

First Nations ISSUES & DEVELOPMENT of BC's LNG Industry





Source: Government of B.C.

First Nations issues and the development of BC's LNG industry

First Nations interests in the development of British Columbia's liquefied natural gas industry (LNG) are complex, and differ across the province. The concerns of people in the southern and northern Interior will be different from those living on the south or north coast. This review provides a brief overview of some of the issues and considerations that affect First Nations as they consider opportunities from the development of LNG projects within their territories.

Background and a brief history

To best appreciate current legal and political realities Indigenous communities deal with, it is important to understand the history of Indigenous Relations in Canada.

As European settlement expanded during the formation of Canada, processes were created that excluded Indigenous people from participating in political, legal, land and resource use, and economic rights and opportunity. Policies of exclusion also targeted Indigenous culture, language and governance. These laws and practices included the formation of Indian Reserves and the creation of residential schools which were part of a systematic process of attempted assimilation.

Throughout the process and history of colonization, historic treaties (those set before the

early 1900s) were established in many parts of Canada. Even today these treaties can be the basis for determining the rights of communities and the obligations of the Crown.

However, in BC a few Historic Treaties were developed on Vancouver Island and Northeastern BC.

Some **modern** treaties and agreements have been signed or are being developed, but the process is slow. These negotiations attempt to define First Nation rights and title.

In 1993, the federal and BC governments and the First Nations Summit launched the BC treaty process and established the BC Treaty Commission (BCTC), which is referred to as "**the keeper of the process.**"

The BCTC coordinates the start of negotiations, monitors progress, keeps negotiations on track, provides information to the public and allocates funds to support Indigenous participation.

After more than two decades, few modern treaties and agreements have been signed but many are still in development. Although the process has been slow, these negotiations attempt to reach a comprehensive treatment of land and resource issues reflecting contemporary issues and needs.

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A brief history continued

Canada's **Indian Act** was amended in 1927 to prohibit anyone for soliciting funds for First Nation legal claims laws, effectively making it illegal for a lawyer to work for a First Nation. But even with such restrictions, Indigenous people fought for their rights. After 1951 when the prohibition was lifted, court cases were launched to address issues surrounding **Aboriginal rights and title**.

Over the years subsequent court decisions led to greater recognition of rights, and establishment of the duty of the Crown to consult with First Nations before development proceeds on lands and territories within which First Nations live (for example, the Calder, Sparrow, and Delgamuukw court decisions).

Key cases also occurred after the proclamation of the new Canadian constitution, which has some provision for recognizing Indigenous and treaty rights in Canada. Title was also established through the Tsilqot'in decision (the William Case). The implications of this case in particular are significant, and are still unfolding.

This evolution of case law, along with the advancement of societal and political discussions has led to uncertainty in British Columbia over the nature of control and management public lands and resources, and what the part First Nations would play in years to come.

The role of First Nations has been evolving to include stronger requirements for consultation before development can proceed. In practice, this means that governments and industry need to consult and accommodate First Nations people in relation to any clear or potential impacts on Indigenous or treaty rights. Federal and provincial governments have agreed to build into law the principles of the United Nations Declaration on the Rights of Indigenous People, including the ethic of "free, prior and informed consent." How this will be done is not yet clear.

Governments and First Nations are trying a range of approaches to reach certainty. Interim treaty related agreements, joint land use planning over regions, and reconciliation agreements, along with modern treaties, are some examples of instruments used.

The Indian Act

The Indian Act is the main law through which the federal government administers and determines Indian status, First Nations governments, and the management of reserve land and communal funds.

It was first introduced in 1876 as a consolidation of earlier colonial ordinances that aimed to eradicate First Nations culture in favour of assimilation into Canadian society. The Act has been amended several times, most significantly in 1951 and 1985, with changes mainly focusing on the removal of particularly discriminatory sections.

The Indian Act is an evolving, paradoxical document that has enabled trauma, human rights violations and social and cultural disruption for generations of First Nations peoples.

The Act also outlines governmental obligations to First Nations peoples, and determines "status" – a legal recognition of a person's Indigenous heritage, which affords certain rights such as the right to live on reserve land.

Source: The Canadian Encyclopedia, Indian Act. An Article by W.B. Henderson, last edited Nov 11, 2017. (Available online)

A brief note on terms

The term Indigenous is a generic term that captures First Nations, Métis and Inuit communities. It is often used now to replace Aboriginal, which is also a generic term capturing First Nations, Métis and Inuit. For the purpose of this information sheet, the term Indigenous is used interchangeably with the term First Nation and does not refer to Inuit or Métis elements. If the terms Aboriginal or Indian are used, they apply to specific policies, legislation or organizations

Current Practice and Consultation

Although many Indigenous rights have been established through the courts, other processes to support consultation and accommodation are also emerging. While governments can provide legal licence for major projects to proceed through complex regulatory processes, companies also need broader social licence to be able to operate, and a key part of getting this societal approval this includes the support and agreement of an affected First Nations.

In order to get projects approved and built, business needs to demonstrate that there are community benefits that offset potential negative impacts, or risks, from projects that might have effects on the Indigenous communities and their environment.

Industry

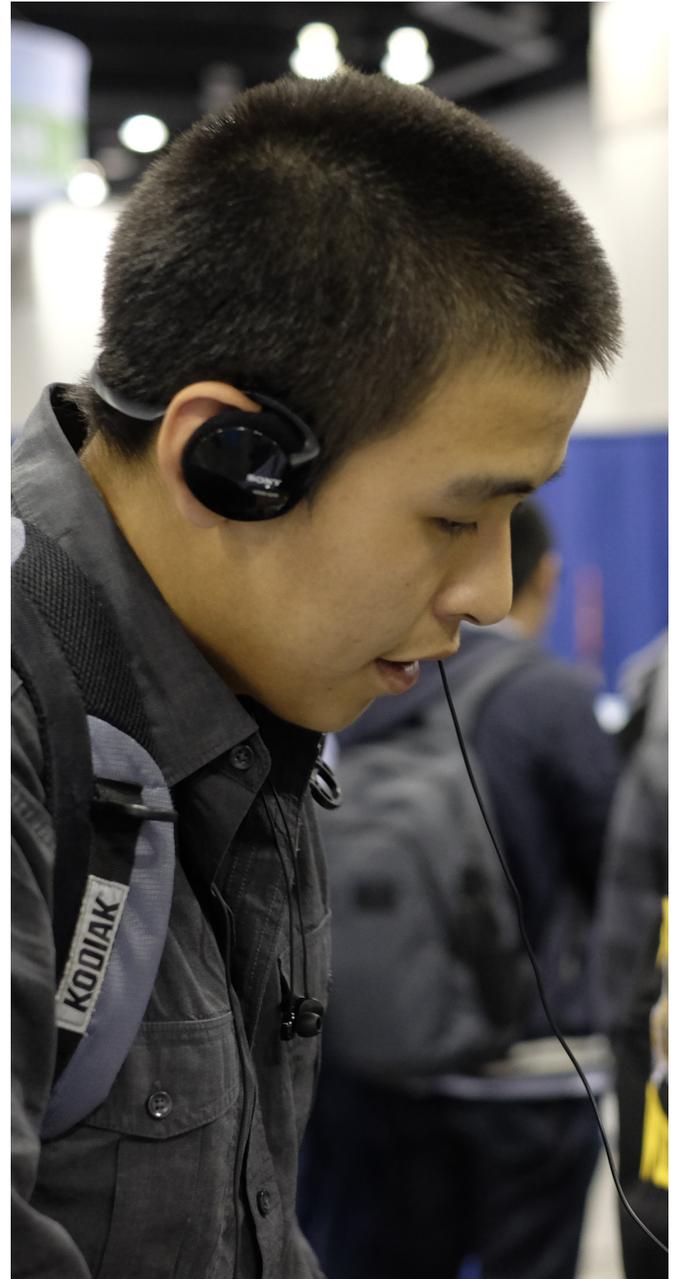
In some instances industry negotiates **impact benefit agreements (IBA)** with a First Nation, which outline the economic and other benefits a First Nation can expect from permitting a project to occur within their territory and lands. An IBA can contain provisions for employment, procurement, and other economic outcomes, and can include compensation for impacts or even an equity participation component. These may be financed by the proponent or by other sources.

A First Nation may also enter into **capacity agreements** that provide a key role for participation in the environmental review of projects.

In shared territory locations, where several First Nations might be considering opportunities advanced by projects, it will be left to industry and First Nations working together to figure out how proceed and how to share benefits and costs.

Governments

Different levels of governments have to address consultation using separate and different approaches. These practices are evolving. Typically



Source: Government of B.C.

the federal government has relied on the outcomes of environmental assessments to determine impacts to Aboriginal rights and title.

British Columbia has also conducted assessments or reviews of some proposed LNG developments. British Columbia has entered into LNG agreements with many First Nation communities allowing for training, environmental protection work, and other capacity building opportunities for those impacted by proposed LNG projects.



ASSESSING PROJECTS

Source: Kitimat LNG

Considerations

When First Nations communities and their governments review the potential benefits and costs of projects there are many things they will typically consider. These considerations reflect many issues, including the landscapes and social settings within which people live, their history and culture, current and potential legal challenges, and the social-economic objectives of communities.

Legal rights

The current legal setting does not allow a First Nation to reject projects without first considering the impacts. While some First Nations want to be able to veto a project, the courts have found that a First Nation has a duty to participate in good faith in project reviews.

The legal context is also advancing, and new court decisions will add to the understanding of how rights and title will be interpreted, and what the responsibilities and limitations are for the provincial and federal governments. Communities who do participate in project reviews work hard to ensure that all potential impacts on Indigenous rights and title are well understood, and indeed defended as might be required.

Environmental protection

Environmental protection goes hand in hand with legal rights. Many rights are related to land and water resources. It takes a lot of expert and community analysis to understand the potential environmental impacts a project can have on these rights. This is often a technical process, where industry, government and a First Nation seek to predict impacts and then know their significance. But it is also important to understand the importance of traditional knowledge (TK), and to use such knowledge to understand Indigenous environmental and community priorities.

A First Nation may also be understandably cautious about sharing TK outside the community. When they work with industry or government, protocols may need to be developed to ensure that ownership and control of TK remains with owners and the community. Traditional knowledge cannot be easily integrated into technical processes, but it can be used in conjunction with other tools and approaches, and it can form the basis for understanding key impacts that may come from development. In many instances TK brings valuable perspectives on land use, impacts, and baseline conditions to the project review and approval process.



Source: Government of B.C.

Economic interests

Many Indigenous communities are dealing with pressing social and economic needs, and even extreme poverty in many communities. Some may engage on projects despite environmental or political concerns because they want to ensure they do not miss out on potential economic benefits. In such cases, communities will need to develop approaches to evaluate and compare the positive and negative impacts of these projects.

A First Nation may have well defined employment and procurement objectives when dealing with industry. They also can arrange for economic and financial participation in the project. The options

for such involvement range from low to high risk. A cash settlement is one option. This provides certainty to a First Nation, but it may end up being low when compared the profits a company might make from the project. On the other hand, a First Nation may want to have a share in the business, which would ensure they receive more revenue if the project does well. But there is a risk that if profits are lower than predicted, or other financial problems emerge, then the First Nation would see less or even no income.

It is important that Indigenous communities carefully examine the opportunities, and then choose the option that best fits a community's expectations, but also meets their risk acceptance level.

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Kitselas poles northeast of Terrace

Source: Kitimat LNG

Governance, jurisdictions and decision-making

First Nations have legitimate issues with how government processes address Indigenous interests. Increasingly they are setting out more parameters when they deal with governments about how or if projects should proceed within their traditional territories. Issues of jurisdiction can make the consultation and planning processes more time consuming and complex for communities. In many instances they will be dealing with the federal and provincial governments at the same time, and may have to engage with multiple agencies.

Internally, First Nations communities also need to determine how they will review projects, engage their citizens, and manage their own reviews and community processes. They may also have to plan how they are going to do all this with limited resources. Some provide for community referendums on projects, and some decision-making takes place at the leadership level. Some work in multi-nation settings, and some are individual.

There are a range of governance arrangements for Indigenous communities including elected band council structures, hereditary structures (i.e.

Haida Hereditary chiefs), or blended arrangements such as hereditary systems using the provincial non-profit society structure (Office of the Wet'suwet'en or Gitksan Chief's Office) or new systems created through self-governance (Huu-ay-aht)."

Each First Nation has its own way of organizing its governance system and the work it conducts. They are always working to ensure that their form and structure of government, including social processes, are respected by industry and other levels of government. This is not always easy to do. It might take some time for industry, and even government people, to understand the differences within and between communities, how they are organized, what their needs and expectations are, and even to recognize that Indigenous communities and governments are not all the same.

Not only do proponents need to clearly communicate what their project is about and what its impacts might be, but communities also have to consider the most effective approaches to presenting their perspectives, and indeed educating non-Indigenous organizations and people about the objectives and needs of communities.



Source: Shell

CHALLENGES

Barriers and challenges for First Nations resource management

Government relations

Indigenous rights and title remain largely unresolved in BC, so there are a range of natural resources and land use issues that are also uncertain. This means that for many communities key issues need to be addressed before they will be open to approving projects.

Progress on reconciliation efforts between Indigenous peoples and governments has been slow, and this affects how a community approaches a project review, and many are working to ensure they protect unresolved rights and title issues.

Internal FN Governance

Many Indigenous communities are struggling with how to manage the institutions imposed upon them by the Indian Act. Some maintain traditional governance structures and some are trying to create models that combine the different systems. But some of these systems can be in conflict and the differences in approach can be difficult to resolve.

Across Canada, Indigenous communities and their governments are working to advance jurisdiction over their territories, and restructure their decision-making systems. These processes are often at different stages, and it can be confusing to external groups who do not understand why such changes are being brought about, or the historic and cultural foundations of these new processes.

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Capacity

LNG projects will be some of the biggest resource development projects built in BC. One project alone can have dozens of boxes of materials, composed of many documents with hundreds of pages each. These reports and studies are available as digital and printed documents. They contain large volumes of technical, legal, and regulatory information, which requires specific expertise to review and understand.

Many communities have small administrative organizations. These offices rarely have staff on hand with the specialized technical knowledge or experience needed to review a complex project. Some Indigenous communities will use external consultants, work with university researchers, or seek other expertise to help them evaluate this material.

First Nations communities cannot effectively engage in the review process without adequate financial and expert resources. This can be a key challenge for effective consultation and well-informed decision making. Key needs may be identifying financial and expertise resources to help support the review of a project, consultation within the community to identify desired outcomes and concerns, and supporting formal engagement with government and industry.

Accurate and balanced information

It can be difficult for communities to find neutral and basic information about the risks and the benefits of the LNG industry. Industry proponents and opponents often provide information that supports their position. Although there is a large amount of material available, it can be hard to know which sources offer information that is not written to advance a perspective.

Much of the project information proponents provide can be also very technical. There is a range of sources that explain the different parts of the LNG industry, how projects are reviewed and approved, the regulatory setting for safety, and



Source: Ian King

the benefits and costs of the industry. Most of this information is provided for the general public, and it rarely emphasizes the role of Indigenous communities or the unique challenges and issues they may face.

When information is provided through workshops or community meetings it is important that it is outlined in language that makes it accessible to a broad range of people with different backgrounds, education levels, and experiences. Proponents and government representatives may not always do this well, and they may not really understand the priorities and values of First Nations communities.

To help make well-informed decisions, Indigenous communities are seeking not only credible information, but they also want enough time to consider and deliberate it. Good quality information helps to ensure that communities know what the different activities of the industry involve, how it may impact their community, and that their questions and concerns are understood and addressed.

Evolving Indigenous Relations

Indigenous communities across British Columbia face a number of unique opportunities in the development of LNG. The governments of British Columbia and Canada have indicated a commitment to advancing Indigenous relations, but in the meantime there is still uncertainty about how these relations will evolve.

Canada – A Nation-to-Nation relationship with First Nations

The federal government recently split its Department of Indigenous and Northern Affairs into two departments. One to deal with programs and services (Indigenous Services Canada); and one that deals with Nation-to-Nation affairs (Crown-Indigenous Relations and Northern Affairs Canada), and governance and relationship issues between First Nations and the federal government.

The federal government has created **ten principles** related to how the federal government will deal with First Nation rights and how they want to engage on a nation-to-nation basis.

These aims are important. But governments will not implement them overnight, and putting them into effect will require time and meaningful effort.

10 Principles

In February 2018, the Government of Canada launched a national engagement with Indigenous People to inform the development of a “Recognition and Implementation of Rights Framework”.

1 Recognition that all relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.

2 Recognition that reconciliation is a fundamental purpose of section 35 of the Constitution Act, 1982.

3 Recognition that the honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.

4 Recognition that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.

5 Recognition that treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.

6 Recognition that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.

7 Recognition that respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.

8 Recognition that reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, which promotes a mutually supportive climate for economic partnership and resource development.

9 Recognition that reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.

10 Recognition recognizes that a distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.



Salish sea near Vancouver

Source: Kevin Hanna

ENVIRONMENT

Canada – Federal Environmental Assessment overhaul

Soon after coming into office in 2015, the federal government started a review of its environmental assessment process (EA), and the working of the National Energy Board and other related environmental legislation. This included a public consultation process led by an Expert Panel, and then a public discussion period on the government's response to the report of the Panel. A similar process looked at modernizing the National Energy Board. Consultation is now finished.

The proposed legislation would strengthen Indigenous roles in EA and create an opening for Indigenous-led EA. The National Energy Board will be abolished and replaced with the Canadian Energy Regulator, which will not conduct EAs. The proposed Impact Assessment Agency of Canada will do EAs, and assess other impacts.

Fundamental issues and needs raised through each of these reviews is that Indigenous consultation and engagement practices must be improved within the processes and practice of environmental assessment (EA). Indigenous involvement in assessments is in a period of transition, and we can

expect to see a change coming to the way involvement is undertaken and how impacts of projects on First Nations communities are addressed in EA. These decisions are continuing to evolve in the courts as we recently saw in the Trans Mountain Pipeline decision to reject the NEB approval of an oil pipeline located in BC and Alberta due to First Nations consultation issues.

BC – Environmental Assessment Act review

The Mandate Letter to the BC Minister of Environment and Climate Change Strategy instructs the Minister to revitalize the EA process and review the professional reliance model to ensure the legal rights of First Nations are respected, and the public's expectation of a strong, transparent process is met. The BC government initiated a review of the provincial EA Act in early 2018. The new EA Act for BC will include substantial consultation opportunities for Indigenous communities and governments, and options for Indigenous led EA. The Act should be passed in early 2019.



Source: Kevin Hanna

Southcentral BC

Federal and Provincial commitment to be compliant with United Nation Declaration of Rights for Indigenous People (UNDRIP)

There are many aspects to UNDRIP that apply to Indigenous communities within Canada. Some of the most influential clauses deal with First Nations consultation in relation to impacts to their rights—impacts that may come from development and other actions or policies. Three points are particularly notable:

1. Free, Prior and Informed Consent (FPIC) is a standard that means First Nations need to make decisions based on adequate information, without interference before a project is approved by governments.
2. The definition of consent is open to interpretation, where some believe it means a veto for

First Nations over projects, whereas others believe it triggers a collaborative approach to consultation between government and First Nations.

3. Implementing UNDRIP, which is a new standard, means this is an area of evolution between government and First Nations.

But much work lies ahead to better align Indigenous evaluation and oversight of projects that impact their lands and territories, and to determine the best ways to use natural resources in ways that support the well-being, culture, and economies of Indigenous communities.



Vancouver Island forest

Source: Kevin Hanna

INNOVATIONS

Pacific Trail Pipeline First Nation Limited Partnership

In 2012, 16 First Nations along the Pacific Trail Pipeline in Northern BC entered into a limited partnership to participate in benefits from the project. In 2018, the councils of all 20 First Nations on the route of the Coastal GasLink pipeline signed benefit agreements. Both natural-gas pipelines would serve LNG plants at Kitimat.

Both projects are also working on identifying training and other opportunities that may benefit the First Nations.

Indigenous EA: Example from Squamish First Nation

In 2016 the Squamish Nation created and implemented its own Environmental Assessment process for the proposed Woodfibre LNG plant, which

would be located near Squamish BC. To ensure that its unique rights (land, resource, cultural, environmental) were addressed by the proponent, the Squamish Nation ran a review process parallel to the ones conducted by the federal and provincial governments. Through a contractual arrangement with Woodfibre LNG, the Squamish Nation then worked to ensure that its conditions were met by governments in their regulatory process, and also by the proponent.

Monitoring Panels and Oversight Committees

Providing sufficient and reliable monitoring and oversight after a project is up and running can be a major concern for First Nations. Playing a key role in monitoring and oversight has been included in a number of agreements with First Nations in British Columbia. Many Nations began by evaluating the potential impacts before project planning moved into high gear, or construction began.

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Joint monitoring and oversight programs may help build trust between regulators and First Nations, and ensure that the ongoing concerns and expectations of First Nations are not forgotten once something is built and operational.

Huu-ay-aht Steelhead partnership

Huu-ay-aht and Steelhead LNG have agreed to co-manage the development of the Kwispaa LNG terminal project at Sarita Bay, on the west coast of Vancouver Island. The proposed site is located on Huu-ay-aht First Nations-owned land near Bamfield. Huu-ay-aht will be leading engagement with other First Nations with respect to impacts this project may have on their territories. This is a unique example because the First Nation and industry are joint proponents for this LNG project. This means that the Huu-ay-aht First Nation has the ability to participate to direct, manage and oversee the project as it advances, and to help guide its eventual operation.



Source: Kitimat LNG

Monitoring environmental conditions and change.

Opportunities

LNG Canada reached a final investment decision for its Kitimat project in 2018. That gave a green light, too, to the associated Coastal GasLink pipeline project. A dozen or so other proposed LNG production projects in BC are at different phases in drafting, planning, review and approval.

Many proposed projects have facilitated Indigenous businesses to participate in the early opportunities that these projects can offer. All aspects of environmental assessment; including planning and route finding, ecological field studies and inventories, archaeology assessments, and stewardship of traditional knowledge are examples of work First Nations have been involved with. Site preparation and other construction activities are other examples.

First Nations have set up business entities to enter into joint ventures or limited partnerships to be able to bid on procurement opportunities. We see examples such as providing a work camp, medical services, or heavy equipment operation, and other goods and services that support the groundwork that has to be done before projects can be built.

The LNG industry has both supporters and opponents across BC, and this contrast also exists within communities living in areas where the industry would occur. Decision making about if or how an Indigenous community engages with the industry will require community deliberation, good information, and time to consider the possible benefits and costs that come from development. It also requires that governments and industry understand the expectations and challenges that Indigenous communities are working to address as they consider opportunities.

Additional information

BC Treaty Commission. <http://www.bctreaty.ca>

First Nations LNG Alliance <https://www.fnlngalliance.com/>

First Nations Energy and Mining Council <http://fnemc.ca/>

United Nations Declaration on the Rights of Indigenous peoples <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

Western Economic Diversification Canada and Natural Resources Canada's Indigenous Partnerships Office Report on Indigenous procurement opportunities for LNG: summary of findings and recommendations. <https://www.fnlngalliance.com/reports/>

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The Information Series is produced by the First Nations LNG Alliance in collaboration with the Centre for Environmental Assessment Research at UBC. The series provides information for individuals and communities interested in learning about the nature, structure, operation and impacts of the LNG industry and natural gas resource development in British Columbia. Where possible the information sheets are developed using sources available online. This is so readers can more easily access the sources used by the author. Information sheets may be updated periodically. Please check the date of issue for the most current version.

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Natural Gas
Unconventional Gas Production
Liquefied Natural Gas Industry in BC
First Nations Issues and the Development of BC's LNG Industry
The Review and Assessment of LNG Projects
Understanding and Managing Risk
Production and Transportation of Liquefied Natural Gas

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