource revenue sharing with First Nations and Metis people, although they have committed themselves to working more closely with Indigenous communities to ensure that they share in the province’s general prosperity.

Resource revenue sharing has become a key feature of the Canadian resource economy and it is likely that it will be extended to the oil, gas and pipeline sector in due course. For First Nations and Metis people, revenue sharing is a financial acknowledgement of their ongoing relationship to the land, their treaty and Aboriginal rights, and the obligation of governments to ensure that Indigenous peoples benefit directly from the use of resources taken from their traditional territories. Revenue sharing also increases the own-source revenue going to First Nations communities, adding to their fiscal independence from government and providing an opportunity to chart their own economic path.

<b>Agreement</b>	<b>Initial Share for Aboriginal Signatories</b>	<b>Secondary Share for Aboriginal Signatories</b>	<b>Threshold for Taxable Royalties</b>
Umbrella Final Agreement with Yukon First Nations	50% of first \$2 million in royalties	10% of additional royalties	
Gwich'in and Shatu final agreements	7.5% of first \$2 million in royalties	1.5% of additional royalties	Above \$3 million
Tlicho final agreement	10.429% of first \$2 million in royalties	2.086% of additional royalties	Above 4.172 million
Labrador, Nunavut and Nunavik Inuit final agreements	10.429% of first \$2 million in royalties	5% of additional royalties	

*Resource Revenue-Sharing Provisions Under Northern Land Claims*

*Source: Ken Coates, Sharing the Wealth: How resource revenue agreements can honour treaties, improve communities and facilitate Canadian development (Macdonald-Laurier Institute, 2015), drawing on Tonina Simeone, Resource Revenue Sharing Arrangements with Aboriginal People, 2014.*

The introduction of revenue sharing is more or less inevitable, either as a percentage of government revenues earned from resource development (the option preferred by Indigenous groups and industry) or as an incremental payment from the resource companies (which some governments favour). It remains to be seen if this will happen voluntarily, as in the case of BC, through agreements, is the Yukon, enthusiastically,

as in the Northwest Territories, cautiously (Manitoba and, potentially, Alberta) or reluctantly (Saskatchewan). It could be Indigenous legal action, potentially relating the Natural Resources Transfer Act (1930), that prods the Canadian legal system to compel government involvement in the case of recalcitrant provinces.

As Canadian federal and provincial governments seek to establish real partnerships with Indigenous peoples, serious consideration has to be given to resource revenue sharing. First Nations and Metis communities expect and deserve an appropriate share in the resource wealth from the resource wealth on their territories. Adding such payments to the corporations involved in resource development would miss the mark on two main counts. First, making the companies pay would simply add to the cost of doing business in Canada and would make further investments less attractive. Second, and more importantly, it is symbolically important for governments to share their revenues with Indigenous communities. First Nations and Metis already have a substantial financial engagement with companies through impact and benefit agreements. Government to government transfers, respecting and honouring the Indigenous connections to traditional territories, create a partnership in prosperity that could, when fully developed, create a much more solid foundation for reconciliation and First Nations and Metis well being in the years to come.

Companies have recognized, largely due to the legal empowerment of Indigenous communities, that First Nations and Metis people want, and deserve, to share in resource-based prosperity. Most significantly, the companies have learned that engaging Indigenous employees and Aboriginally owned firms in the production processes has worked to the collective benefit of all participants. Resource revenue sharing extends this commercial and symbolic partnership to the government level. One could present this differently. If Indigenous peoples do not secure an appropriate and defensible level of financial return from resource development, there is no reason for them to participate in approval processes and to agree to the projects. Conversely, the assurance of significant payments from resource development is a substantial inducement to participate in the sector and to facilitate the approval of resource projects.

Done properly, Indigenous peoples will participate appropriately in the Western Canadian resource economy. More will be employed in the resource workforce, including at the managerial level. The growth of Indigenous businesses will continue, ensuring a great share of the risk and return for First Nations and Metis-owned companies. Enhanced Indigenous involvement with environmental assessment, monitoring and remediation will increase community comfort levels around development. Collaboration agreements and resource revenue sharing will increase the financial return to Indigenous communities, providing a major contribution to the greater well being of the Aboriginal populations of the West. Many of these elements are in place – largely, it must be restated, because of Aboriginal political and legal action – with only resource revenue sharing standing as the major shortcoming in the Western Canadian resource regime.

JURISDICTION	GRRS	POLICY/MODEL
BC	Yes	A non-treaty GRRS agreement mechanism exists for mining, as well as the forestry, clean energy, and oil and gas sectors.
Yukon	Yes	GRRS is applied through signed land claims (Final Agreements, guided by the Umbrella Final Agreement).  A revised arrangement is being discussed between the government and Yukon First Nations, particularly those that have not signed land claims settlements
North West Territories	Yes	GRRS is applied through three signed land claims and an interim resource development agreement between the Government of Canada and Aboriginal communities.  An additional GRRS arrangement between the Government of the Northwest Territories, the Inuvialuit Regional Corporation, the Gwich'in Tribal Council, the Sahtu Secretariat Inc., the Tlicho Government, and the Northwest Territory Métis Nation was signed in conjunction with devolution.
Alberta	No	The province has not instituted a GRRS model.
Saskatchewan	No	The province has not instituted a GRRS model. Some Aboriginal groups are calling for GRRS but the provincial government has indicated that it will not undertake GRRS.
Manitoba	No	The province has not instituted a GRRS model.

*Status of Mineral-specific government resource revenue sharing (GRRS) arrangements with Aboriginal people in Canadian jurisdictions*

Improvements can come in all areas. Industry continues to review and improve their processes and is become more proficient and reliable in building relationships with Aboriginal communities. Government agencies, while still tangled in earlier models and processes, have started to build new relationships with Indigenous peoples, although improvements here have been significantly slower than with the Aboriginal-business relationships. First Nations still struggle to overcome suspicion of non-Indigenous actors, although their growing achievements in business and equity ownership is increasing confidence and improving relationships through greater engagement. First Nations and Metis people struggle with capacity issues, as they seek to engage more constructively with government and business. Importantly, business and government likewise struggle with capacity issues – related more to cross-cultural understanding than degree-qualified staff members – in their efforts to improve collaborations with Aboriginal communities.

## **A Strategy for Going Forward on Pipeline Construction:**

Canada stands to pay a substantial price in terms of employment and economic development if First Nations, oil and gas companies, pipeline firms and governments cannot identify a proper path forward. The conditions are right for collaborative solutions, one based on respect for and understanding of Indigenous legal rights, hard-headed business decisions and the application of the highest international environmental standards. The discussion, which started in boom times and which is now occurring during a sharp depression in energy prices and demand, must be predicated on mutual understanding and a much greater realization of what will be lost if suitable accommodations cannot be reached.

There are ways to overcome the current uncertainty, to recognize the shared interests and to appreciate the long-term value of positive and constructive relationships with First Nations and other Indigenous actors. In reimagining the future of pipeline construction in Western Canada, several things appear clear from the outset. Without the enthusiastic and committed support and participation of affected First Nations, the chances of pipeline construction decline significantly. First Nations groups along the pipeline corridor must support and embrace the final arrangements and be long-term partners in the projects. This reflects both the First Nations' increased legal rights and the realities of community engagement and commitments made by the Government of Canada to respect Indigenous decisions. First Nations' involvement must proceed in such a way that affected Aboriginal populations see tangible benefits in the form of genuine and long-term economic, social, and cultural progress and self-reliance that reduce dependence on transfer payment from the Government of Canada.

While some environmental groups may oppose energy infrastructure on principle, all Canadians want reassurance that these projects are carried out in a responsible manner and to the highest standards of environmental protection. If credible assurances can be given in this regard, opposition will weaken markedly. Environmental and conservation issues therefore have to be addressed at the highest level possible to assure Canadians that the West Coast will be adequately protected and that appropriate emergency response measures are in place. This must include a robust evaluation and assessment process, albeit one that is not unduly long or cumbersome, and there must be acceptable long-term monitoring, emergency and remediation programs in place.

Federal and provincial governments need to work out acceptable financial arrangements – including with First Nations groups – to ensure that jurisdictional conflicts do not stop the project. Federalism has often been a barrier to large-scale projects in Canada. While much of the current attention focuses on Indigenous support for or opposition to pipeline construction, the reality is that stated opposition from Ontario, Quebec, British Columbia and several major municipalities is much more of a barrier to pipeline projects than are Indigenous concerns.

The project must be financially feasible for the companies involved, including the pipeline operators and the oil sands firms. Otherwise any of the projects will wither and die. This happened with the Mackenzie Valley Pipeline project, much to the dismay of many Indigenous groups along the route that counted on the construction and maintenance jobs

and the long-term revenue to bring a greater measure of prosperity to their communities. Time is of the essence, as both Aboriginal and non-Aboriginal Canadians face huge opportunity costs if current pipeline projects fail. The current downturn, and ominous forecasts of future price and demand declines, has shown the vulnerability of the western Canadian commodities sector. Opportunities do not exist forever. If investment moves off-shore, the world will have access to non-Canadian oil and gas for generations, making later market entry more challenging.

**Action Items:** Improvements in pipeline reviews, approvals, construction and operations will not occur without significant steps being made by all participants. Uncertainty reigns at present. The Government of Canada has not clarified its evaluation and approval process, but has added an additional consultative stage to the Kinder Morgan approval. Jurisdictional challenges between the provinces, and particularly between Western and Eastern provinces need to be addressed. The current focus on Indigenous concerns runs the risk of assigning First Nations the blame for contentious and controversial decisions on projects that might well have foundered on other grounds. Conversely, Indigenous engagement and approval of pipeline projects has the potential to unblock the logjams, in large measure because of the apparently willingness of Canadians to accept First Nations participation as a sign of environmental suitability.

## Reformatting the Pipeline Approval Process

Governments must, as a matter of high priority, clarify the existing and future pipeline approval processes. Companies and First Nations have invested heavily in evaluation systems that do not currently have the full support of the Government of Canada and the appropriate provincial jurisdictions. All of those involved – firms, First Nations, government agencies, environmentalists and community groups – deserve to know the parameters, processes and timelines for project assessment and decisions.

There is clearly room for improvement, if only to get greater buy-in from participants. Unanimity cannot be a goal in defining the right way to proceed. Some opponents are intractably opposed to further oil and gas development and transmission, in large measure because of their concerns about global climate change. While that is a sincere and deeply held conviction, it should not be permitted to override the priorities of Government and the wishes of Indigenous peoples. Canada currently has tens of thousands of kilometers of oil and gas pipelines in safe and successful operation. The nation's economy requires the maintenance and extension of our current system.

Put simply, the ground rules have to be spelled out in full, and soon, with strong commitments from participating governments that they will respect the legal authority of the Government of Canada, the provinces and Indigenous communities, while supporting the environmentally secure development of pipelines. All participants deserve to know the context within which the work of proponents and interveners is to proceed.

There is room to improve upon existing arrangements. While technical and environmental review proceed, the Government of Canada should launch a regional



process with substantial Aboriginal, industrial, and regional representation that would examine and negotiate the broader elements of a general agreement for each of the major projects. This process should have a hard deadline to focus efforts on all sides. Proponents should continue to engage with Indigenous groups with substantial Aboriginal participation in order to oversee the social, economic, and regional development aspects of each project. Governments and First Nations in the region may want to consider the processes and structures of modern treaties (such as those developed for the Council of Yukon First Nations, the Inuvialuit and Gwich'in) that define Indigenous participation in regional economic development and environmental management to oversee the planning and development process. This arrangement will ensure First Nations' participation in a long-term oversight of major resource projects.

Location, as Mr. Justice Thomas Berger famously said in the final report on the Mackenzie Valley Pipeline Inquiry, is a natural resource. It follows that First Nations along the pipeline corridor have a significant interest in the prosperity that the pipeline will generate. It is increasingly clear that First Nations with a financial and managerial stake in developing the pipeline are much more likely to support the project. This has to happen in a responsible, fair, and constructive way.

Specifically, proponents and government should agree that First Nations will participate financially in all future pipeline projects, as is evident in current discussions. Partnership means and requires full participation in the projects, including initial investments (if desired), risk, and participation in revenue sharing when the pipeline is profitable. Pipeline companies, incidentally, understand the importance of this position, having already offered First Nations the opportunity to secure ownership in new pipeline.

The financial engagement of Northern First Nations should be a central part of the long-term strategy. Engaging First Nations in the regions surrounding the pipeline corridor as equity partners is the best means of ensuring productive, long-term partnerships. First Nations should be able to buy additional equity in the new corporation at fair market value. First Nations should buy their equity with their own resources, including loans and loans guarantees (potentially from the governments of Canada and the provinces and territories) to be repaid out of projected revenues. Ideally, First Nations should acquire a sufficiently large equity share to ensure long-term management and board participation in the project.

Other complementary possibilities are worth considering. For example, the leasing, on fair market terms, of the existing pipeline corridor from private land-owners and the federal government and its designation as an Aboriginal energy corridor to be run by a company owned and operated by First Nations or the transfer of the Crown lands involved to First Nations along the route and the designation of those lands as reserves. The pipeline should pay rent to the Aboriginal energy corridor company for use of the corridor for an amount to be determined in advance and fixed in a contractual agreement.

Such an approach has many advantages. As we have argued elsewhere, equity participation by First Nations would help to turn the pipeline proposal from an outsiders' project resented by mistrustful First Nations along the route into a full partnership between an industry with expertise and capital and newly empowered Aboriginal people

and governments. Aboriginal energy corridors across Western Canada, for example, could be conduits for all forms of energy seeking to flow across prairies to international markets. Substantial Aboriginal ownership stakes would give First Nations the confidence, authority, and incentives to embrace responsible development. Best of all, powerful equity positions removes the seller's remorse that too often afflicts Aboriginal agreements with resource development. As partial (or even majority) owners, they would participate fully in all the value created by their involvement and consent. This approach would create three distinct revenue streams for First Nations, each one justified by their powerful negotiating authority under treaties, Aboriginal title, and judicial decisions. The three streams are:

1. The return on investment (through equity participation);
2. Rent or other charges to be levied for the use of the pipeline right-of-way within the energy corridor; and
3. Aboriginal property tax revenues within a pipeline corridor designated as reserve lands.

These arrangements should generate important benefits for Aboriginal communities. It is vital that the Government of Canada not reduce current programming for First Nations simply because the First Nations have earned incremental revenue. Other Government spending is rooted in treaty obligations or tied to national Aboriginal policies. If First Nations' own source revenue is used to reduce federal spending, frustration will re-emerge instantly. Incidentally, this happened in the past with First Nations income in the 1960s and 1970s, so there are major sensitivities here. Aboriginal communities must be left in no doubt that participating in development will result in incremental increases in revenues, leave them better off, and move them closer to parity in government services with other Canadians.

## Impact and Benefit Agreements (IBAs)

Under Canadian law, First Nations have the right (as represented in the doctrine of "duty to consult and accommodate") to be consulted on all stages of the project's development. First Nations have made effective use of these rights in negotiating significant impact and benefit agreements with resource companies. Given the scale and nature of Canadian properties, it is vital that IBAs balance the potential of the project and the needs of affected First Nations. At present, IBAs generally focus on a specific First Nation, usually the one(s) most affected by the proposed resource development. Pipelines require a modified version:

- **Corridor-wide IBAs:** The pipeline will affect all First Nations along a particular corridor. It follows that a unique region or corridor-wide IBA address issues that extend beyond the First Nations directly connected the corridor.
- **Specific First Nations IBAs:** Some communities will need more targeted IBAs because of the direct impact and opportunities associated with the pipeline route through their traditional territories.

Existing IBAs in Canada focus on short-term resource projects. Given the pipeline's long anticipated lifespan, IBAs in the corridor must take into account the need for longer-term arrangements. Given the nature of the global energy sector, conditions could include an IBA renewal system to accommodate changes in financial circumstances, pricing, and demand.

## **Environmental Protection**

The proposed Canadian pipelines pass through remarkable lands in Canada. All Canadians, and not just First Nations, are concerned about environmental protection. To this end, the following measures might be considered. The most advanced electronic and technological monitoring should be used at each stage of the project. The pipeline company and governments must undertake, as they have implicitly done already, that the pipeline and shipping systems will be the most advanced in the world. Technological monitoring of the highest standard should be used at each stage of the project. There are growing signs that the Government of Canada has accepted this proposition.

First Nations should participate fully and environmental groups should contribute to developing the environmental protection and response system. The regime must have the highest standards available worldwide. First Nations companies and employees should provide the backbone of the surveillance and response units along the pipeline corridors.

## **Collaborative Infrastructure Planning and Development**

As the pipelines are developed, regional infrastructure will need major improvements. It is vital that these improvements be undertaken with a view to the needs and aspirations of the Indigenous people of Western Canada. A collaborative planning process, using existing organizations and review processes but involving all corridor communities, will ensure that the pipeline investments in road, power, Internet, and other infrastructure will meet long-term regional Aboriginal and non-Aboriginal needs. This commitment would address a long-standing problem with regional resource development in Western Canada, and potentially provide a template for future developments.

## **Training, Jobs, and Business Opportunities**

First Nations people, particularly the youth, are eager for local, steady, well-paying jobs. It is vital that the employment and business development opportunities associated with the pipeline project match First Nations abilities and human resources wherever possible. This part of all pipeline projects— typically captured in the IBAs — would extensive training and workplace preparation programs tied to anticipated workforce needs; a commitment to sign supply, procurement, and service agreements with First Nations businesses and development corporations, so that local First Nations firms would have a fair opportunity to capitalize on pipeline related demand and opportunity. It would be beneficial, too, if First Nations, governments

and companies collaborated on the development of high schools initiative designed to improve educational outcomes, increase employability, and support community development initiatives.

There are many more things that can be done. In the end, gaining First Nations' acceptance of the country's grand and expansion pipeline strategy requires a rethinking of the ground rules and operational plans of the developers. Many of the key companies understand this and are working with First Nations accordingly.

## **Fostering First Nations Engagement in the Western Canadian Oil and Gas Sector**

First Nations have established a strong base for further engagement in the Western Canadian oil, gas and pipeline industry. The law and emerging government policy at the federal, provincial and territorial levels supports and, indeed, requires extensive and effective Aboriginal participation in natural resource development. Companies and governments understand the consultation requirements but continue to wrestle with the technical details of how to set parameters around engagement processes. But uncertainty continues.

On the Aboriginal side, few communities have a substantial consensus on how to move forward. Those not yet involved in natural resource development activities do not fully understand best practices and financial options. It is not yet clear if First Nations have reached the apex of their struggle for legal rights and political autonomy; more than a few Indigenous leaders believe that there are additional victories in the offing before the Supreme Court. Those communities wanting a balance between environmental concerns and economic opportunity struggle to decide between short-term and long-term considerations.

Companies face comparable difficulties. Major projects face re-defined approval processes and regulations, often in the middle of expensive and time-consuming. Forty years ago, companies required only political approval (and often some form of subsidy or tax relief). Twenty years ago, they needed political support and had to address environmental concerns and complete environmental review processes. Now, firms have to secure political support (which is often conditioned by public support or criticism), pass more extensive (and expensive) environmental review, and secure the concurrence of affected Indigenous populations. These requirements – which they accept as appropriate and as expressing the democratic will of the people – add to the time required to bring projects into operation, increase the costs of working in Canada, and weaken the country's competitive advantage. In a truly globalized energy sector, the comparative complexity, cost and responsiveness of Canadian requirements weigh significant in corporate planning and investment processes.

Governments face different pressures. A strong and outspoken environmental movement, buttressed by shared interests with some Indigenous communities and empowered by global commitments to address carbon emissions, have lessened the political support for energy development. The Government of Ontario's aggressive green energy strategies

are attracting a great deal of attention. Conversely, the collapse of oil and gas prices have reduced revenues to the Governments of Newfoundland, Saskatchewan, Alberta and British Columbia, creating real budgetary hardships in the process. Pipelines, long a staple part of Canada's economy, have come under intense criticism; gaining the support of numerous provincial governments (with municipalities speaking out as well) increases the challenges of getting projects approved. The additional government decisions required about tanker navigation on the West Coast, the heavy promotion of alternate energies (but not yet nuclear power), and the need for substantial government investments in regional infrastructure contribute to the growing complexity in the field.

Canadians, at large, have a vested interest in the maintenance of a strong energy sector. Natural resources contribute a great deal to federal and provincial revenues and therefore support a wide-range of government programs. Tens of thousands of men and women work in the industry – as the mass layoffs in Alberta in 2015-2016 demonstrated with shocking clarity. While a significant number of Canadians are concerned about environmental issues and climate change, it is likely that a majority of the population desires an appropriate balance between employment, government income and ecological sustainability. Achieving such a balance, while securing the ongoing support and participation of First Nations, is no easy assignment.

It is clear – based on evolving Canadian law, the positions of the Governments of Alberta and Canada on the United Nations Declaration on the Rights of Indigenous Peoples, the aspirations of First Nations, the desire of resource companies for collaborative partnerships with Aboriginal peoples, and the need to square environmental considerations with development plans – that a new relationship is needed with First Nations in Western Canada. The energy sector has two basic options in moving forward. First, it can focus on the letter of the law, as interpreted by the courts, and operate accordingly. Secondly, government, industry and First Nations can define, for the region or the country, a “made in Western Canada” approach that respects the needs and interests of all participants and that responds both to requirements for environmental protection and market influences. The initial option, which continues the pattern of the past quarter century, is filled with uncertainty and, inevitably, frustration. The second option, which reflects the systems created under the modern treaties that now cover much of Northern Canada, would create fair, just and sustainable processes for ensuring effective and sustainable energy development across Western Canada.

It is common in such contentious circumstances to focus on points of disagreement and contestation, and to conclude that a lasting resolution is near impossible. In this case, examining elements of agreement and drawing attention to existing best practices would best serve the collective interest in western energy development. Western Canada has a unique combination of First Nations entrepreneurs, communities that are cautiously supportive of development, companies with many years experience in the area, provincial and territorial governments that know their financial future rests on well-managed resource activities and regional populations that have – albeit reluctantly – concluded that Aboriginal aspirations and legal powers entitle them to a central place in the planning and execution of regional and national development plans.



Forty years from now, assuming the collective attention to First Nations' aspirations and the continued economic importance of fossil fuels, Western Canada will have established a new standard for Indigenous engagement in the resource economy. The region will have increased the number of First Nations businesses, employing tens of thousands Aboriginal workers. The wealth that previously went primarily to the non-Indigenous communities will be distributed more evenly across the region, contributing to the greater well being of all. The industry will work to the highest international environmental standards, with First Nations communities playing a crucial role in approval, monitoring and remuneration. And the financial returns from the energy sector will have helped create a more diverse economy, one rooted on Western Canada's unique resource wealth.

In what will truly be a "New West," First Nations will be playing a prominent role in the regional economic, social and political order. Many of the region's largest companies will be Aboriginal Economic Development Corporations or Indigenous-owned firms. Aboriginal communities will, in growing numbers, be financially autonomous from the Government of Canada and will have the resources to produce greater well being and healthier people. The transformation will be more one of trajectory than the immediate resolution of outstanding social and economic challenges facing First Nations people and communities. Industry will move in this direction in collaboration with Indigenous peoples and organizations and not in conflict and opposition. First Nations will be partners in the energy sector, setting the standards, shaping the agenda and sharing in the prosperity associated with the development of the Western Canadian energy sector.

This paper draws on a series of papers prepared for the Macdonald-Laurier Institute's project on Aboriginal People and Natural Resource Development in Canada. Specific projects include Brian Lee Crowley and Ken Coates, *New Beginnings: How Resource Development Could Reshape Relations with Aboriginal People*; Brian Lee Crowley and Ken Coates, *The Way Out: New thinking about Aboriginal engagement and energy infrastructure to the West Coast*; Dwight Newman, *The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector*; Ken Coates and Dwight Newman, *The End is Not Nigh: Reason over alarmism in analysing the Tshilqot'in decision*; Ken Coates, *Sharing the Wealth: How resource revenue agreements can honour treaties, improve communities and facilitate Canadian development*; Bram Noble and Aniekan Udofia, *Protectors of the Land: Toward an EA Process that Works for Aboriginal Communities and Developers*; Ken Coates and Blaine Favel, *From assertion and assumption on 'free, prior and informed consent' to a new model for Indigenous engagement on resource development*; Blaine Favel and Ken Coates, *Understanding UNDRIP: Choosing action on priorities over sweeping claims about the United Nations Declaration on the Rights of Indigenous Peoples*; Ken Coates, Greg Finnegan, Craig Hall and Kelley Lendsay, *Unearthing Human Resources: Aboriginal Skills Development and Employment in the Natural Resource Sector*. Electronic copies of these papers are available at <http://www.macdonaldlaurier.ca/aboriginal-canada-and-the-natural-resource-economy-series/>.

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