The Conference Board of Canada

Indigenous Ownership

Overcoming Obstacles and Forging Partnerships

Impact Paper | September 29, 2022

Contents

Key Findings

- Most Indigenous communities lack access to affordable capital needed to acquire meaningful ownership levels in major projects. Addressing this issue will require expanding successful but geographically limited financing programs.

- Métis and Inuit communities lack access to Indigenous–led institutions that are facilitating major project ownership. A distinctions-based approach is needed to bridge this gap.

- Remote communities can benefit from shared capacity and resources that take into account their small scale, and funding programs that consider their low revenues and high project costs.

- Through early engagement, trust-based relationships, and creative transaction structures, Indigenous communities and project proponents are de-risking investments in major projects.

- The federal government can further de-risk major project investments involving Indigenous co-owners by clarifying how its policies will impact project returns.

Introduction

Indigenous ownership is rising across Canada's $540 billion major project landscape,[1] with the potential to unlock new investment and advance economic reconciliation.

Driving this trend are Indigenous communities seeking stable, long-term revenues and greater decision-making power over projects impacting their territories. Industry is also awakening to the strengths and increased certainty Indigenous co-owners can bring to their operations.

The opportunities these new partnerships are creating have sparked a growing urgency for Canada to break down long-standing barriers in the way of Indigenous major project ownership. Promising efforts are under way, but many Indigenous communities still lack access to the resources they need to make informed decisions, manage risks, and finance large-scale investments in their future.

This impact paper will answer the following research question: What do Indigenous groups need to participate as strong, equity-based partners in major projects? This paper is the first in a series of three pieces that will also explore best practices across industry, government, and lenders and the link between Indigenous equity participation and self-determination.

1 Natural Resources Canada, *Natural Resources: Major Projects Planned or Under Construction — 2021 to 2031.*

Recognizing the Diversity of Indigenous Communities and Nations in Canada

The Indigenous populations in Canada are diverse. Indigenous identity groups in Canada include First Nations, Inuit, and Métis peoples. But these groups are composed of a significant number of distinct cultures. We recognize these distinctions, and the findings in this impact paper do not necessarily reflect the views of all Indigenous peoples in Canada.

Indigenous Rights and Major Project Agreements

For much of Canada's history, Indigenous peoples were voiceless in major project decisions. Change began in 1951, when an amendment to the *Indian Act* removed a ban on First Nations' access to legal representation. This amendment was followed by the 1973 landmark ruling in *Calder v. Attorney-General of British Columbia,* in which the Supreme Court of Canada recognized that Indigenous peoples have rights flowing from their long-time occupation, possession, and use of their traditional territories. In 1982, these existing rights were enshrined in section 35 of Canada's constitution, and in the 2004 case *Haida Nation v. British Columbia (Minister of Forests),* the Supreme Court of Canada ruled that the Crown has a duty to consult Indigenous peoples before taking actions that may adversely affect their rights. When these actions relate to major projects, practical aspects of discharging the duty are often delegated to project proponents.[2]

The duty to consult is contextual. On the high end, it can require securing an Indigenous community's consent (as the Supreme Court of Canada found in the 2014 case *Tsilhqot'in Nation v. British Columbia*); on the low end, it may require as little as informing the community about decisions already made.[3] Privately negotiated agreements, typically referred to as Impact Benefit Agreements (IBAs), have played an increasingly important role in discharging the duty to consult, with companies agreeing to mitigate project impacts in exchange for communities' agreeing not to enforce their rights in a way that delays or blocks the project.[4] In the mining sector alone, almost 500 such agreements are currently in place,[5] typically including commitments related to environmental protection, Indigenous employment and business development, and funding for community infrastructure and programming.[6]

The *United Nations Declaration on the Rights of Indigenous Peoples Act*, which came into force in 2021, is set to further encourage agreement-making between Indigenous communities and project proponents. The Act ratifies the "United Nations Declaration on the Rights of Indigenous peoples" (UNDRIP), creating an obligation and a framework for the federal government to work toward its objectives. UNDRIP states that Indigenous peoples must give their "free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."[7] Indigenous groups, legal scholars, and the Government of Canada have all argued that this right to free, prior, and informed consent (FPIC) does not amount to a unilateral Indigenous veto over projects.[8] UNDRIP places explicit limits on the right to FPIC to avoid conflict with

2 Hummel, "Behind the Curtain."
3 Boutilier, "Free, Prior, and Informed Consent and Reconciliation in Canada."
4 Hummel, "Behind the Curtain."
5 Mining Association of Canada, "Mining-Indigenous Relationship Agreements."
6 Kielland, *Supporting Aboriginal Participation in Resource Development.*
7 United Nations, "United Nations Declaration of the Rights of Indigenous Peoples," 23.
8 Boutilier, "Free, Prior, and Informed Consent and Reconciliation in Canada."

"respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."[9] However, FPIC is a higher standard than the duty to consult and will strengthen the position of Indigenous communities in their negotiations with project proponents.[10]

The Business Case for Indigenous Ownership

While co-ownership does not in itself confirm a community has given its irrevocable FPIC to a project, it is, according to a law firm partner in our participant interview, a "signal that the Indigenous community is in favour of the project and will be imposing their own standards."[11] Industry is increasingly looking to these signals and standards for clarity, leading to more meaningful relationships with Indigenous communities. By seeking out community perspectives at the outset of planning, proponents aim to improve decision-making around the project's governance structure, environmental stewardship, and operational processes.[12] Some are seeing these business relationships lead to additional projects, with Indigenous partners lined up before projects are even conceived.[13]

Companies embracing the shift are increasingly refining their approach through formal certifications like the Progressive Aboriginal Relations (PAR) program from the Canadian Council for Aboriginal Business[14] and the Employer of Choice Certification program from Indigenous Works.[15] Some are also developing Reconciliation Action Plans that make project equity for Indigenous groups a strategic priority.[16]

Increased Indigenous ownership levels are generating a range of benefits for major projects, including reduced regulatory risk, accelerated permit approvals, improved communications channels, and better long-term alignment of interests between industry and Indigenous communities.[17] Greater Indigenous involvement at the strategic level, with community-appointed board members in a position to impact all aspects of operations, is ultimately leading to better projects and more equitable benefit-sharing—building trust within communities while creating predictability for investors.[18] In a 2020 KPMG survey of senior leaders overseeing major projects, 86 per cent cited non-technical factors as having a significant influence on their ability to deliver projects on time and on budget.

9 United Nations, "United Nations Declaration on the Rights of Indigenous Peoples," 29.
10 Boutilier, "Free, Prior, and Informed Consent and Reconciliation in Canada."
11 Participant interview: Law firm partner.
12 Participant interview: Director of Indigenous Relations at Canadian natural resource company.
13 Indigenous Partnerships Success Showcase, "First Nations Can Be Partners in Major Projects."
14 Canadian Council for Aboriginal Business, "PAR Companies."
15 Indigenous Works, "Certification."
16 TC Energy, "Reconciliation Action Plan."
17 Helbronner and others, "Considerations When Structuring Equity Investments with Indigenous Organizations"; Warrier and others, "Indigenous Ownership of Natural Resource Projects"; and Hoicka, Savic, and Campney, "Reconciliation through Renewable Energy?"
18 Wilson, "What Is Benefit Sharing?"; and participant interview: Director of Indigenous Relations at a Canadian natural resource company.

These factors include organizational structure and culture, decision-making protocols, communication and stakeholder intergration–all areas in which Indigenous communities are poised to innovate as co-owners.[19]

For Indigenous communities, the revenue-sharing enabled by co-ownership is a means of obtaining financial independence and economic freedom, reducing their reliance on transfer payments from the federal government.[20] Creative deal structures are helping bring stability to these revenues by giving communities the option to purchase shares after projects are built and generating revenue, as well as by allowing them to cover upfront deal costs by forgoing a portion of their future dividends.[21] This pursuit of new revenue streams aligns with the goals of UNDRIP, which emphasizes that Indigenous peoples have a right not only to self-determination, but also to a "ways and means for financing" it.[22]

When co-ownership enables a project to proceed, it also generates similar benefits to those derived from IBAs—unlocking a larger value chain of economic opportunities that local Indigenous-owned construction, engineering, and other firms are often well placed to participate in.[23] Indigenous co-owners are leveraging their position to support the development of these local firms while also training a new generation of finance and management professionals who can take the lead on future investments.[24]

A Distinctions-Based Approach to Ownership

First Nations, Inuit, and Métis communities are charting their own distinct paths toward major project ownership. All face challenges in accessing the capacity and capital needed to make ownership possible while navigating their own unique barriers.

First Nations

First Nations face numerous *Indian Act* constraints on their assets and revenues that require complex corporate structures before they can achieve ownership. Establishing these structures can add years and millions in costs to the front end of equity investments, after which additional *Indian Act* measures drive up capital costs and reduce project rates of return.[25] Legislative developments have enabled some First Nations to partially address these barriers. Passed in 1999, the *First Nations Land Management Act* allows First Nations to enact their own land codes and opt out of 40 sections of the *Indian Act* related to land use, the environment, and natural resources. A quarter of all First Nations have since done so, allowing them to create land-use zones and to issue leases, permits, and licences to industry without first obtaining approval from Indigenous Services Canada (ISC).[26] *The First Nations Fiscal Management Act* came into effect in 2006, creating four First Nations institutions:

19 KPMG (2020) Five Pillars of Major Project Success. https://assets.kpmg/content/dam/kpmg/ca/pdf/2019/12/major-project-governance-en-web.pdf

20 Participant interview: First Nations councillor.

21 Participant interview: Law firm partner.

22 United Nations, "United Nations Declaration on the Rights of Indigenous Peoples," 8; and Senate of Canada. "The Standing Senate Committee on Aboriginal Peoples: Evidence."

23 Bull, "Indigenous Partnerships—the Key to Meeting Canada's Climate Commitments?"

24 Participant interview: Financial advisor to Indigenous groups.

25 Participant interview: Vice-president of a First Nations development corporation.

26 Indigenous Services Canada, "First Nations Land Management."

the First Nations Finance Authority (FNFA), the First Nations Tax Commission (FNTC), the First Nations Financial Management Board (FNFMB), and the First Nations Statistical Institute (FNSI).[27] Though the FNSI is no longer active, the other three institutions coordinate to develop good governance and finance practices across First Nations while enabling access to lending options similar to those used by Canadian municipalities.[28] Participation in these institutions is optional—approximately half of all First Nations have passed band council resolutions to gain access to their advisory services.[29] These institutions created the First Nations Major Project Coalition (FNMPC) in 2017 to provide advisory services specifically focused on major project ownership. The FNMPC now supports over 85 member First Nations involved in a portfolio of projects valued at $17 billion.[30]

Métis

Métis peoples are not subject to *Indian Act* restrictions. However, they lack access to any advisory or lending institutions comparable to those created by the *First Nations Fiscal Management Act*. Unlike First Nations and Inuit, they cannot apply for funding through Indigenous Services Canada's Lands and Economic Development programs, so their access to independent technical advice and capacity building related to major project decisions is limited.[31]

Métis communities also face a unique challenge in that they are mostly landless—only in Alberta do Métis have a government-recognized land base. In 2022, the Willow Lake Métis Nation used revenues from an equity stake in the Northern Courier Pipeline Project to purchase its first parcel of land: 205 acres to be used for a community centre, housing, and food and power production.[32] The Métis National Council has called for the creation of a Major Projects Equity Fund to facilitate Métis ownership and inclusion in major projects. The Council cites the potential to improve Métis employment, income, wealth, and quality of life while increasing the likelihood of community support for projects and growing the tax base across all levels of government.[33]

Inuit

Like Métis, Inuit are not subject to the *Indian Act* and cannot access First Nations–specific borrowing and advisory services. The Inuit homeland, Inuit Nunangat, is made up of 51 communities spread across four regions: the Inuvialuit Settlement Region, Nunavut, Nunavik, and Nunatsiavut, together representing a third of Canada's land mass.[34] The remoteness of many Inuit communities increases project costs,[35] and the unique land-ownership systems created by the modern treaties that cover Inuit Nunangat also influence major project decisions.

27 First Nations Financial Management Board, "Our Story."

28 First Nations Financial Management Board. "About the *First Nations Fiscal Management Act (FMA)*."

29 *First Nations Fiscal Management Act.*

30 Natural Resources Canada, "Canada Invests in the First Nations Major Projects."

31 Participant interview: CEO of a Métis economic development organization; Indigenous Services Canada, "Lands and Economic Development Services Program"; and Indigenous Services Canada, "Community Opportunity Readiness."

32 Fortier, Ragan, and Jugaru, "Willow Lake Métis Nation Completes Historic Land Purchase."

33 Métis Nation, "Access to Capital for the Métis Nation."

34 Indigenous Services Canada, "Inuit Nunangat Policy."

35 Participant interview: CEO of an Inuit development corporation.

For instance, under the Nunavut Land Claims Agreement (NLCA), 80 per cent of Nunavut is Crown land, where the vast majority of resource royalties flow to the federal government—the first $2 million in royalties are split evenly with Inuit, with the federal government retaining 95 per cent of any royalties generated beyond that amount. Much of the remaining land in Nunavut is Inuit-owned land—a total of 352,000 square kilometres that stands as one of the largest private landholdings in the world.[36] Inuit negotiators selected Inuit-owned lands for their cultural and hunting significance, but also worked closely with geologists to acquire subsurface rights and resource co-management powers over lands with high mineral potential.[37] While there is ongoing debate among Inuit over the best use of these lands, the NLCA ensures that major projects located wholly or partly on Inuit-owned land cannot proceed without a finalized IBA that considers a range of matters relevant to the needs of Inuit, including employment, training, and environmental stewardship.[38] Agnico Eagle provides an example of this in practice with its IBA commitments to Inuit procurement—in 2021, 62 per cent ($556 million) of Meadowbank Complex and Meliadine Mine spending was with Inuit-owned businesses.[39] Three Regional Inuit Associations are responsible for negotiating these IBAs, and they are emerging as leaders in the development of these agreements. The associations have made the rare choice to disclose their details to the public and allow the sharing of best practices.[40] At the 2022 Nunavut Mining Symposium, they discussed the potential of Inuit mine ownership, stressing the need for financial due diligence and involving impacted communities in negotiations.[41]

Building Capacity to Oversee Major Projects

Building lasting community capacity to invest in major projects is critical. Indigenous communities need to conduct due diligence, negotiate terms, collaborate with other stakeholders, make a range of operational decisions, mitigate negative impacts, and maximize spin-off benefits—all while keeping community members informed and engaged.

Due Diligence and Risk Management

Indigenous communities face a range of upfront costs to manage the legal and financial considerations inherent in equity ownership. These costs include the creation of a legal entity separate from the community, which is necessary for First Nations to work around *Indian Act* financing restrictions, limit liability to community members, and ensure due diligence is conducted outside of political processes.

36 Fenge and Quassa, “Negotiating and Implementing the Nunavut Land Claims Agreement.”
37 Buchan, “Required Reading.”
38 Nunavut Tunngavik, “Article 26: Inuit Impact and Benefit Agreements.”
39 Agnico Eagle, *Building Better Together.*
40 Hummel, “Behind the Curtain.”
41 Lochead, “Should Inuit Organizations Buy Into Mining Companies?”

This due diligence is extensive. Indigenous communities must reach an agreement with proponents on the project's value and the acquisition price for their equity share. They also need to determine at what point in the project timeline dividend payments can begin, how often they are to occur, and the timing of how revenues will flow through entities in the corporate structure and ultimately reach the community.

Indigenous communities also need to assess the risks related to any potential cost overruns or variations in the project's net revenues. These risks could be tied to interruptions in production, fluctuations in commodity prices, or changes in operation, maintenance, insurance, transportation, and other expenses.[42] And Indigenous communities need to make plans involving how to leverage project revenue to finance urgently needed local infrastructure.[43]

Indigenous communities need independent advice in these matters—they cannot simply rely on financial projections from proponents, which could be overly optimistic and tailored to gain their approval.[44] Companies may readily offer shares in a risky project to avoid an upfront payment to the community, knowing that their project has a high chance of failure and that their shares may become worthless. Communities may also need to walk away from an equity offer regardless of risk if their immediate cash-flow needs outweigh the potential of future returns.[45]

Making the Most of a Seat at the Table

Indigenous communities must acquire the expertise they need, whether internally or externally, to negotiate and exercise governance rights. These governance rights include the ability to appoint project managers, operational committee members, and directors to the board(s) governing the project, as well as the right to flag matters of material importance for board review or external audit.[46] Some Indigenous communities chart a path from passive to active investors over time by negotiating options to increase ownership levels and decision-making powers throughout the life of the project.[47]

Well-established companies may be reluctant to let communities acquire these rights and cede unilateral control of a project.[48] Even when they do, Indigenous communities need to evaluate whether industry proponents are seeking a genuine partnership that will give them an equal voice and real influence over a project's operations and management. In some scenarios, a narrow a focus on a seat at the table risks sidelining communities as "one member of a board of directors [that] you don't control and cannot influence."[49]

42 Warrier and others, "Indigenous Ownership of Natural Resource Projects."
43 Participant interview: First Nations councillor.
44 Participant interview: President of a regional industry association.
45 Participant interview: Financial advisor to Indigenous groups.
46 Warrier and others, "Indigenous Ownership of Natural Resource Projects."
47 Participant interview: CEO of a First Nations development corporation.
48 Participant interview: President of a regional industry association.
49 Participant interview: Financial advisor to Indigenous groups.

While community board representatives become "close to the controlling mind and management of the project,"[50] they also face restrictions on what information they can and cannot disclose. Maintaining transparency with the community throughout major projects presents additional challenges. Individuals may be limited in accessing project information because they lack a computer or Internet access in remote regions. Even when accessible, detailed reports related to investment decisions may require assistance to interpret.[51]

Acting on Indigenous Priorities

Indigenous communities must also consider a range of socio-economic, cultural, and environmental impacts generated by major projects. Managing these impacts is critical.

> **"Success is not just measured in monetary gain. It is measured in the success of the individual and the community as a whole."**
> **Participant interview: First Nations councillor**

Common actions Indigenous communities and project proponents have agreed upon include setting Indigenous employment targets, establishing preferential hiring policies and training programs, providing priority bidding opportunities for Indigenous businesses, protecting sacred sites, instituting provisions regarding culture and language in the workplace, supporting community projects and programs, and introducing environmental provisions beyond those imposed by the environmental assessment process.[52] Past failures by industry and government to remediate sites have led Indigenous communities to be skeptical of projects that lack a defined reclamation plan.[53]

Indigenous communities need time to develop and implement plans to address these priorities. They seek lasting benefits, with some communities considering the ripple effects of projects over the next seven generations or longer.[54] Indigenous communities are seeking industry partners that respect the time and resources required to make informed decisions about participation, as local capacity may be stretched handling numerous project proposals at once.[55] Ultimately, projects benefit from more realistic plans and timelines when co-developed with Indigenous peoples.[56]

50 Ibid.

51 Participant interview: Management consultant for Indigenous groups

52 Organisation for Economic Co-operation and Development. "Linking Indigenous Communities with Regional Development in Canada."

53 Participant interview: President of a regional industry association.

54 Participant interview: Management consultant for Indigenous groups.

55 Ibid.

56 Participant interview: First Nations councillor.

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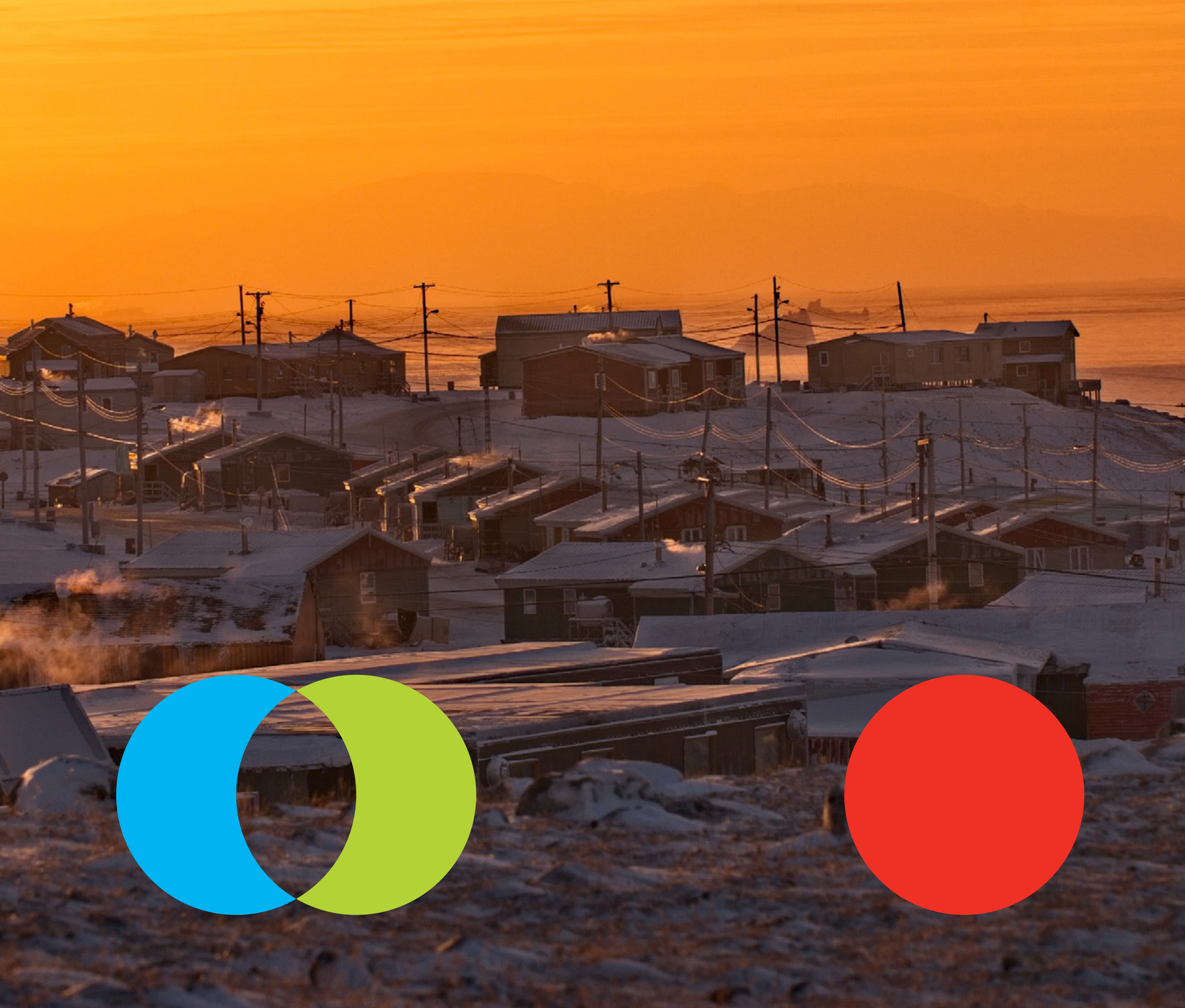


Collaborating and Co-investing

Additional complexities can result when multiple Indigenous communities pool their resources to co-invest in a single project. An additional legal entity is needed to represent the coalition. Projects with lateral/linear infrastructure crossing multiple territories may also require multiple share classes carrying differing ownership rights because communities of varying sizes and proximities to the project will be impacted in different ways. These diverse impacts create the need for apportionment measures that ensure that ownership rights are allocated fairly.[57] Indigenous communities collaborating under these circumstances can face cultural and language barriers.[58] In some cases, outstanding issues and "blurry lines"[59] between communities can work against consensus and lead to missed opportunities.

Funding Lasting Capacity

Some Indigenous communities have already developed a high degree of sophistication related to equity participation in major projects, while others are just beginning down this path.[60] Communities acquire capacity funding in different ways: some rely on project proponents to assist with transaction costs, while communities with more established business operations rely on their own-source revenues.

ISC's Community Opportunity Readiness Program provides First Nations and Inuit communities with funding they can use to prepare for negotiations. Natural Resources Canada's Indigenous Natural Resource Partnerships program provides funding to support the operations of the First Nations Major Project Coalition (FNMPC).[61]

At the provincial level, the Alberta Indigenous Opportunities Corporation offers capacity funding to facilitate Indigenous investment in natural resource, agriculture, telecommunications, and transportation projects. This funding is intended to give Indigenous communities access to financial, legal, environmental, and other third-party services related to project due diligence.[62] The Saskatchewan First Nations Power Authority (FNPA) also offers a suite of programs focused on building capacity related to First Nations–led renewable energy projects. This suite includes funding to support working groups made up of community members, leadership, Elders, and youth as they identify suitable projects for the community. Communities can then apply for funding to develop project pre-feasibility assessments and business plans, with access to FNPA-provided project financial modelling, technical design, and procurement services.[63]

57 Project Reconciliation. "A Path to Economic Sovereignty."
58 French, "Indigenous Communities Face Unique Challenges in Funding Infrastructure Projects."
59 Participant interview: CEO of a First Nations development corporation.
60 Participant interview: Vice-president of a First Nations development corporation.
61 Natural Resources Canada, "Indigenous Natural Resource Partnerships."
62 Indigenous Services Canada, "Community Opportunity Readiness Program (CORP)."
63 First Nations Power Authority, "For Indigenous Communities."

Current capacity funding opportunities are focused more on hiring outside expertise than on building lasting capacity.[64] Despite this challenge, Indigenous communities are still facilitating knowledge transfer from external advisors to community members on their negotiation teams.

"[Community members are] going to have an understanding of how these things are approached, planned, and negotiated, so the next time we have an opportunity, we can take a more proactive role and have less dependence on advisors."

Participant interview: Financial advisor to Indigenous groups

Indigenous-owned businesses within major project supply chains are also an important training ground where individuals are gaining management experience tied directly to project operations.[65]

A lack of childcare access in remote communities has held back Indigenous women from greater participation in training opportunities related to major projects—limiting their opportunities for career advancement.

The timeliness of capacity funding can also pose issues—it may not become available until project negotiations are under way and can be out of sync with community needs.

"Many communities out there are entirely committed to those funding windows and sometimes those funding windows don't fit within the development cycle or in the planning cycles of those communities."

Participant interview: CEO of a First Nations development corporation

When funding is focused on hiring staff with technical expertise, it must be available in sufficient amounts to compete for in-demand professionals.[66] When focused on training community members, it needs to be accessible regardless of remoteness and geared toward transferrable skills that lead to careers beyond a single project.[67] Shared capacity development resources that are led by Indigenous peoples, like the FNMPC, are important because they achieve economies of scale not possible in most communities.[68]

Industry also needs to be proactive in working with Indigenous communities ahead of projects to find out what resources they have and what opportunities exist to increase capacity. As one interview participant stated, "It's just that simple—call us."[69] Increasing the coordination of resources across governments, industry, and Indigenous communities can lead to better results.

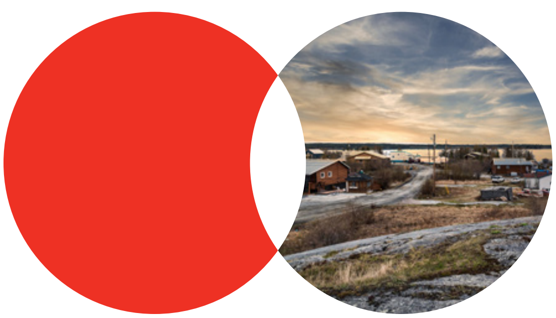
64 Participant interview: Law firm partner.
65 Participant interview: Senior analyst with a First Nations non-profit.
66 Participant interview: First Nations Director of Economic Development.
67 Participant interview: First Nations councillor.
68 Participant interview: CEO of a First Nations development corporation.
69 Participant interview: First Nations councillor.

“Cross pollination of ideas and best practices is great. ... When we work as a collective, we have a better chance of securing these projects.”

Participant interview: CEO of a First Nations development corporation

Accessing Capital to Finance Ownership

Access to affordable capital is another major barrier to Indigenous equity participation—and it’s exacerbated by low community revenues, high project costs, and long-standing *Indian Act* restrictions. Coordination and creativity are unlocking private sector capital and due diligence, but governments, industry, and lenders can do more to make equity participation a viable option for all Indigenous communities.



Remote Communities Face Unique Barriers

The cost to acquire ownership stakes in major projects can be steep, and in most cases, arranging debt financing is necessary to complete the transaction.[70] Access to this financing varies widely across Indigenous communities. A decade has passed since market capital eclipsed government transfers as the main source of finance for Indigenous economic development,[71] but just 15 per cent of First Nations account for 65 per cent of all borrowing activity.[72] Variance in revenues is the primary cause of this disparity, as communities need revenue streams to serve as collateral when seeking finance through commercial lenders.[73] In 2016, 50 per cent of First Nations had annual revenues below $3 million, though the most financially successful First Nation reached almost $100 million.[74]

Alongside low revenues, remote communities also face increased building, transportation, and operating costs while contending with short seasonal windows for shipping and construction.[75] Some have a poor or no credit history[76] and are focused on urgent priorities related to housing and other basic infrastructure. These factors limit their resources and risk appetite for investments in major projects.[77]

70 Participant interview: CEO of a First Nations development corporation.

71 Collin and Rice, *Evening the Odds.*

72 The National Aboriginal Economic Development Board, Recommendations Report on Improving Access to Capital for Indigenous Peoples in Canada; and Crown-Indigenous Relations and Northern Affairs, “Indigenous Peoples and Communities.”

73 Participant interview: Vice-president of Indigenous banking for a commercial lender; and The National Aboriginal Economic Development Board, *Recommendations Report on Improving Access to Capital for Indigenous Peoples in Canada.*

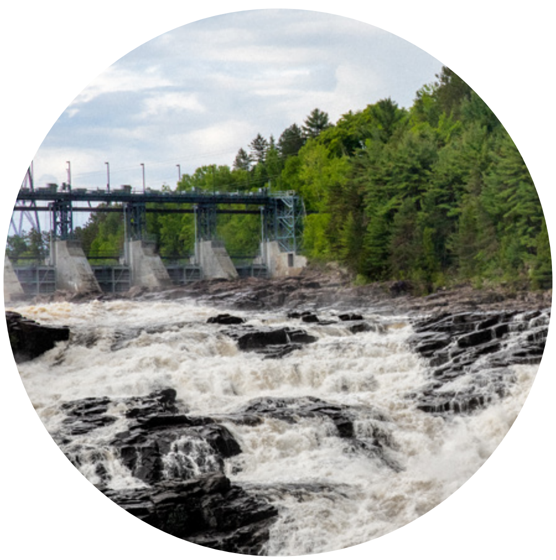
74 RBC Economics & Thought Leadership, “92 to Zero.”

75 Indigenous Services Canada, “Remoteness of First Nations Communities”; and Chen and others, “Identifying Financially Remote First Nations Reserves.”

76 MacLaren, “The Positive Legacy of Ontario’s Aboriginal Loan Guarantee Program.”

77 Participant interview: Financial advisor to Indigenous groups.

However, as one interview participant stated, "The size of the infrastructure should not negate the Indigenous rights." Supporting remote communities with access to risk-appropriate financing can help them overcome their barriers to equity participation and develop stable revenue streams to address their priorities. We see an encouraging example in Alaska, where Indigenous-owned companies represent nine of the 10 largest companies in the state[78] and act as a stabilizing force for remote communities, most of which grew faster than the state's urban areas over the past decade.[79]



The *Indian Act* Restricts and Erodes First Nations' Capital

Section 89 of the *Indian Act* prevents First Nations assets "situated on a reserve" from being used as collateral to access financing.[80] This restriction forces First Nations to use complicated legal work-arounds before they can engage with lenders. These complexities also impact lender policies regarding asset valuation and risk assessment, which can then prevent Indigenous communities from accessing capital.[81] In some cases, lenders are willing to finance Indigenous equity participation but at interest rates that are too high for the project to remain financially viable.[82] The First Nations Finance Authority (FNFA) offers a way around these lending restrictions, but just 142 First Nations have completed all required certification steps to become FNFA borrowing members.[83]

Sections 61 to 69 of the *Indian Act* also form a framework wherein ISC collects a range of different revenues derived from reserve land and holds them in trust. These funds are kept in the Consolidated Revenue Fund (CRF) until a First Nation applies and obtains the Minister's consent to spend funds for an approved purpose.[84]

78 Henry, "The 2021 Top 49ers."
79 Bradner, "Population Trends in Rural and Urban Alaska."
80 *Indian Act.*
81 Warrier and others, "Indigenous Ownership of Natural Resource Projects."
82 MacLaren, "The Positive Legacy of Ontario's Aboriginal Loan Guarantee Program."
83 First Nations Finance Authority, *Every Loan Tells a Story.*
84 Indigenous Services Canada, "Trust Moneys."

At the end of 2021, the CRF held over $525 million[85] in capital and revenue funds, where they earned an annual interest rate of 1.16 per cent.[86] The low interest earned on these funds erodes their value over time, especially during periods of high inflation. This issue was flagged over a decade ago in an Indigenous and Northern Affairs Canada (INAC) internal audit and has been raised repeatedly since by the National Indigenous Economic Development Board (NIEDB) and by Indigenous communities seeking access to their revenues.[87]

Interview participants also raised issues with how the Canada Revenue Agency (CRA) interprets Section 87 of the *Indian Act*. The section exempts First Nations–owned business income from taxation. But to qualify for this exemption, the business cannot be structured as a corporation, and the CRA must also consider the business income to be "situated on reserve." The CRA states that "there is no standard test that can be used to determine if business income is situated on a reserve" and instead provides as guidance a non-exhaustive list of factors it will consider, including "the nature of the business activities."[88] These factors can vary in both relevance and weight from case to case. Interview participants found this approach too subjective to provide certainty as to how their revenues from major projects will be taxed.[89] They instead rely on the CRA's current interpretation of section 149(1)(c) of the Income Tax Act, which considers First Nations bands to be a "public body performing a function of government" and therefore exempt from taxation.[90] This approach also involves uncertainty: communities need to know how their revenues will be taxed over the decades of a project's lifespan, which is a challenge given that the CRA can change its interpretation of their taxation status at any time.[91]

Clawbacks Are a Drag on the Indigenous Economy

Indigenous peoples have an inherent right to self-government that is guaranteed by section 35 of the constitution. A growing number of Indigenous groups are pursuing this self-government through negotiated agreements with other levels of government that have the Indigenous groups assume responsibility for delivering local programs and grant them power to create laws and policies for their own communities. Note that for First Nations, these community-approved laws replace those imposed by the *Indian Act*.[92] The federal government enters into fiscal relationship agreements with these self-governing Indigenous groups to ensure they have sufficient resources to fulfill their program-delivery responsibilities

85 Government of Canada, "Other Liabilities."

86 Indigenous Services Canada, "Rates of Interest on Capital and Revenue Accounts."

87 The National Aboriginal Economic Development Board, "Recommendations for Improving First Nations Access to Indian Moneys"; and Edey, "Bearspaw First Nation Says Waiting for Funds Is Costing Them Millions."

88 Canada Revenue Agency, "Information on the Tax Exemption Under Section 87 of the *Indian Act.*"

89 Participant interview: Vice-president of a First Nations development corporation.

90 Nishnawbe Aski Development Fund, Taxation Issues for Aboriginal Individuals and Organizations; and Canada Revenue Agency, "Internal T.I. 2016-0645031I7 - 149(1)(c) - Indian Act Bands."

91 Participant interview: Vice-president of a First Nations development corporation.

92 Crown-Indigenous Relations and Northern Affairs, "Self-Government."

while retaining their decision-making autonomy.[93] Interview participants raised issue with the federal government's practice of reducing the funding provided to self-governing Indigenous groups that generate own-source revenue from their business activities or local taxation. Until 2017, self-governing Indigenous groups saw 50 per cent of their own-source revenues clawed back from any amounts owing from the federal government—a policy that deterred business investment, frustrated self-government negotiations,[94] and encouraged complicated business structures[95] and secrecy[96] across the corporate–Indigenous agreement landscape for fear that any new revenues communities earned would be offset by a loss of program funding.[97] A three-year moratorium on these clawbacks ran from 2017 to 2020, until the completion of Canada's collaborative self-government fiscal policy, which replaced the 50 per cent clawback with a case-by-case approach to an Indigenous government's fiscal resources. Under this policy, Indigenous groups can still see their federal funding reduced based on multiple factors, including the amount of own-source revenue they generate.[98]

Backstopping Indigenous Access to Capital

Loan guarantees have emerged as an effective means of enabling Indigenous access to capital despite existing challenges. Loan guarantees are a promise from another party to repay any outstanding debt in the event of default. They are an appealing way for governments to support equity participation in major projects because they do not require an outlay of cash and because they benefit from the due diligence already conducted by a lender.[99] Currently, some Indigenous communities can obtain loan guarantees for equity participation through the Alberta Indigenous Opportunities Corporation, the Ontario Aboriginal Loan Guarantee Program, and the Saskatchewan Indigenous Investment Finance Corporation.[100]

While these programs are promising, other regions of the country show a clear gap to be filled. On May 10, 2022, the Business Council of British Columbia joined the FNMPC to call for a national program to enable Indigenous equity participation in major projects through access to capital, technical advice, and funds for capacity building. The program would be co-designed with Indigenous peoples and focused on their interests and unique challenges, such as remoteness.[101]

93 Crown-Indigenous Relations and Northern Affairs, "Canada's Collaborative Self-Government Fiscal Policy."
94 Joannou, "Ottawa Cancels Clawback of First Nations Revenue."
95 Ratcliff & Company LLP, *Structuring First Nations Economic Development.*
96 Hummel, "Behind the Curtain."
97 Participant interview: Senior advisor to a national Indigenous organization.
98 Crown-Indigenous Relations and Northern Affairs, "Canada's Collaborative Self-Government Fiscal Policy."
99 Participant interview: Law firm partner; and MacLaren, "The Positive Legacy of Ontario's Aboriginal Loan Guarantee Program."
100 Saskatchewan Indigenous Investment Finance Corporation, "Program."
101 First Nations Major Projects Coalition and the Business Council of British Columbia, "Joint Primer: National Roundtable on Indigenous Access to Capital in Canada"

And while the FNFA is leading the way in efforts to pool First Nations capital and enable lower borrowing costs related to equity ownership, a lack of similar institutions for Métis and Inuit limits these peoples' financing options in relation to major projects.

Some provincial governments are also leveraging their procurement powers to improve margins for Indigenous-led clean energy projects and attract private investment.[102] In British Columbia, these measures have generated $6.1 billion of investment into Indigenous owned and co-owned projects.[103] Governments and industry also have opportunities to learn from international Indigenous examples, including the Māori, who have struck an agreement with the New Zealand Superannuation Fund to share information and co-invest in large-scale businesses and assets.[104]

Conclusion

Rising Indigenous ownership of major projects is unleashing a new economic era—one where respect for Indigenous rights stands as a source of greater certainty and shared prosperity. However, there is still much work to be done. Industry, governments, and lenders collaborating with Indigenous communities can improve access to the capacity and capital these communities need for meaningful and effective participation in major projects. The next piece in this series of Conference Board publications reviews best practices for achieving this goal and will be followed by a final piece that explores the connection between Indigenous equity participation and self-determination.

102Farooqi, "Energizing the Nation to Nation Relationship."
103 Lovekin, Whitestone, and Kasteel, "Finding a Path Forward."
104 Pandey, "NZ Super Partners with Māori Investment Fund to Explore New Investments."

Appendix A
Major Projects With Indigenous Co-owners

Energy

Cascade Power Project: The $1.5 billion power-generation facility fired by natural gas is partly owned by six First Nations through a $93 million investment. Project Finance International named the project Canadian Power Deal of the Year for 2020, citing an innovative agreement structure that enabled Indigenous equity participation by lowering their risk exposure.[1]

Coastal Gas Link Project: All 20 Indigenous communities along the route of this $6.6 billion natural gas pipeline have signed an option to acquire a 10 per cent stake in the project.[2]

East Tank Farm Development: In 2017, Fort McKay First Nation and Mikisew Cree First Nation purchased a 49 per cent stake, valued at $500 million, in the oilsands storage project.[3]

LNG Newfoundland and Labrador Project: Miawpukek First Nation worked with LNG Newfoundland and Labrador and the First Nations Major Projects Coalition (FNMPC) to become part owner of this $10 billion project in 2021—the first instance of Indigenous equity participation in the province's offshore energy industry.[4]

Trans Mountain Pipeline and Expansion (TMX) Project: Three separate Indigenous-led coalitions (Project Reconciliation, Chinook Pathways, and Nesika Services) are seeking, in all, 100 per cent ownership of the pipeline. It was purchased by the federal government for $4.4 billion before undergoing a $21.4 billion expansion.[5]

Electricity

Alberta PowerLine: Seven Alberta First Nations own a combined 40 per cent equity stake in this $1.6 billion transmission-line project.[6]

Chatham-Kent to Lakeshore Transmission Line Project: Chippewas of the Thames First Nation are working with the FNMPC to engage the project proponent and take an equity stake in this project.[7]

East-West Tie Transmission Project: Six Indigenous communities will own a combined 20 per cent equity stake in this $777 million transmission-line project when it is completed in 2022.[8]

1 Narine, "Cascade Power Project with First Nations' Multi-Million-Dollar Equity Stake Wins Deal of the Year Award."
2 Coastal GasLink, "Indigenous Groups Sign Historic Equity Option Agreements with TC Energy on Coastal GasLink"; and TC Energy, "Coastal GasLink."
3 Bird, "Mikisew Cree and Fort McKay First Nations Close $503M Deal on Oilsands Project."
4 CBC News, "First Nations Groups to Participate in Project to Capitalize on Liquefied Natural Gas."
5 Canadian Press, "Indigenous Groups Still Aim to Buy Trans Mountain Pipeline."
6 ATCO, "Alberta PowerLine."
7 First Nations Major Projects Coalition, "Chatham Kent to Lakeshore Transmission Line."
8 Enbridge, "East-West Tie Transmission Project (EWT)."

Wataynikaneyap Power Transmission Project: This $1.9 billion project is owned by 24 Indigenous communities who hold a combined 51 per cent equity stake in Wataynikaneyap Power LP. The remaining 49 per cent of shares are owned by Fortis Ontario Inc. and Fortis Inc.[9]

Forestry

Gitxsan Wood Pellet Plant: Gitxsan Development Corporation is a part owner of a $50 million wood pellet plant, alongside Hazelton BioEnergy.[10]

Clean Energy and Technology

Benjamins Mills Wind Project: The 13 Mi'kmaw bands in Nova Scotia, through the jointly owned Wskijnu'k Mtmo'taqnuow Agency, are majority shareholders in this $309 million wind project, the largest in Nova Scotia.[11]

Grand Renewable Energy Park: This $7 billion solar and wind farm is partly owned by Six Nations of the Grand River and is the largest solar farm in Canada.[12]

H2N Hydrogen Plant: Fort Nelson First Nation and Hydrogen Naturally Inc. are in the early stages of developing this $1.2 billion hydrogen production plant.[13]

Henvey Inlet Wind Project: This $1 billion single-phase wind project is the largest in Ontario and is a 50–50 partnership between Pattern Energy and Henvey Inlet First Nation.[14]

Innavik Hydroelectric Project: The Inuit community of Inukjuak initiated this $128 million run-of-the-river hydroelectric project, a 50–50 partnership between the community's Pituvik Landholding Corporation and the renewable energy company Innergex.[15]

Lower Mattagami River Project: This $2.6 billion hydroelectric project is a partnership between Ontario Power Generation and Moose Cree First Nation. Through the Amisk-oo-Skow Agreement, Moose Cree First Nation received 25 per cent equity.[16]

NeToo Hydropower Project: This project is in the study phase while Cheslatta Carrier Nation works with the FNMPC and Rio Tinto to determine its commercial viability.[17]

Oneida Energy Storage: This $500 million joint venture between NRStor Inc. and Six Nations of the Grand River Development Corporation is one of the largest energy storage projects in the world.[18]

Peter Sutherland Sr. Hydro Station: This $300 million hydroelectric project is a partnership between Ontario Power Generation and Coral Rapids Power, a wholly owned subsidiary of Taykwa Tagamou Nation.[19]

Tu Deh-Kah Geothermal: Fort Nelson First Nation owns 100 per cent of this $100 million project[20] that will see the Clarke Lake gas field converted into one of Canada's first commercially viable geothermal energy production facilities.[21]

9 Capkun, "Wataynikaneyap Power Transmission Project Recognized as Top Project"; and Torys LLP, "Wataynikaneyap Transmission Project."
10 Cools, "Hazelton, BC Pellet Plant Set to Open in 2021."
11 Grant, "Proposed Wind Farm Could Become Nova Scotia's Largest."
12 Power Technology, "Grand Renewable Energy Park, Haldimand County, Ontario."
13 Bennett, "Fort Nelson FN Propose Super Green Hydrogen Plant."
14 First Nations Finance Authority, *Stronger Together.*
15 Vitello, "Financial Closing of the Innavik Hydro Project in Quebec."
16 Ontario Power Generation, "Lower Mattagami River Project."
17 First Nations Major Projects Coalition, "NeToo Hydropower Project at Kenney Dam."
18 Canada Infrastructure Bank, "Oneida Energy Storage."
19 Ontario Power Generation, "Peter Sutherland Sr. Hydro Station."
20 Richter, "Clarke Lake Geothermal Project in BC, Canada Going Ahead."
21 First Nations Major Projects Coalition, "Clarke Lake Geothermal Project."

Appendix B

Methodology

This impact paper is part of a broader research project examining the support systems available to Indigenous entrepreneurs in the North. We conducted an independent literature review of academic articles and grey literature reports related to Indigenous equity participation in Canada. We also undertook a thematic analysis of the interviews. The purpose of this impact paper is to answer the following research question: What do Indigenous groups need to participate as strong, equity-based partners in major projects?

Interviews

The interviews synthesized in this impact paper draw from the larger research project. We interviewed individuals from 38 organizations from across Canada. The types of organizations we interviewed included Indigenous financial institutions, community development corporations, economic development associations, industry associations, lenders, law firms, investment firms, resource development companies, and not-for-profit organizations. We used a purposive sample for the interview component of the project. The project's advisory committee identified the subject matter experts who we interviewed, and we used a snowball sampling strategy to select the remaining participants. This strategy involved obtaining recommendations from our interviewees. Interviews were semi-structured and focused on the benefits and risks related to Indigenous equity participation, as well as barriers faced by Indigenous communities seeking equity in major projects.

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