

# Pacific Business & Law Institute—Mining in Aboriginal Communities

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Tony Pearce Speaking Notes

## *“The Problem with Environmental Assessment”*

### **Introduction**

" I remain confident that the EA process has the capacity and flexibility to address aboriginal rights issues in British Columbia." <sup>1</sup>

These words were written by Environment Minister Barry Penner to the Nak’azdli Band Council on January 19 this year concerning the proposed Mt. Milligan mine project. They provide a concise focus to my main theme today—which is that nothing could be further from the truth. Not only does the EA process not have the capacity or the flexibility to address aboriginal rights issues in BC, it is simply the wrong forum to be doing it.

I’m going to be talking today about that issue, and about the failings of the BC EA process generally with respect to the interests of aboriginal communities. Specifically, I will address the following topics:

1. what should an EA process do;
2. what is the current state of affairs with respect to the provincial EA process and aboriginal participation;
3. what is the right relationship of the EA process and the Crown’s duty to consult and accommodate; and,
4. how we should fix the process.

I will be making my comments on the basis of having participated now in some 18 major project assessments in western Canada, almost all of them on behalf of aboriginal communities. A handful of these involved the BC EA process, and it is these I will be mostly referring to today.

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<sup>1</sup> BC Environment Minister Barry Penner to Nak’azdli Band Council, 19 January 2009

The bulk of my experience with the BC process relevant to the role of first nations into the process has not been encouraging. In fact, it has and continues to be, disheartening. As the nature of the Crown's honour in dealing with first nations to achieve proper reconciliation, and the content of the Crown's duty with respect to consultation and accommodation in land use decisions, are gradually being clarified on a case by case basis by the high court, BC seems increasingly unable to grapple with the notion that a meaningful consultation process has to be mutually acceptable, if not mutually designed, by both the parties involved.

Just a couple of weeks ago, on February 26, the BC ministers amended the environmental certificate for the Tulsequah Chief Mine Project to approve a hover barge operation for the mine. The hover barge is an alternative transportation option to a 160 km access road to Atlin that was previously approved by the ministers when they approved the Tulsequah mine in 1998. At that time, a flawed EA process resulted in a judicial review, and the case went all the way to the Supreme Court. In 2002, following the Court of Appeal decision, the ministers re-issued the certificate.

At any rate, the same day they approved the barge amendment, they received the final report from the Taku River Tlingit First Nation on the EA for that project. Normally the ministers have 45 days to render a decision once the EAO has submitted a project assessment report but, because this was an amendment to an existing certificate and not a new certificate, there was no such timeline and no requirement that the ministers act hastily. In this case, they made their decision a scant 13 days after receiving the assessment report from the EAO.

Not only was there no regulatory timeline, there was also no urgency to issue the certificate because there was now no project on the horizon. On February 17, ten days previous, the proponent announced an indefinite suspension of all activities at the mine because,

“The lengthening of the development schedule, increased capital costs, current commodity prices and the limitations on the Company's ability to access sources of additional funding raise serious concerns about the development of the Tulsequah Chief Mine by the Company without strategic partners. As a result, Redcorp is proposing to engage in discussions with its funding

partners to evaluate strategic opportunities, including alternative development strategies.”<sup>2</sup>

Despite the facts that the EAO was informed that the Tlingit final report was on the way, that there was no regulatory timeline involved, and that the proponent had previously suspended the project, the ministers rushed to get the certificate out the door. They could not wait, apparently, to see what the Tlingit had to say. So much for deep consultation, respect and reconciliation.

I shall return to the Tulsequah Chief story a little later, but first I want to frame the discussion by posing a fundamental question—why do we have environmental assessment in the first place?

## **What is Environmental Assessment?**

In theory, environmental assessment is the one essential analytical tool that allows decision-makers to test the environmental and social acceptability of new industrial projects. Is this project one that should be allowed to proceed? If so, what are the terms and conditions needed to minimize the downside and maximize the benefits?

While the environmental assessment process inevitably leads to a political decision about whether to proceed or not, it should not be confused with the decision-making step. EA is properly a fact-finding, technical exercise, which should lead to a well-informed recommendation to the decision-maker about the desirable course of action.

EA is forward-looking, and provides an evaluation process that can integrate many variables and produce a comprehensive result. It can, and should, focus attention on considerations or dimensions of the project that are usually neglected by proponents and decision-makers. Socio-economic, cultural and cumulative impacts are examples. Effects on the sustainability of local communities and landscapes are others.

There are trends emerging in EA practice elsewhere to take the process well beyond the traditional view of simply minimizing environmental impacts. Today, we want to see

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<sup>2</sup> Redcorp Ventures press release. February 17, 2009.

that major projects contribute to sustainability by producing net benefits to local communities as well as the general public good.

### **What does EA Need to Do?**

If EA is to be a useful tool for gauging sustainability of a proposed project there are, then, some essential requirements for a meaningful EA process. First, EA needs to be able to answer the question of whether a new project should proceed; i.e., it needs to be able to recommend ‘yes’ or ‘no’ to the decision-maker. To do this, it needs to have an evaluation methodology to allow it to get there.

Second, it needs to be objective, neutral, and free from political interference. EA should be a technical exercise, not a political one.

Third, the process needs to be comprehensive, transparent and accountable to the affected parties.

Fourth, it needs to produce credible and accurate information about the potential effects of a proposed project before a decision to approve the project is made.

Fifth, it needs to meaningfully consider the interests and values of those potentially affected, and this means it must provide for an effective role for affected local communities, particularly for First Nation communities who have aboriginal rights, title and interests at risk.

Finally, it needs to satisfy the information requirements for the Crown’s duty to consult and accommodate potentially affected first nations. EA can usefully serve as the first stage of consultation—collecting and evaluating the relevant information so that an accurate picture of the project’s impacts and potential mitigation measures can be developed. Beyond this, it should not go. Consultation with a view to reaching an accommodation is very much a political, and not a technical, process. Different sets of people with different sets of skills and mandates are required in the two processes. As I shall argue below, consultation and accommodation must be attempted through a formally established and mutually agreed-upon government-to-government process.

## **The BCEAA Process**

BC passed its first EA legislation in 1995. Since then, about 85 project reviews have been completed under the direction of the BC Environmental Assessment Office. Counting several additional project assessments completed prior to the 1995 legislation, in total approximately 100 projects have received some kind of environmental assessment in BC.

It is notable that not one of these resulted in a recommendation from the EAO to reject the proposal. All have been recommended for approval, or the proponent dropped out of the process for one reason or another.

Given that BC EA process has regulated timelines—180 days to complete the assessment and another 45 for the ministers to make a decision—proponents have certainty about the time required. From the proponent's perspective, as well as government's, the EA process is tremendously reliable—play the game, which means provide all the information that is requested by the EAO, and it delivers virtually guaranteed approvals within 225 days.

The picture is different from the first nation perspective. As I will demonstrate, the BC process is broken, it doesn't effectively take into account their interests, and in the end is simply not credible.

This is a huge problem, because first nations faced with industrial projects in their territories that are controversial or threatening are expected, indeed forced, to participate in the EA process. If the projects are ones that are not controversial and have possible appeal to the first nation, and the proponent is respectful, cooperative and prepared to assist the first nation in the EA process, then there are the ingredients for a successful process. The EAs for the proposed Ruby Creek molybdenum project near Atlin and the Orca Gravel project at Port McNeil are examples where these conditions prevailed, and a positive result for all parties was achieved.

However, this is frequently not the situation, and where one of these ingredients is missing there is the likelihood of failure. Here are the problems.

To understand better where we are today, one more piece of history is critical. While the 1995 EA legislation had a number of positive features that enabled effective first nation involvement in the process, the EAO soon found itself the subject of three lawsuits from participating first nations over the administration of the process. In 2002, the current provincial government, instead of attempting to fix the process to make it more effectively responsive to first nation issues, simply gutted the 1995 legislation to remove, among a number of important things, all substantive components that provided for first nation involvement.

We now are working with the 2002 EA legislation. It is necessary to briefly compare the two acts.

First, the 1995 *BCEAA* explicitly stated the objectives of the legislation. These included to provide for the participation of first nations in the process and the promotion of sustainability, and to ensure an open, accountable and neutrally administered process.

The 2002 *BCEA Act* deleted these objectives, so now its intent is obscure.

The 1995 *Act* established a project committee to conduct assessment, and established a clear role for first nations on that committee. As Chief Justice McLachlin wrote in *Taku River*, “the project committee becomes the primary engine driving the assessment process.” The project committee got to establish the review procedures, and had the stated purpose of providing ministers with advice, expertise and recommendations about the project under review. Importantly, the Minister had to consider the recommendations of the committee.

The 2002 *BCEAA* eliminated the project committee. Now, the EAO project director determines the process and review content, using *ad hoc* advisory working groups consisting mostly of provincial regulators, to assist in the review. The process is entirely discretionary—no substantive content, standards for review, or procedures are specified. The project director formulates the conclusions and recommendations, and produces the report to the ministers. All substantive references in the act to the role of first nations have been jettisoned.

The 1995 *BCEAA* required that project report specifications be prepared as a guide for the proponent to write its project report. These set out a list of content topics, including:

- effects on aboriginal rights
- effects on social, cultural, health and heritage issues
- cumulative effects
- plans for proponent's consultation w/ affected first nations
- evaluating adequacy of mitigation plans

The 2002 *BCEAA* is silent on project report content; this is now left to the discretion of project director to determine content.

The 1995 *BCEAA* had the project committee recommending to the executive director on whether to refer the application to the Ministers for decision, and providing input to the director's recommendations about terms and conditions for the certificate. This is now the sole responsibility of the director.

So, given this analysis of the act, what are some of the problems we see today?

## **Problems with the Process**

### **Problem #1 Politically Driven, Discretionary & Biased Process**

The first problem is that process is not neutrally administered or free from political interference, as a credible EA process needs to be. The 2002 *BCEAA* provides for political direction at several stages. Section 21, for example, enables Ministers to provide policy direction to the director conducting the assessment. The executive director can refer a policy matter to Ministers, and any direction received must be reflected in the assessment report.

Where does this get us? The inevitable result is that government gets to pre-ordain the results of the assessment. Government policy that promotes mining development, for instance, is not going to allow an environmental assessor to reject or impede a new mining project. The scope, findings and recommendations of the assessment have to be consistent with government policy.

The Taku River Tlingits witnessed the impact of this in the Tulsequah Chief project assessment reconvened by the trial judge. The project committee attempted to develop a sustainability test in order to further evaluate the project's effects. The project director in that review continually had to get approval from various ministries as to whether each new design element was consistent with that ministry's policy. The test was never completed.

The EAO directors can employ outside consultants but the assessment report is not required to reflect the advice or recommendations made by consultants. If the director does not like the findings of the expert advisor, or if they are deemed inconsistent with government policy, the director can simply bury them. The product that emerges is then necessarily biased since it does not present complete information about the project.

The discretion also applies to the public record that is kept during the assessment. Any disagreeable or somehow threatening documents can, at the director's discretion, be kept off the registry.

Bias is also built into the current process by the almost sole reliance on government regulatory officials as advisors. These are same people who issue authorizations for the construction and operation of the project. They see the world through regulatory glasses, which is to say that the strategic question of whether or not the project should proceed is never entertained, its only a matter of affixing the necessary terms and conditions to the permit. This is an active and explicit role for advancing government policy, not one for an objective independent technical analysis of environmental impact.

### Prosperity Mine

The most egregious recent example of politically motivated behaviour by the EAO is the Prosperity mine story. Prosperity is a proposed open pit gold-copper mine in the Chilcotin, some 100 miles or so west of Williams Lake. It is an economically marginal at best, and almost entered the environmental assessment process in 2000 before the economic feasibility evaporated and the project was suspended. That, and the fact that three successive federal fisheries ministers consistently refused to entertain the concept of destroying a remarkably productive fish-bearing lake. This position was reversed by the

new conservative fisheries minister in late 2007, which put the lake on the chopping block. Rising commodity prices at the same time meant that the proponent was eager to get the project launched.

Both the province and company originally supported the notion of the project going to a joint federal-provincial review panel for the EA. With that in mind, the Tsilhqot'in National Government, representing six Tsilhqot'in communities, including the Xenigwet'in who are the closest to the project site, entered into negotiations with the federal and provincial governments to discuss how they could participate in the joint panel process. Meetings were held and terms of reference for the processes involved were being discussed at the table.

During that time, the proponent Taseko Mines rethought its desire for a joint review panel and, reflecting on the hugely unanticipated negative recommendation from the joint review panel assessing the Kemess North project, suddenly lost its appetite for subjecting its mine to an independent review. It wrote to the EAO and requested an alternative EA process. That was on a Friday. The following Wednesday the EAO, otherwise engaged in good faith negotiations with the TNG about the joint panel process, offered the company its choice of the *BCEAA* process or, bizarrely, a joint panel that could not make recommendations. Taseko immediately wrote back and selected, wisely if certainty of outcome is a priority, the provincial process.

But what does this say about objectivity and seriousness of a process that lets the proponent decide what kind of an assessment it will be subjected to?

What does this say about the neutrality of a provincial agency that can so quickly switch its position on such a major decision?

What does this say about its integrity when it makes such a far-reaching decision without consulting the other affected parties with whom it is negotiating a different arrangement altogether?

What does this say about the mental state of a provincial agency is that is purportedly doing its best to convince aboriginal people that it can offer a sincere and meaningful assessment and consultation process when it betrays the people it is negotiating with?

### **Problem #2 No Sustainability Test**

The second problem relates to the lack of a sustainability test. As the Tulsequah Chief story reveals, having such a test is critical, particularly for aboriginal communities. Judge Kirkpatrick in *Taku* quashed the ministers' initial approval of the project because it failed to respect this purpose of the Act.

“It is clear that the Ministers’ reasons demonstrate that the statutory obligation to promote sustainability criteria, an object of the EA, was not fully addressed—the obligation was not fulfilled.”

The 2002 *BCEAA* eliminated the sustainability objective. There is as a consequence no reason any longer to test the sustainability of a proposed project. Indeed, there is no sustainability test in the EA process. While the Act provides the possibility that ministers can reject a project, there is no mechanism that can enable such a determination to be made. No principles, no criteria, no tools, no framework of analysis—nothing! The effect of this is that the EA simply becomes another step in permitting process. Why bother? Why not have projects proceed directly to permitting (since it's the same people involved anyway) and eliminate this time-consuming and ineffective process that cannot, or will not, do the job that real sustainability analysis demands.

### **Problem #3 First nations are under-resourced**

The third problem is that effective and meaningful participation in an EA requires proper resourcing for first nations. Reviewing a mining proposal places substantial, often overwhelming demands on first nation governments and budgets. Dedicated full-time or part-time staff in the lands, social health, and economic development departments of first nation governments are required. Usually considerable outside assistance on various technical aspects of the project, are also required. There are always community and leadership review and feedback processes required. All this amounts to a significant investment of energy, human resources and money to drive if due diligence and effectiveness are to be attained.

Who is to pay? The EAO takes the position that proponents ought to pay. Proponents take the position that the Crown should pay. Sometimes, proponents are fairly progressive in this regard and are willing to financially support the first nation through the EA process. But where this is not the case, there is a huge struggle by the first nation to find adequate funding to participate in a process they would, for the most part, simply like to go away. To be fair, the EAO now usually offers some minimal funding for first nation participation, but usually at levels far from sufficient to enable meaningful participation. In my experience, almost all first nations who participate in an EA come out the other side in debt.

And then, of course, how does the first nation get funded to participate in the on-going permitting and regulatory process? This is never addressed. And yet, a first nation government will require effective involvement in the environmental management and oversight of the mine through its lifetime until reclamation and closure are achieved. I know of no examples where the provincial government has ever responded meaningfully to this issue. Once the mine is approved, proponents are no longer interested in funding what they see as the first nation's self-government responsibilities. If there happens to be an impacts and benefits agreement in place, proponents will expect, unfairly in my view, that first nations employ a portion of their benefits package to funding the first nation government's involvement in post-approval regulatory and oversight roles. Usually, however, there is no impacts and benefits agreement to do even this.

The paltry investment the EAO is prepared to make to fund first nation participation in an EA process is clearly reflective of how BC government values its own process in making project decisions. For the 2006-07 fiscal year, the EAO had a budget of \$5.6m that, allocated across some 63 projects under review that year, amounted to \$87 thousand per project. Those projects totaled some \$20b of potential investment. In other words, BC spent approximately \$0.28 per \$1000 of potential investment assessing proposals.

#### **Problem #4 No Accommodation Process**

A fourth problem is that there no established statutory regime for the Crown to carry out its new duty to consult and accommodate. The EAO contends that it can carry out this

duty in addition to its assessment role. The problem is that the EAO doesn't know how to do this. Because there is no legislative regime, the EAO has been pursuing this task on an *ad hoc* basis, attempting to convince first nations that this is the only game in town. The result is a process that does not work for first nations—it is unilaterally designed and executed, and the first nation has no opportunity to influence how the process is implemented. The result, as the recent experience of the Taku River Tlingit clearly demonstrates, is disaster.

### Tulsequah Chief Process

In the recent EA conducted for the Tulsequah Chief barge project, the consultation process got particularly murky and confused. Separate from the EA process, the Ministry of Mines, Energy & Petroleum resources established a discussion table with the Tlingit for the purposes of the Crown's duty to consult on potential infringements by the project on aboriginal rights and title. There was no formally agreed terms of reference for this process, and no articulation with the EA process. By the time the EAO sent its assessment report up to the ministers, no concrete results had been produced.

At the same time, inside the EA process, the EAO was apparently doing its own consultation process. Halfway through the assessment, at the end of July last year, the agency wrote to the Tlingit and stated that it would be preparing a separate consultation report to go to the ministers, and that it requested the Tlingit to identify 'with specificity, the activities and asserted aboriginal rights of the TRTFN that could be impacted by the project'. Further, it would like this information no later than the end of August.

The Tlingit responded that, among other things, the EAO's request was out of order since there was the government-to-government process already established for this purpose. Not much was heard on this topic from the EAO until mid-January when it produced a draft of its consultation report to the ministers, asking for comment. At that time, due to other commitments in both the EA and mine permitting processes, TRT did not have the resources to review the consultation draft. Instead, the TRT met directly with the EAO to discuss the outstanding issues raised by the barge project for the TRT, since it was only at this point in the process when the issues had crystallized sufficiently that TRT could

properly identify what meaningful measures by the Crown could further mitigate the potential effects of the barge on Tlingit interests.

While the EA process did identify and resolve some of the Tlingits' issues that could be dealt with as conditions of approval, several others emerged that would require action by the Crown. However, despite having this meeting specifically to review these potential accommodation measures with the EAO, it sent its draft consultation report to the ministers without even acknowledging the concerns identified by the TRT. The accommodation measures the TRT had identified were not there. The TRT's concerns about both the Crown's and the proponent's non-compliance with the existing certificate was not mentioned. The problems identified about the adequacy of the proponent's mitigation measures for dealing with impacts to Tlingit interests was not mentioned.

Not only were the issues raised by the Tlingits missing, but the EAO's analysis of the significance of the potential effects led to astounding conclusions. The EAO's consultation report, while acknowledging that the barge project would cause an overall 10% reduction in fishing opportunity for Tlingit commercial fishers, simply concluded that this would be an insignificant adverse effect. The EAO did not consult the Tlingit in making that determination. In the face of this impact, it did not mention in its report to the ministers the Tlingits' recommendations for monitoring the barge/fishery interactions, or for establishing a compensation program to offset the opportunity loss, fishery closures as a result of an accident, or barge-caused property damages. It further did not address the critical issue of how the Tlingits would be able to engage in the environmental oversight body that was to be established for the project. It simply ignored the concerns, and presented a sanitized picture of 'no outstanding issues' to the ministers. Yet, in its own words, it had conducted deep consultation, and had satisfactorily discharged the Crown's duty to consult and accommodate the first nation. The EAO's consultation report was an extraordinary misrepresentation of the facts.

#### What Consultation & Accommodation Needs to Look Like

The BC EA process is simplistically geared to generating a list of conditions that can be attached to an environmental certificate as requirements for the proponent to mitigate and

manage the impacts of its project. Further, the proponent has to voluntarily undertake the commitment. The EAO will not entertain any measures that the proponent will not agree to. For example, the TRT proposed a small independent committee of technical experts form the environmental oversight body for the proposed barge operation. The discussion paper prepared by the TRT for this showed annual costs of such a committee at approximately \$80,000. Because the proponent stated it would not pay for this, the EAO would not even distribute the TRT's paper to the working group for discussion, let alone consider the body as a viable monitoring tool.

Further, while the EA process might identify measures needed by the Crown, there is no means to ensure or enforce the Crown to implement such measures. The EAO is consistently reluctant to conclude or recommend that the Crown needs to do anything that will cost it money or require a commitment. First Nations need to know, before project approval, that the Crown will commit to do certain things to make the project sustainable. They need to know, for example, that the Crown will staff another conservation officer in the area to handle increased wildlife regulation, or fund a community impacts monitoring committee, or set aside an area of important wildlife habitat to compensate for habitat lost to the mine. There is simply no process within the EAO where the Crown will make these commitments. The result is that at the end of the EA, the whole box of measures that the Crown needs to undertake to accommodate the first nation's interests is still not dealt with. The ministers approve the project, but first nations cannot since half their issues are still unresolved. What is needed is a regime where consultation and accommodation can be completed by the time the ministers are ready to announce their decision. All parties need to be at the same place at the same time. The current process has the first nation, if it has the persistence and dollars to continue, struggling for long into the permitting stages fighting with bureaucrats to get their issues resolved through permit conditions. This is an almost hopeless, not to say terribly disrespectful, process.

So, while EA as a technical fact-finding exercise can represent the first stage of consultation, it cannot complete it. Once the technical issues are known, and the potential mitigation and accommodation measures identified, a different and separate

political process, government-to-government, is required to complete the consultation and accommodation duty.

This process should be established jointly by the affected first nation and BC at the outset of the project review so that expectations are clearly defined. It should be sequential to the EA process—that is, the EA process should be in its final stages so that whatever issues have not been resolved in it can be moved to the consultation table for resolution. At the end of the day, the relevant ministries of the Crown and the first nation should sign an accommodation agreement that spells out the measures both parties are committed to. This accommodation agreement needs to be before a decision deadline so that it can be made concurrently by the parties.

### Ruby Creek Process

In the Ruby Creek molybdenum mine assessment a couple of years ago, the Taku River Tlingit persuaded government that a parallel process would be needed, separate from the EA process, to conduct the needed consultation and deal with the accommodation issues that would fall outside the EAO's ability to deliver. It was a struggle with the EAO to get this in place but, finally, with the assistance of a couple of deputy ministers, a truly government-to-government consultation process was put in place. A joint table was established, and the negotiations carried on during the EA review. Both processes were completed at the same time. That accommodation process resulted in a joint BC-Tlingit report going to the decision-makers of both parties. It was an accommodation report, not an accommodation agreement that the Tlingit wanted, but it did recommend a number of measures that BC should undertake to accommodate the interests of the Tlingit as would be affected by the Ruby Creek mine. Some of these are now in the process of being implemented.

The Ruby Creek government-to-government process produced a positive outcome. Despite a few deficiencies, its collaborative approach, jointly defined by the parties before proceeding, was definitely an evolutionary step forward in implementing the Crown's consultation duty. Why did not BC take this model and move it forward?

### **Problem #5 IBAs as Accommodation**

The fifth problem concerns impacts and benefits agreements (IBAs). What is clear in the BC assessment process today is that the EAO views measures that can be achieved through an impacts and benefits agreement between the proponent and the affected first nation as potential accommodation. If, for example, the proponent states that a specific measure can be delivered through such an agreement, then the EAO's view is that Crown is off the hook. This is the case even when it is unclear that an IBA will ever be negotiated. All that is required is upfront commitment from the proponent that a specific measure can, or will, be delivered in a forthcoming IBA, and the EAO can write in its assessment report that the first nation will be 'accommodated' to that extent.

The Crown apparently takes the position that it is not obligated to ensure that, in the case where an IBA is not reached, it steps up to the plate to fill the gap. What the Crown should do is compel the parties to reach an IBA before the ministers make a decision on the project. This would force the parties to get realistic and make the necessary compromises to get an agreement in place in a timely way, at least for those projects where a first nation is anticipating approving the project. In those cases where the first nation is opposed to the project, then the issue has to be addressed at a different level.

Passing some of the accommodation onto the proponent without an ironclad guarantee that it will transpire is not consistent with the honour of the Crown. The duty to accommodate is ultimately the Crown's. If some measures can be provided by the proponent through a negotiated agreement with the first nation, then that is real enough. But if the proponent fails to deliver, for whatever reason, then the duty always returns to the Crown to ensure that accommodation has been achieved.

### **Remedies**

So where do we go from here? I'd like to say that a great leap backward to the 1995 EA legislation would be a great leap forward. And so it would, for a whole lot of reasons. However, it would not be enough. If we are all agreed, as I hope we are, that EA is a critical tool for making sustainable decisions about the use of land and resources in BC,

then I think we are also agreed that it has to be a robust process that delivers credible and accurate information about the proposed project to all decision-makers. It must be science-based and free from political interference. It must be neutrally administered, transparent and accountable to the affected parties. It must have the tools and resources to conduct intellectually rigorous reviews, and the analytical capacity to demonstrate that sustainability will be achieved, or not, if the project proceeds, and it must be able to make the appropriate recommendation on the basis of the sustainability test! These principles will of necessity require a shift in focus away from simply avoiding adverse effects toward an expectation of positive contributions to the achievement of sustainability objectives at all levels.

While the 1995 *BCEAA* was a vast improvement over the current act on some of these fronts, neither is sufficient any longer. A completely new legislative regime for EA is needed—one that, among other things, provides for proper and effective engagement of first nations in the process and subsequent decision-making. Other jurisdictions are making the kinds of changes necessary, and BC has a long way to catch up.

The first principle is that the process, and the agency running it, has to be truly independent. What is needed is an assessment authority that reports to the legislature, not to a particular ministry. The authority needs to have the mandate for developing standards and policies for assessment processes, and ensuring that EAs conducted under its supervision maintain the standards. The authority would have its mandate, terms of reference, and appointments to its controlling board, be jointly done by BC and first nations. It needs to be staffed by qualified EA practitioners who would manage project reviews.

In parallel, a new statutory regime for consultation and accommodation needs to be established. This will need sufficient flexibility to provide for variance among individual consultative processes, so that local needs and adaptations can be integrated into a mutually designed process for each specific case. It needs to ensure that the outcomes of such processes are captured in accommodation agreements. Reconciliation is not achieved by the Crown unilaterally deciding which accommodation measures it will commit to.

Both new legislative regimes must provide sufficient capacity for first nation participation in the processes they set up. Respect and reconciliation demand that the Crown no longer forces first nations, as it now does, to participate in their processes without proper resources to do it meaningfully.

It may be that an intermediate step is required, given Minister Penner's wrongly construed view of the situation. The minister should commission an independent task force to review the BC EA process. Terms of reference for the task force, and appointments to it, should be jointly developed by BC and appropriate first nation representatives. Such a review, properly constituted, would remove all uncertainty about adequacy of the process we currently have, and outline the basis for developing a new regime in which the Crown's duty with respect to recognition and reconciliation for aboriginal people, at least in these very important decision-making processes, can be meaningfully and honourably achieved.