

Indigenous Participation in Governance of Land & Natural Resources in Northern Canada

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GoSápmi research project workshop
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Outline

Indigenous Participation in Governance of Land & Natural Resources in Northern Canada

1. Indigenous Rights in Canada
2. Land Claims Agreements / Modern Treaties
3. Co-Management in Canada's North re Major Projects
4. Judicial Consideration / Example
5. Tentative Observations and Emerging & Legacy Issues

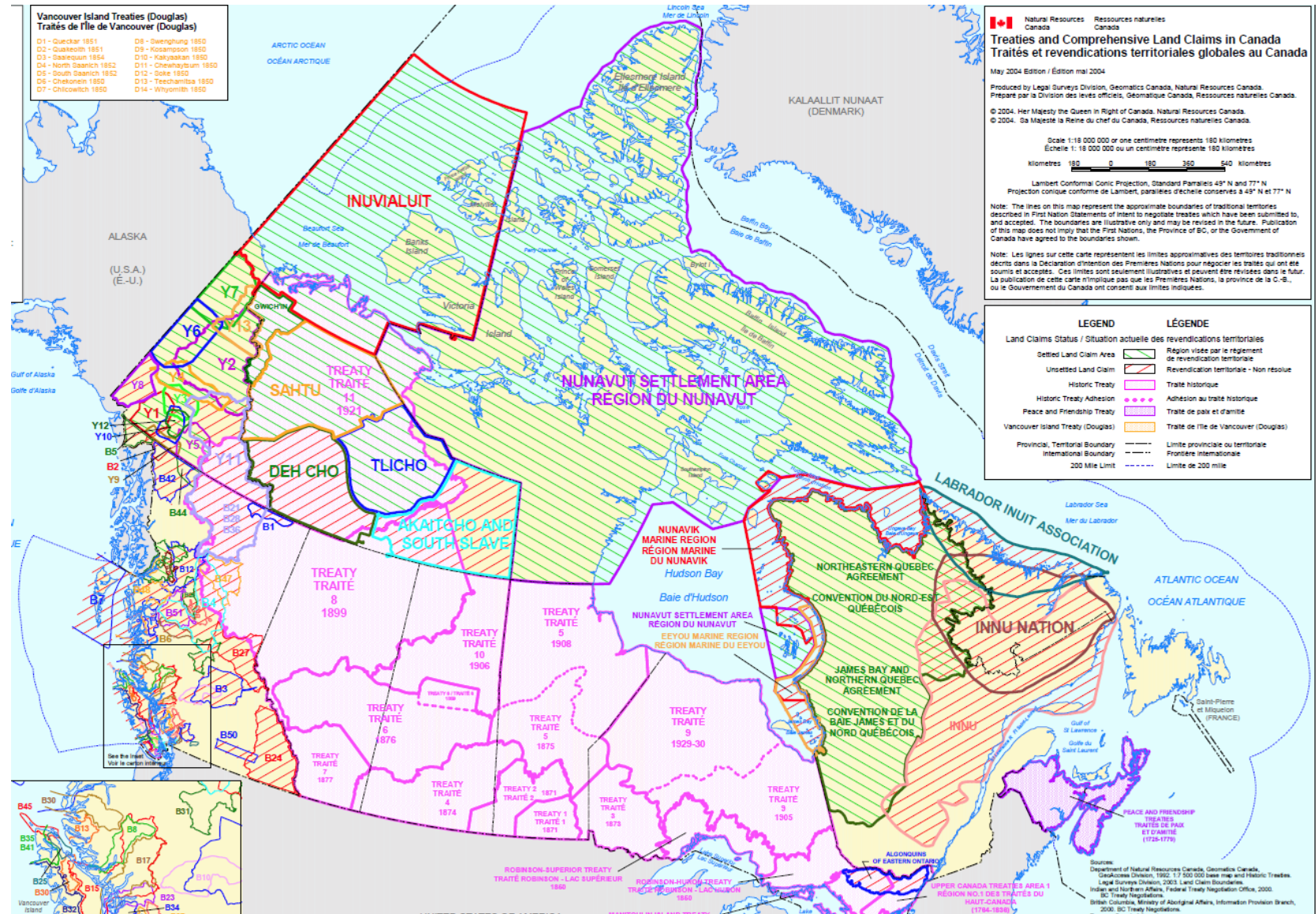


Indigenous rights in Canada: “Aboriginal Law” Context

Constitution Act, 1982

s.35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Canadian “Aboriginal Law” and Indigenous Law Context



Land Claims Agreements / Modern Treaties



Modern Treaties in Canada

Legal nature of Land Claims Agreements:

- Negotiated, constitutionally protected Crown-Indigenous agreements, basis for 'nation-to-nation' relationship
- Lengthy, sophisticated, comprehensive, contract-like agreements
- Content includes: land management, wildlife management, development assessment, land use planning, heritage resources, economic development, resource royalties, protected areas, expropriation, etc

Modern Treaties in Canada

“Modern treaties are intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership” (para 33)

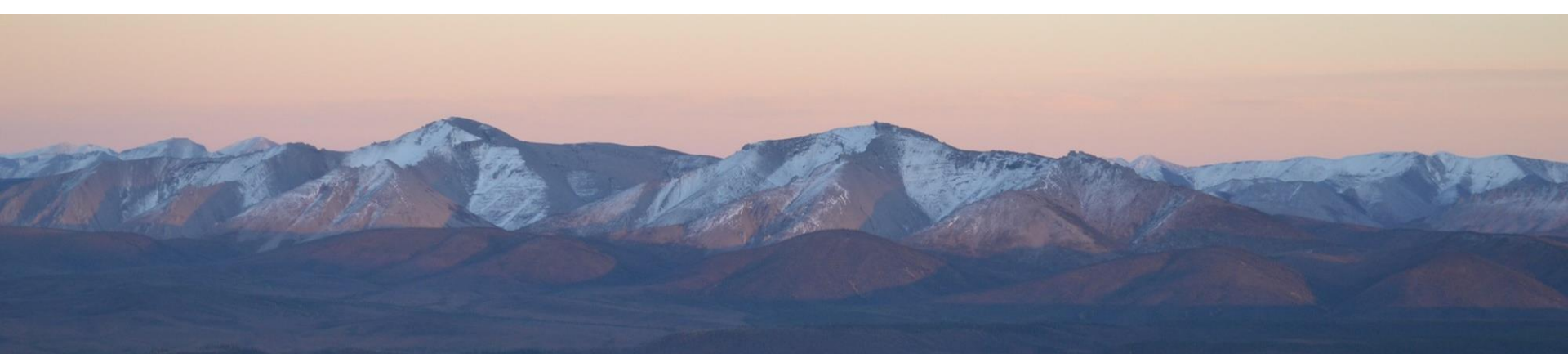
“As expressions of partnership between nations, modern treaties play a critical role in fostering reconciliation. Through s. 35 of the Constitution Act, 1982, they have assumed a vital place in our constitutional fabric. Negotiating modern treaties, and living by the mutual rights and responsibilities they set out, has the potential to forge a renewed relationship between the Crown and Indigenous peoples” (para 1)

- *First Nation of Nacho Nyak Dun v. Government of Yukon* (SCC 2017)

Modern Treaties in Canada

“Modern treaties... attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship... The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.” (para 10)

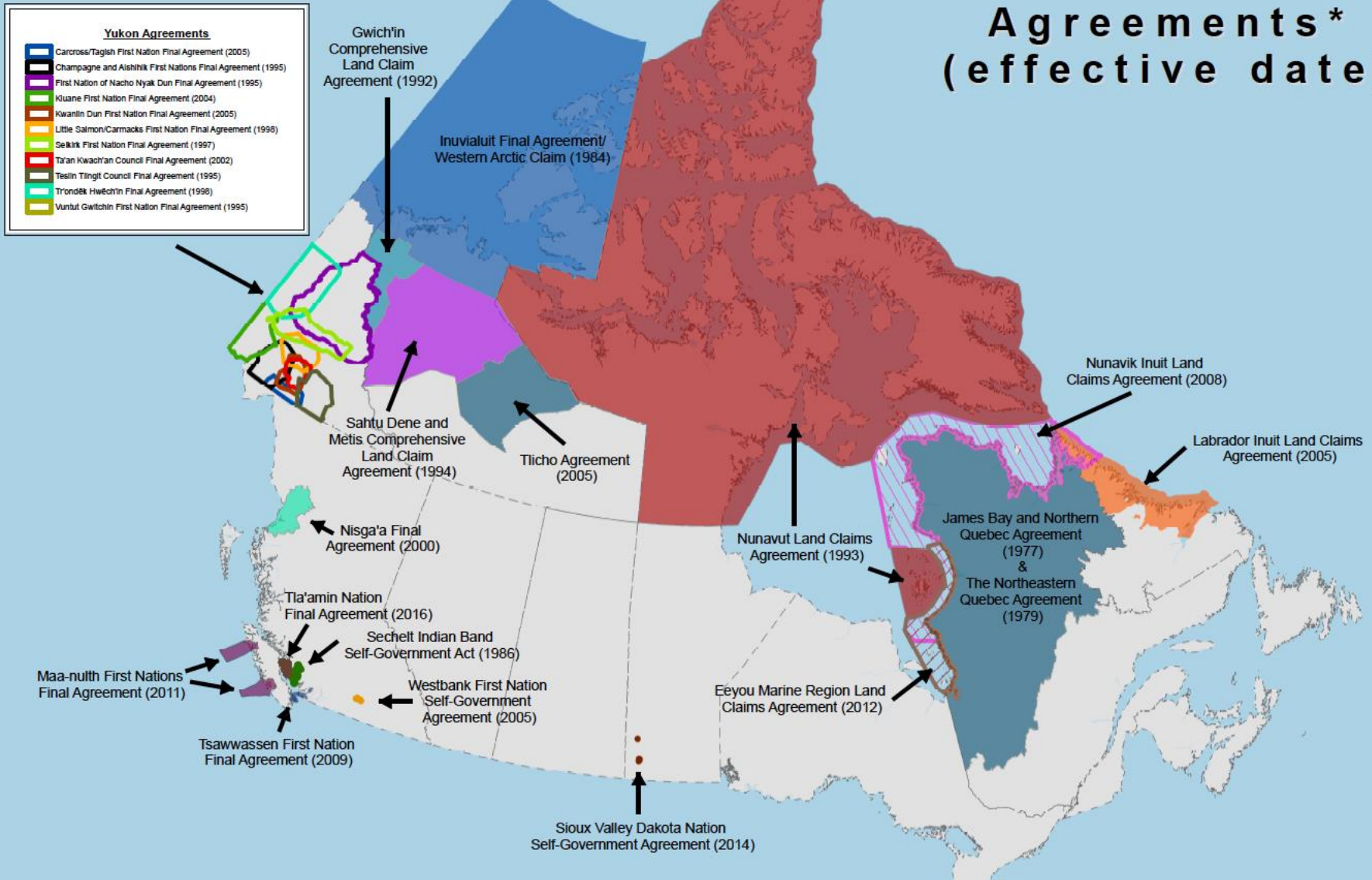
- *Beckman v. Little Salmon/Carmacks First Nation* (2010 SCC 53)



Co-Management in Canada's North

- Core feature of modern treaties: co-management
- Co-Management Boards
 - Composed of federal, territorial, and Indigenous treaty party reps
 - Integrate the interests of land claim parties w direct representation
 - Land, water, wildlife, dispute resolution, land use planning, resource/project development
 - Compromise between Indigenous parties' desire for complete control with fed gov't insistence of control; power-sharing
- Co-Management and major projects
 - Institutional basis for land use planning and project assessment

Modern Treaties and Self-Government Agreements* (effective date)

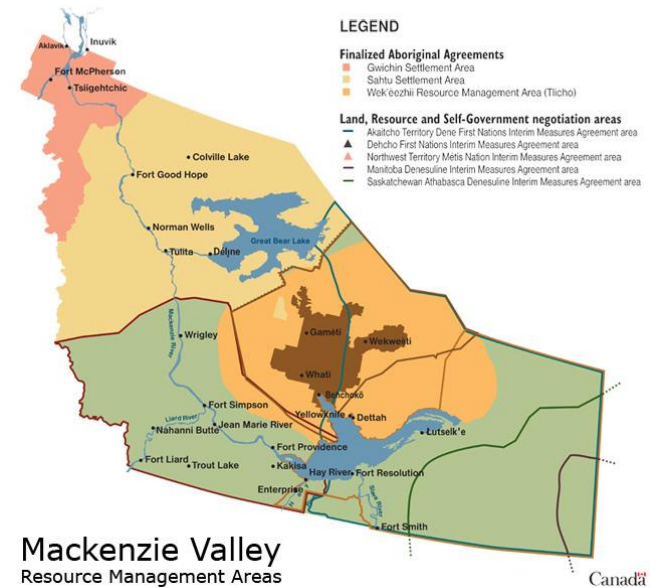






Northwest Territories

- LCAs – Gwich'in (1992), Sahtu (1993), Tlicho (2005)
- 1998 - Mackenzie Valley Resource Management Act (MVRMA)
- MVRMA governs EAs and LUPs in NWT (except Inuvialuit Settlement Region)
- MVRMA administered by the Mackenzie Valley Environmental Impact Review Board and the various land use planning and land and water boards under land claims
- MVRMA (and land claim agreements) created and provided authorities to co-management boards to carry out land use planning, regulate the use of land and water and, and to conduct environmental assessments and reviews of major projects



24.2.2 The Planning Board shall have equal membership from nominees of the Gwich'in Tribal Council and of government, not including the chairperson.

24.2.3 The head office of the Planning Board shall be in the settlement area.

24.2.4 The following principles shall guide land use planning in the settlement area:

- (a) the purpose of land use planning is to protect and promote the existing and future wellbeing of the residents and communities of the settlement area having regard to the interests of all Canadians;
- (b) special attention shall be devoted to:
 - (i) protecting and promoting the existing and future social, cultural and economic well-being of the Gwich'in;
 - (ii) lands used by the Gwich'in for harvesting and other uses of resources; and
 - (iii) the rights of the Gwich'in under this agreement;
- (c) land use planning shall directly involve communities and designated Gwich'in organizations; and
- (d) the plan developed through the planning process shall provide for the conservation, development and utilization of land, resources and waters.



24.3 ENVIRONMENTAL IMPACT ASSESSMENT AND REVIEW

24.3.1 All development proposals in the Mackenzie Valley, including development proposals in relation to Gwich'in lands, shall be subject to the process of environmental impact assessment and review as set out in 24.3.

- 24.3.2
- (a) An Environmental Impact Review Board ("the Review Board") shall be established as the main instrument for the conduct of environmental impact assessment and review in the Mackenzie Valley.
 - (b) The Review Board shall have equal membership from nominees of aboriginal groups and of government, not including the chairperson. No less than one member of the Board shall be a nominee of the Gwich'in Tribal Council.

...

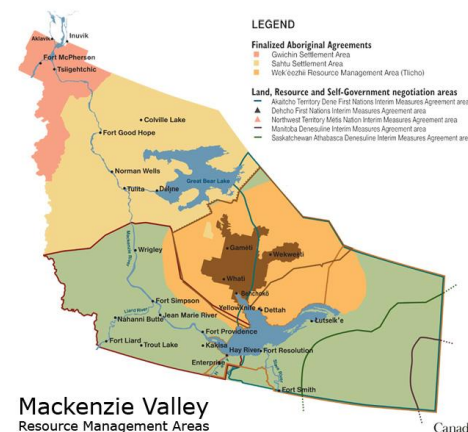
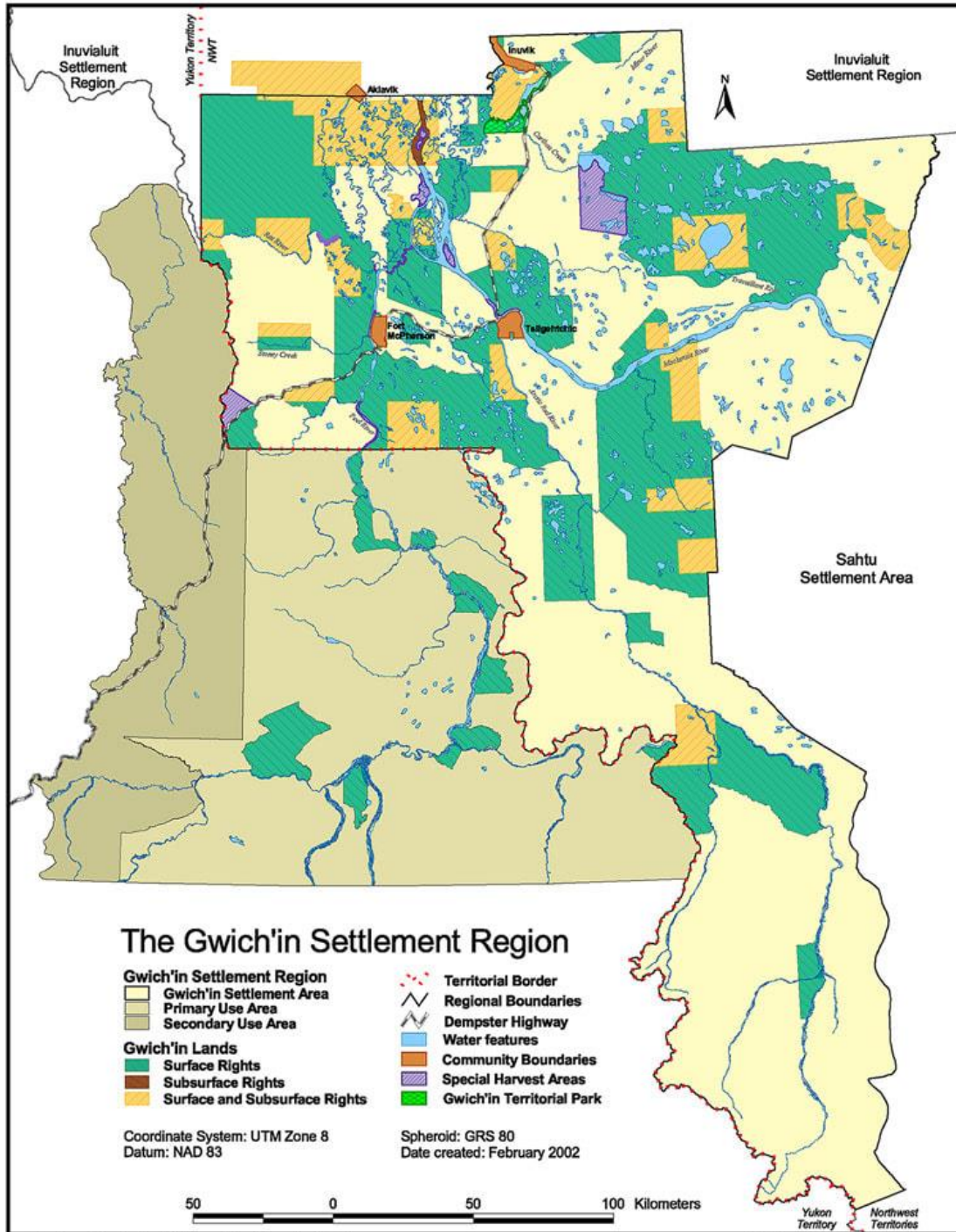
24.3.12 An environmental impact review shall have regard to:

- (a) the protection of the existing and future economic, social and cultural well-being of the residents and communities in the Mackenzie Valley;
- (b) the protection of the environment from significant adverse impact from the proposed development; and
- (c) in cases where the proposed development will likely result in a significant adverse impact on the environment, the need for mitigative or remedial measures.

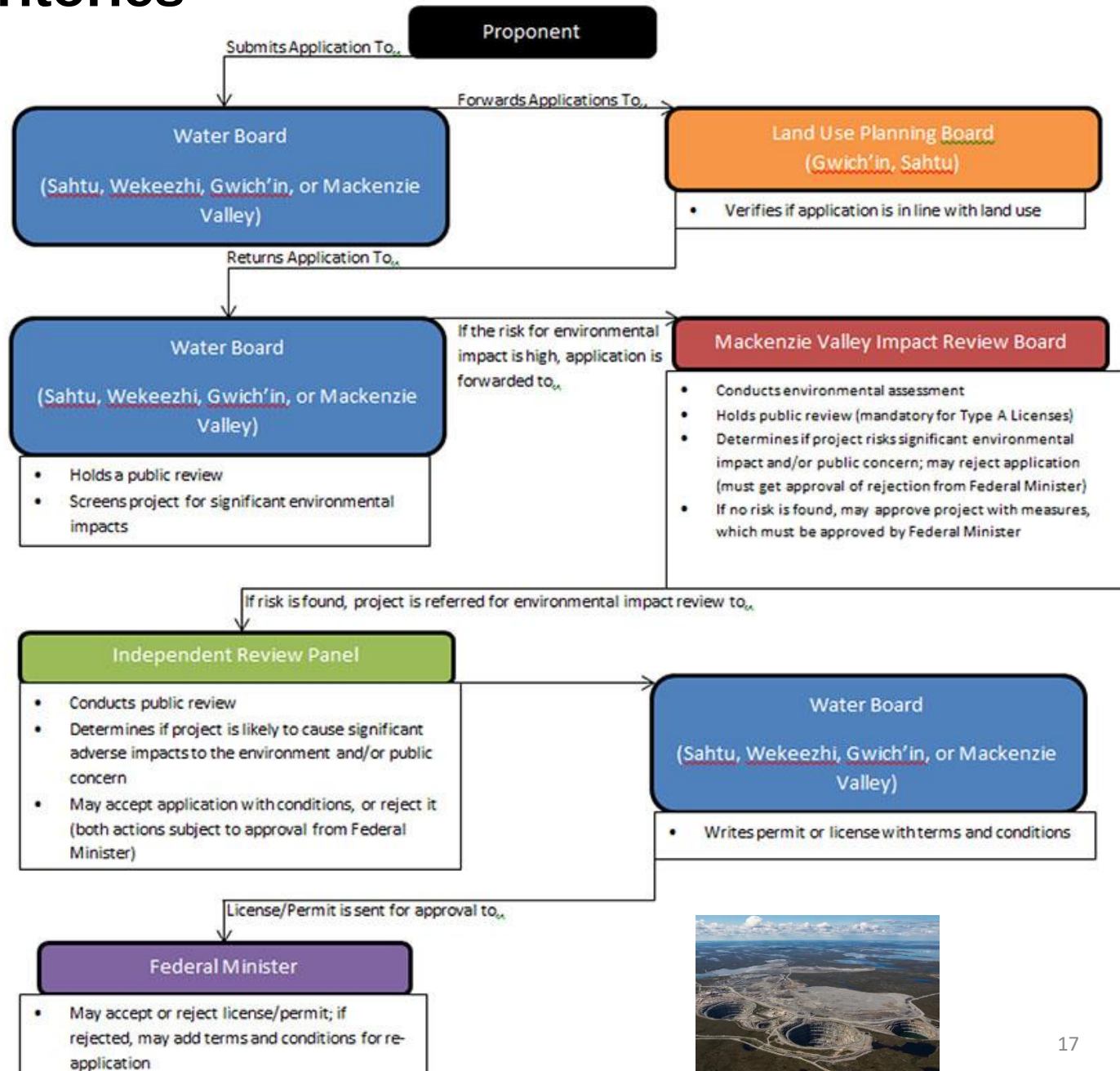
24.3.13 An environmental impact review shall include:

- (a) the submission by the proponent of an impact statement in accordance with any guidelines established by the Review Board or the panel;
- (b) such analysis by the Review Board or the panel as is considered appropriate;
- (c) public consultation or hearings in affected communities; and





Northwest Territories

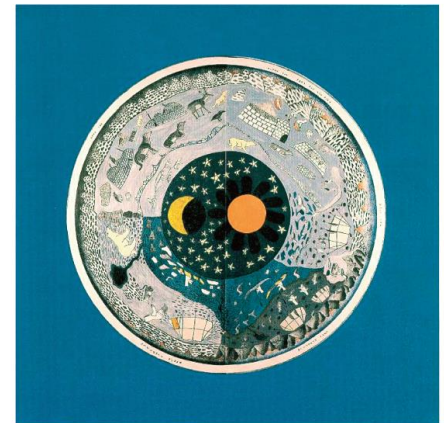


Nunavut Final Agreement

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Agreement Between
the Inuit of the Nunavut Settlement Area
and Her Majesty the Queen in right of Canada
as amended

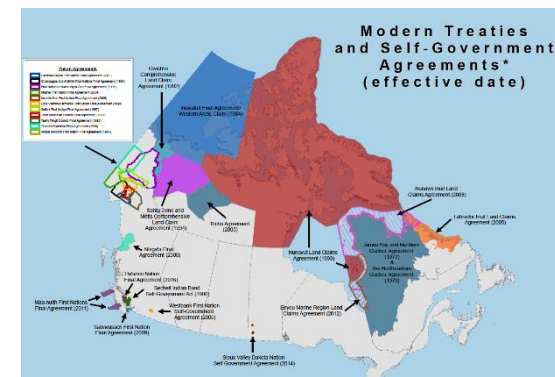


CONSOLIDATED VERSION
(amendments included herein are up to January 29, 2009)

Printed May, 2013

Indian and Northern
Affairs Canada

Affaires indiennes
et du Nord Canada

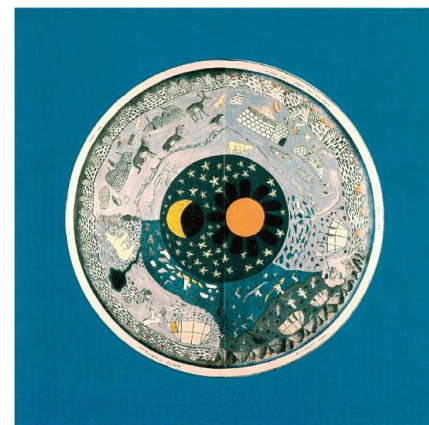


Nunavut Final Agreement

ARTICLE 12: DEVELOPMENT IMPACT

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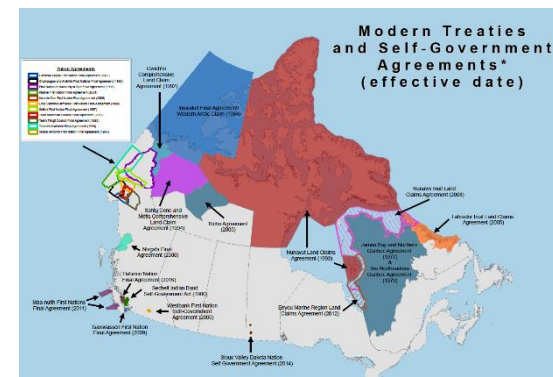
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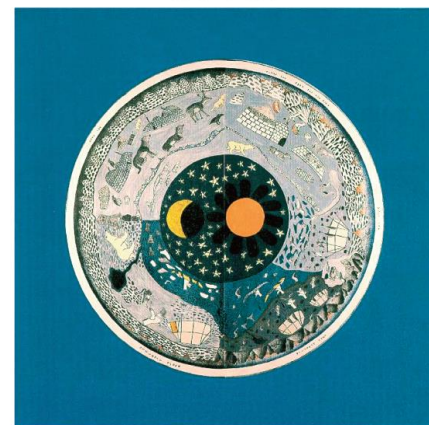
Nunavut Final Agreement

Matters Taken into Account

12.5.5 NIRB shall, when reviewing any project proposal, take into account all matters that are relevant to its mandate, including the following:

- (a) whether the project would enhance and protect the existing and future well-being of the residents and communities of the Nunavut Settlement Area, taking into account the interests of other Canadians;
- (b) whether the project would unduly prejudice the ecosystemic integrity of the Nunavut Settlement Area;
- (c) whether the proposal reflects the priorities and values of the residents of the Nunavut Settlement Area;
- (d) steps which the proponent proposes to take to avoid and mitigate adverse impacts;
- (e) steps the proponent proposes to take, or that should be taken, to compensate interests adversely affected by the project;
- (f) posting of performance bonds;
- (g) the monitoring program that the proponent proposes to establish, or that should be established, for ecosystemic and socio-economic impacts; and

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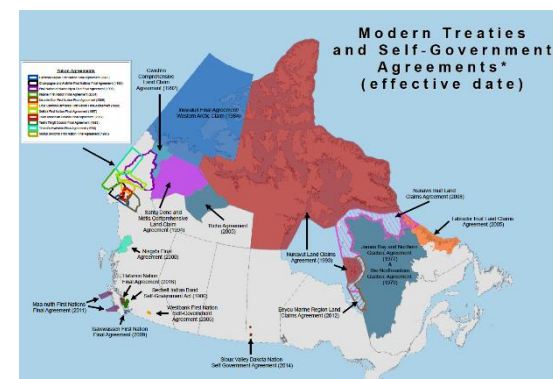
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Modern Treaties and Self-Government Agreements* (effective date)

DATA SOURCES:

- Northwest Territories Self-Government Agreement (1993)
- Nunavut Self-Government Agreement (1999)
- Yukon First Nations Self-Government Agreement (2002)
- British Columbia First Nations Self-Government Agreement (2009)
- Alberta First Nations Self-Government Agreement (2011)
- Saskatchewan First Nations Self-Government Agreement (2014)
- Manitoba First Nations Self-Government Agreement (2016)
- Ontario First Nations Self-Government Agreement (2017)
- Quebec First Nations Self-Government Agreement (2018)
- Inuit Self-Government Agreement (2019)

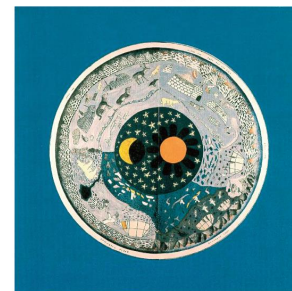
Map Labels:

- Canada (Self-Government Agreement) (1993)
- Quebec First Nations Self-Government Agreement (2018)
- British Columbia First Nations Self-Government Agreement (2009)
- Alberta First Nations Self-Government Agreement (2011)
- Saskatchewan First Nations Self-Government Agreement (2014)
- Manitoba First Nations Self-Government Agreement (2016)
- Ontario First Nations Self-Government Agreement (2017)
- Quebec First Nations Self-Government Agreement (2018)
- Inuit Self-Government Agreement (2019)
- Yukon First Nations Self-Government Agreement (2002)
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- Ontario First Nations Self-Government Agreement (2017)
- Quebec First Nations Self-Government Agreement (2018)
- Inuit Self-Government Agreement (2019)
- Yukon First Nations Self-Government Agreement (2002)
- Nunavut Self-Government Agreement (1999)
- Northwest Territories Self-Government Agreement (1993)

Nunavut

- 1993 - Nunavut Land Claims Agreement
- 2015 - Nunavut Planning and Project Assessment Act (NuPPAA)
- Co-management boards responsible for administering project regulatory processes in the territory:
- Nunavut Planning Commission (NPC)
- Nunavut Impact Review Board (NIRB)
- NIRB is responsible for impact assessment in Nunavut

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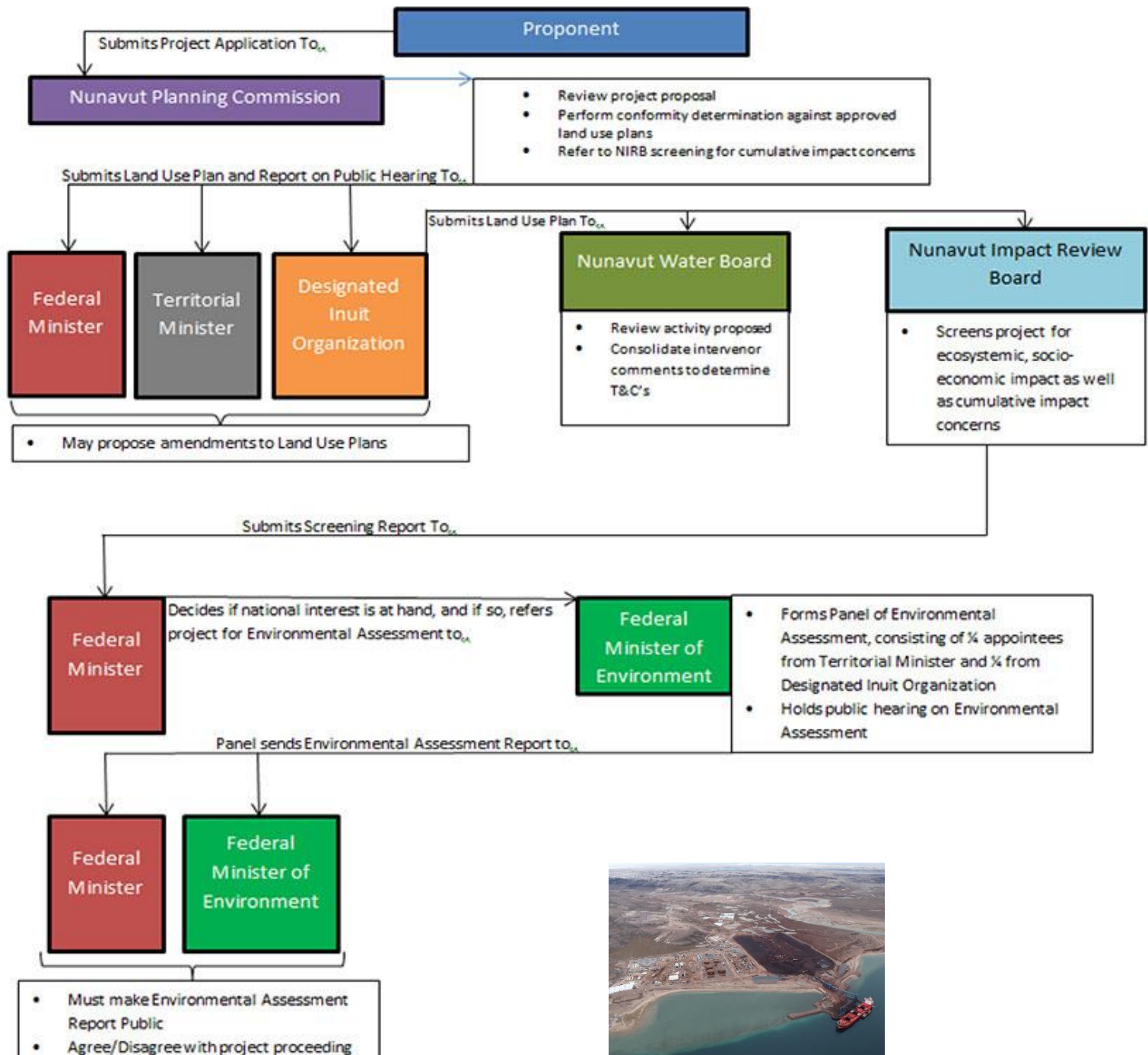
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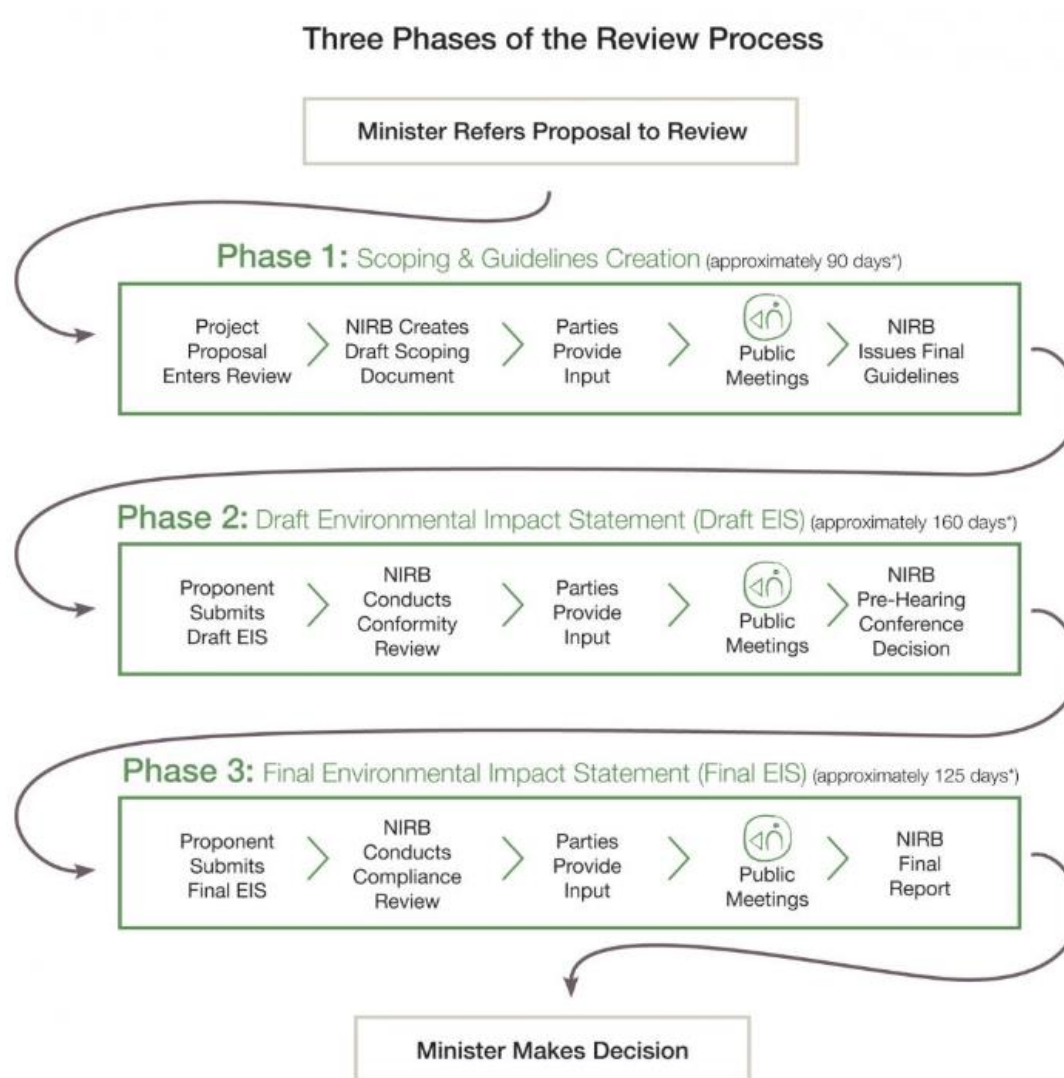
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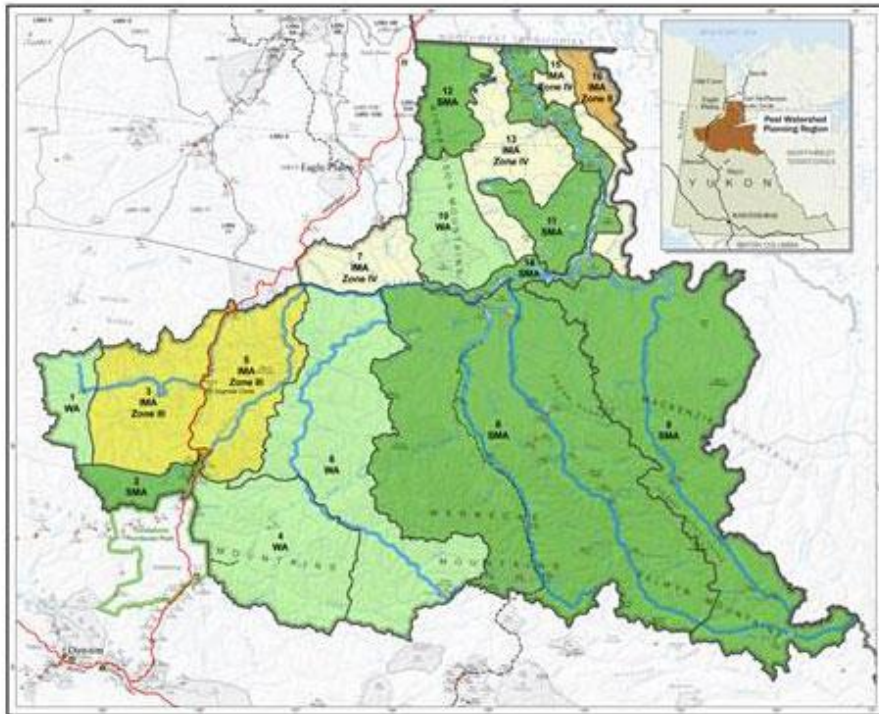
Nunavut



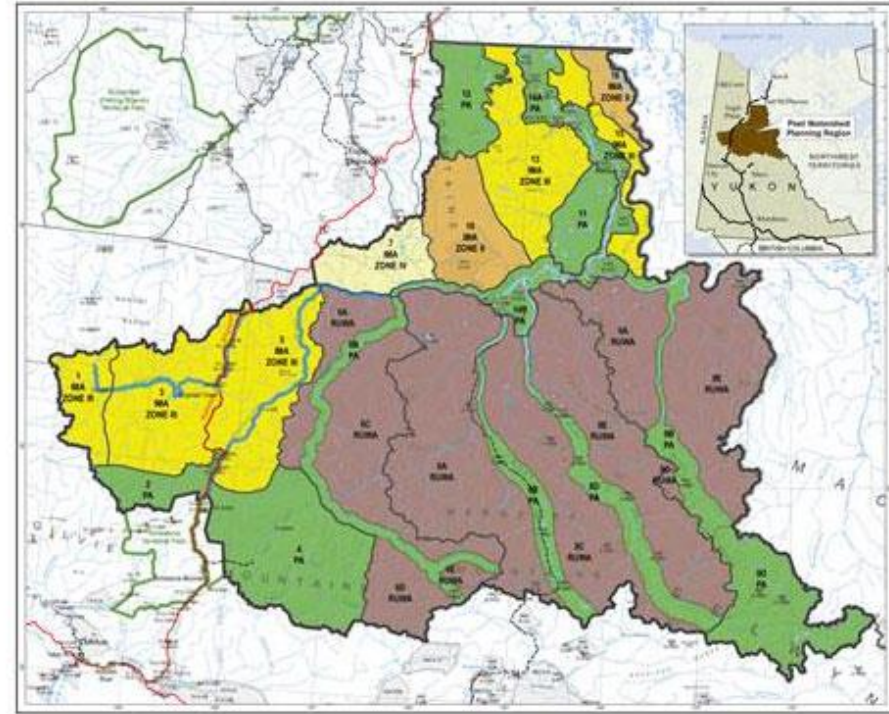
Judicial Consideration: Land Use Planning

First Nation of Nacho Nyak Dun v. Government of Yukon (SCC 2017)

- “process for developing regional land use plans that ensures the meaningful participation of First Nations in the management of public” resources in settlement and non-settlement lands”



Final Recommended Plan



Yukon Government Plan

Judicial Consideration: Project Assessment

Ka's 'Gee Tu First Nation v. Canada, 2007 FC 764

- “One of the central purposes of the Act was to provide an important role for Aboriginals and other residents in resource management decisions in the Mackenzie Valley... The Act repeatedly stresses the importance of providing a process which recognizes the role of the local residents and their way of life in the management of natural resources in the Mackenzie Valley. Numerous provisions are included that provide for consultation with the various affected communities.”

Qikiqtani Inuit Association v Canada (1998 FC)

- “appointment of Inuit members to the Board does not alone mean that in designing its rules of procedure the Board has met the requirement that it give due regard to Inuit culture, customs and knowledge. Nor does it mean that the purposes of the Agreement have been met. Participation by the Inuit who will be affected by a particular decision is what is important”

Judicial Consideration: Consultation

Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC

“Consultation was required to help manage the important ongoing relationship between the government and the Aboriginal community in a way that upheld the honour of the Crown.”

- Duty to consult and accommodate applies in modern treaty contexts
- Duty is an additional source of participation rights
- Flows from constitutional principle of “Honour of the Crown”

Example: Baffinland Mary River Iron Mine, Nunavut



Example: Baffinland Mary River Iron Mine

- Land use conformity
- NIRB review
- NIRB recommend approve
- Minister approval (2012)
- ...
- LUP non-conform/
amendment (2018)
- NIRB review (2018-2022)
- NIRB recommend not
approve (May 2022)
- Minister decision??



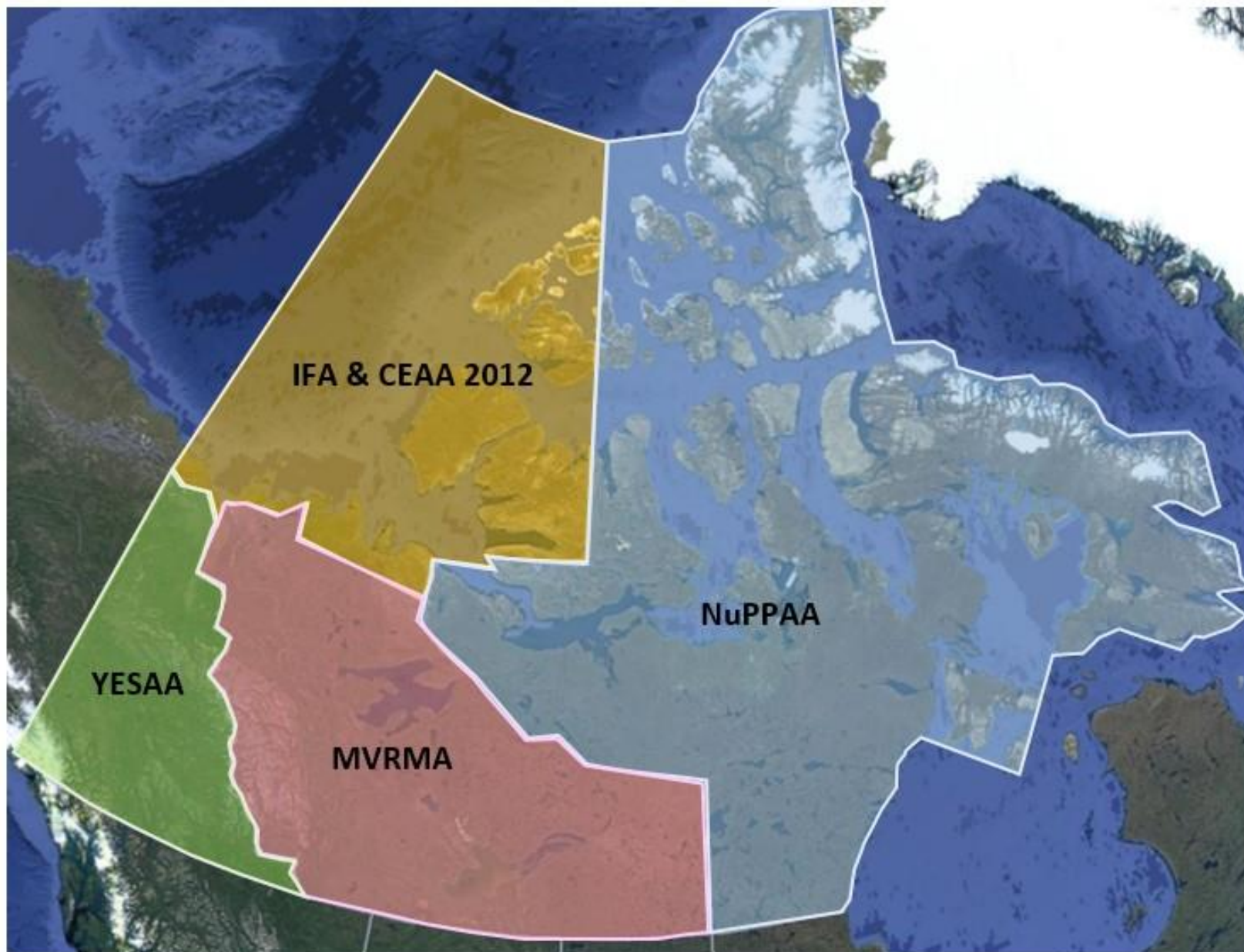


Example: Baffinland Mary River Iron Mine

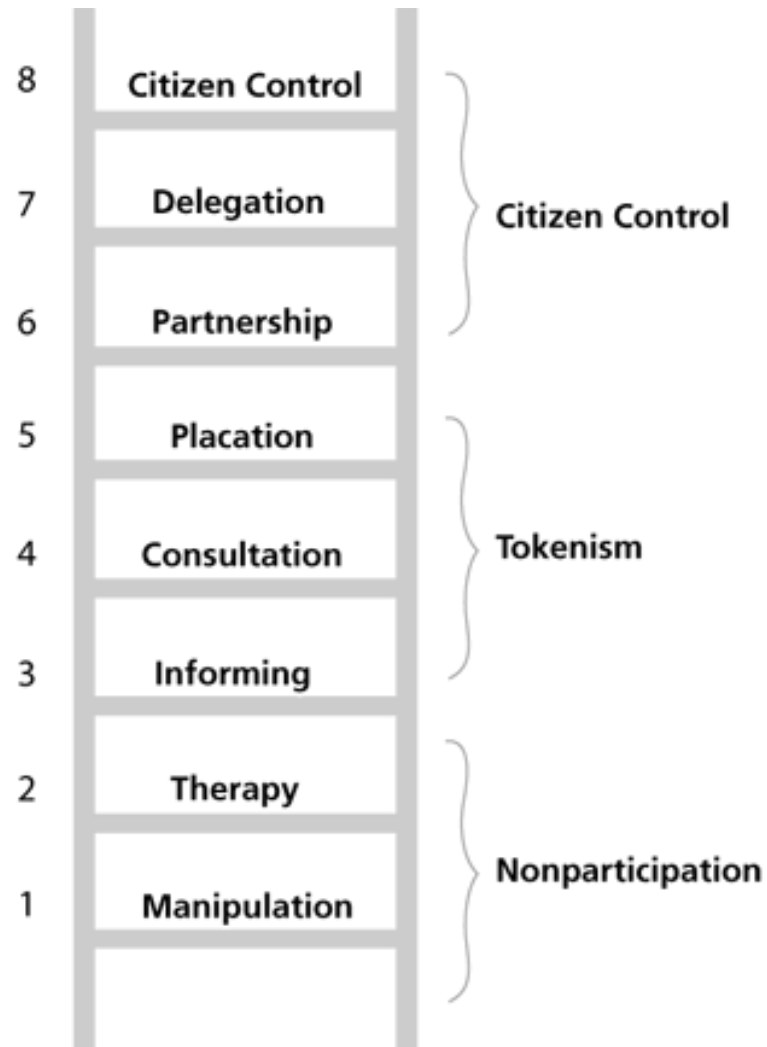
After careful consideration, the Board has concluded that there is potential for the Phase 2 Development Proposal to have significant and lasting adverse effects on marine mammals and fish, caribou and other terrestrial wildlife, along with vegetation and freshwater. The Board also finds that these ecosystemic effects may in turn lead to significant adverse socio-economic effects on Inuit harvesting, culture, land use and food security.

The Board has decided that despite the best efforts of all involved in the development of more than 250 commitments and the ICA, the potential for these significant adverse ecosystemic and socio-economic effects cannot be adequately mitigated to allow the Phase 2 Development Proposal to proceed at this time.

The Board has therefore concluded that the Phase 2 Development Proposal as assessed cannot proceed at this time in a manner that will protect and promote the existing and future well-being of the residents and communities of the Nunavut Settlement Area, and Canada in general, and would also not be protective of the ecosystemic integrity of the Nunavut Settlement Area.

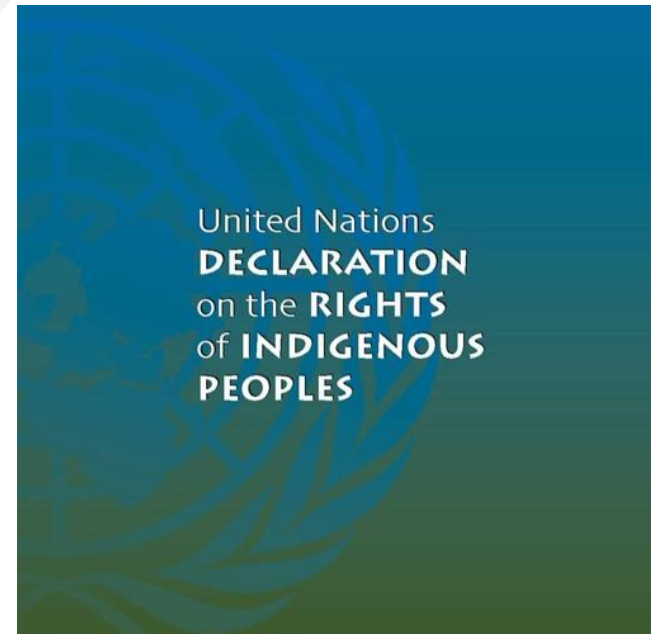


Insert Arnstein's Ladder



Emerging and Legacy Issues

- UNDRIP/FPIC implementation
- Decarbonization vs. Participation
- “co-development” of law and policy
- Self-government /jurisdiction/sectoral
- Fiscal/funding arrangements
- Revitalization of Indigenous laws
- Treaty implementation challenges
- Well-being gap persists

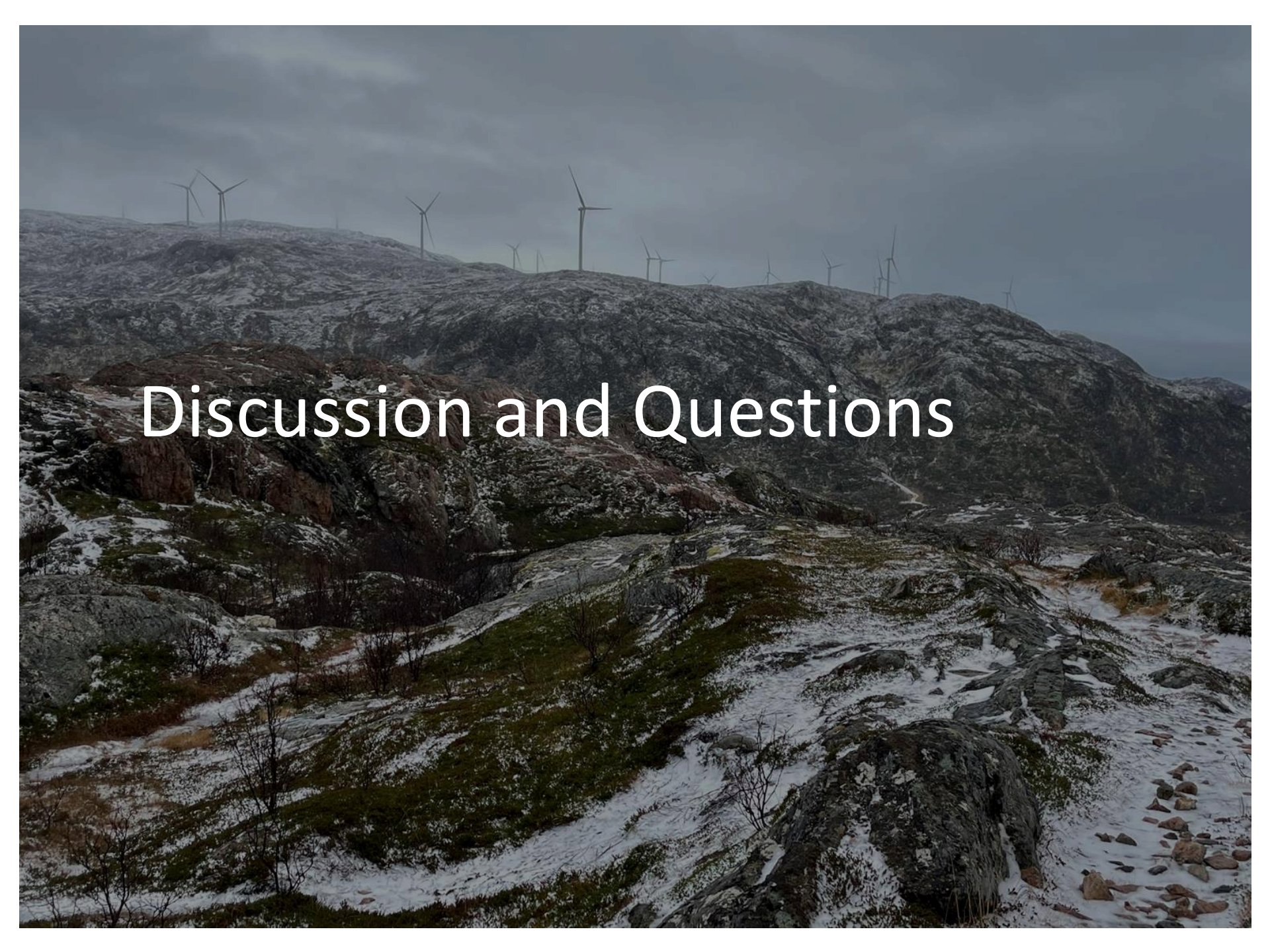


- LCAs consistent w UNDRIP?
- Article 18 (Indigenous participation)
- Article 28 (lands appropriated)
- Article 32 (project review / FPIC)
- Article 40 (dispute resolution)



Discussion and Questions





Discussion and Questions

An aerial photograph of a vast, flat landscape, likely a tundra or wetland, with patches of snow and water. In the background, a range of snow-capped mountains stretches across the horizon under a clear sky. The foreground features a large, irregularly shaped body of water, possibly a lake or a large pond, surrounded by low-lying vegetation and small, snow-filled depressions. The overall scene is serene and expansive.

Thank you

Addendum re Int'l Law and Indigenous Rights in Canada

- Customary international law – monist
- Treaty law - dualist
- Cdn courts less open to int'l law than Scandinavian courts
- Notwithstanding Ominayak, Art 27 ICCPR not an effective part of the discourse in domestic law
- Cda has not ratified ILO 169 and unlikely to do so
- Cda joined OAS (1990) but like US not a party to the Convention – but see the Declaration on the Rights of Man
- Hence the focus on UNDRIP
- Now have cautiously worded federal and BC implementation statutes
- Research question: to what extent are modern treaties consistent with the Declaration?