Renewable Energy Development First Nations Lands in Western Canada

Author: Karan Wadhwani, MSc in Sustainable Energy Development, University of Calgary Academic Supervisor: Prof. Allan Ingelson, Faculty of Law & Haskayne School of Business, University of Calgary

Abstract

The paper researches the advancements of Renewable Energy Projects (REP) on First Nations Lands (FNL) in Canada. The paper analyzes the regulations, laws, gaps, and perspectives of different jurisdictions concerning REP on FNL. The purpose of this study is to identify the gaps and challenges in current regulations around reclamation and remediation responsibility for REP on FNL or traditional lands. The study is important as Canada moves towards net zero and the demand for renewable energy increases. The research conducted will be from various organizations, research institutions, governments, and arms-length associations, including; rules, laws, and regulations that govern the country, province, cities, and First Nations communities. The paper focuses on the challenges the First Nations (FN) communities face, such as; access to capital, financial assurance, laws around reclamation, and partnerships for REP on sovereign lands.



SUSTAINABLE CITIES AND COMMUNITIES



1.What are the opportunities to build long-term relationships with First Nations to assist in the development of REP in Alberta and other provinces? 1. What are some examples of these REP on FNL?

- 2. What is the process to implement a REP, and what are some of the
- successful case studies?

Research Questions

- 3. What are the positives of these projects, key learnings, and takeaways of what worked well?
- 4. What can we learn from past REPs such as Solar, Wind, and Biomass on FNL in Canada?
- 2. What are the laws and regulations governing the remediation and reclamation of REP and the reclamation financial assurance requirements on FNL in Alberta?
- 3.Are there gaps in the laws identified in question 2? 4. What are the barriers to private corporations interested in developing REP in Alberta on FNL?

Methodology

The research conducted is from various **organizations**, research institutions, governments, and arms-length associations, including; rules, laws, and regulations that govern the country, province, cities, and First Nations communities. The paper focuses on the challenges the First Nations (FN) communities face, such as; access to capital, financial assurance, and laws around reclamation and partnerships for REP on sovereign lands.



LAWS

Impact Assessment Act (Canada) June 20, 2024-Impact Assessment Agency of Canada -Will engage Indigenous peoples throughout the impact assessment process.

-New tools in this process include; the Indigenous Engagement and Partnership Plan, The Consultation Protocols and Frameworks for Collaboration, and the Cooperation Agreements.

Government of Alberta

2017- the amended EPEA to include the addition of **power** generation from renewable energy of wind, solar, or geothermal sources for electrical production.

-The Conservation and Reclamation Directive for Renewable Energy Operations (REOs), also known as the Directive, provided a base standard for conservation and reclamation of REOs. -The Alberta Directive applied to all operations except those located in the **boundary of federal lands**, including **Indigenous**

Background and Research Questions

What are First Nations Lands and Where are They Located in Alberta

In this study, when the terminology FNLs is used, this refers to 'numbered land' as defined by historical treaties (Post Confederation Treaties 1867-1930) and as indicated in the map in Figure 1 (indicated in Treaties 1-11) which spans across Canada and includes but not limited to Western Canada Alberta, Saskatchewan and Manitoba). In Alberta, there are 138 First Nations Reserves and 8 Metis settlements and legislation has resulted in the transfer of provincial Crown lands to other Metis communities. The Reserves are in the three treaty areas across Alberta. Metis Settlements are located mainly in northwest and east-central Alberta.

Basic Principles of Reserve Land

- -Reserve Land is vested in His Majesty and set aside for the use and benefit of a Band
- -Before Reserve Land can be leased to a third party, it must be designated to the Federal Crown.
- -All third parties include all corporations, which can also mean a Band owned corporation.
- -Indigenous and Northern Affairs Canada (INAC) must ensure that the rights and interests of First Nations and other affected parties are respected.

Land Designation

A designation of land is usually for a fixed term and does not extinguish the First Nation's interest in the land, nor does it lose reserve status. This can be done to replace third-party interests when doing additions to reserve lands, it also allows to attract investment and a vested interest in the Reserve Land such as a lease, and financing. This creates economic certainty (leasehold interest) as per subsection 28(2) and Buckshee (28(1)) of the Indian Act. (Lafleur & Director, n.d.)



5. What are the solutions, subsidies, and funding pathways that can be used for REP on FNL?

Findings

How Can We Assist First Nations in Realizing Self-Determined REP to FNL and Attain **Complete Ownership?**

To assist First Nations communities in realizing self-determined energy projects, we must remove the legal barriers, increase the opportunity for reclamation funds, and assess already existing funds to allow them to be self-sufficient. We must mitigate the barriers to access of capital if outside investment is needed, and encourage First Nations to lean on Trust and Sovereign Funds for the creation of REP. Indigenous communities need good partners in order to go above and beyond, they need to connect all things, this is more important for Indigenous Peoples, it connects to food, elders, youth, governance, and the land. (Enabling Efficiency-Pathways and Recommendations Based on the Perceptions, Barriers, and Needs of Indigenous People, Communities, and Organizations, 2023) There is an opportunity to renew and foster Canada's relationship with Indigenous Peoples of Canada with a focus on negotiation, selfgovernance and independence. Canada's official sign on to UNDRIP in 2016 and the TRC give promise to a long process of improving relations and partnerships with Indigenous Peoples. Additionally, there is an opportunity to assist and reduce the reliance of diesel dependent communities as Figure 15 shows the Remote Territorial Communities and Power source.

Partnerships with Utilities and Indigenous Power Proponents

To create an effective partnership there needs to be mutual understanding and motivation for each party to pursue renewable energy options. It is crucial to understand the reasons such as; incorporating renewables into diesel-based grids for the purpose of addressing climate change and reducing the economic barriers from the high cost of diesel generation in remote areas. Developing REP with Indigenous power proponents is also a way for utilities to strengthen and repair relationships with Indigenous governments, and access federal funding, as utilities are better positioned to balance the diesel infrastructure updates with investment into REP. Given all the reasons and goals for a project, it is important for parties to communicate their intentions to each other, including elements of; trust, open and transparent communication, engagement, ownership, role of Governments, and federal Investments.

Engagement

To form and sustain strong partnerships with Indigenous power proponents, utilities are being called to consider and implement a new ethos of engagement. It is emphasized that this engagement ought to extend beyond individual partnerships and inform all of the ways in which utilities interact with remote Indigenous Peoples.(Fitzgerald & Lovekin, 2018) Both utilities and Indigenous proponents have expressed that partnerships do not exist without an open line of communication, and even if either party is experiencing capacity deficits or consultation fatigue, they would like to hear from each other sooner and encourage one another to speak up. It is recommended that utilities increase and diversify their engagement techniques, including knowledge of Indigenous rights and titles, organizational realities, and ways of life. (Fitzgerald & Lovekin, 2018) In some cases, it might be appropriate for utilities to take inspiration from international declarations or government commitments, but they must also be open to the possibility of abandoning them in order to respect unique Indigenous protocols. Given the diversity of Indigenous Peoples and the legacy of non-consultation among utilities, this type of engagement will require utilities to build significant internal capacity.(Fitzgerald & Lovekin, 2018)

Results and Conclusions

Social Implication on Large-Scale Renewable Energy Partnerships

Outcomes of sincere relationships, trust building, and impact benefits involving energy proponents are major elements in collaborations on a REP. Major barriers and challenges also occur in these areas, when it comes to community-led energy projects and the pursuit of reconciliation between Indigenous and settler governments, specific to energy access and control of power which are raised in early engagement, supporting this is the need for capacity building, decision-making and project impact benefits. (Yalamala et al., 2023)



Section 92, part ii, states, that as a government we must; Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.

UNDRIP

Article 3-Indigenous peoples have the right to self-determination. By virtue of that right they **freely determine** their political status and freely UNITED NATIONS DECLARATION ON pursue their economic, social and cultural development.

THE RIGHTS O Article 32- Indigenous peoples have the right to determine and INDIGENOUS PEOPLES develop priorities and strategies for the development or use of their lands or territories and other resources. Obtain their free and informed consent prior to the approval of any project affecting

reserves, military bases and national parks.

Government of Canada (GOC) published a new Cabinet Directive July 2024- Regulatory and Permitting Efficiency for Clean **Growth Projects** -This Directive, identified 6 sectors, including; #3) power/electricity, #4) nuclear and #6) clean fuels. -Function of the Directive is to accelerate the GOCs decisionmaking and set out clear federal roles and responsibilities within the public service, to give confidence to Canadians and investors in projects in Canada and with a focus on integrity and efficiency of federal regulator and permitting systems.

Indigenous Partnerships

-Canada has a duty to consult and, as appropriate, accommodate Indigenous peoples whose rights may be impacted by a project on their lands, territories or resources. -Indigenous equity ownership, participation, partnerships and involvement in decision-making can be essential to the success of clean growth projects.

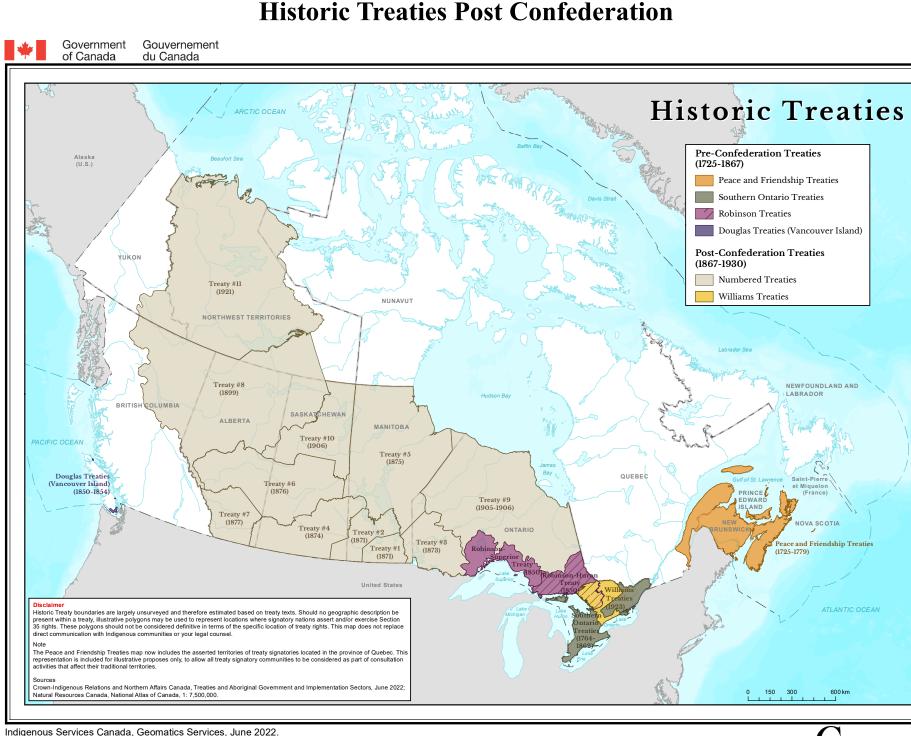
-All REP decisions are approved by Chief in Council and no oversight from a federal agency.

There has been a push and an increase in capacity from status First Nations being able to educate and grow internal resources for individual/ community growth and self-management. When a FN does not have the capacity for the development of a project, a consultant is usually hired. In terms of the legal framework, there is currently no governing body for the development of REP on FNL and this could be because of the lack and or support of the IOGC and their past performance. It can be assumed that REP does not have as much of an impact as oil and gas when it comes to the lands, and so there is no need to implement a regulatory approval body at this time, along with the nature of the new technologies and changes towards alternative energies.

How to Designate the Land

As per section 38 (2) of the *Indian Act* a band may conditionally, or unconditionally, designate by way of the crown any interests of the band and its members in all or part of a reserve for it being leased or interest being granted. This is valid under section 39.1 if it is made to the crown (INAC) and accepted by a Minister. (Lafleur & Director, n.d.)

The First Nations Land Management Act is now the instrument being used to reduce the barriers of the *Indian Act*, this is an off-ramp for First Nations to manage their land and give the designation to a third party, which is now usually a corporation-owned and operated by the band itself. They are working within the laws that were meant to control them (laws to take away rights) and now working to make this more tolerable. Some First Nations might decide entirely to not abide by any land designation process and or the rights under their sovereignty in terms of say REP on FNL, the only downfall here is that if the process is not followed and the rules are not played then they can not be applicable for the financing and investment opportunities which are offered and or managed by the Crown.



Ownership

For Indigenous power proponents, the discussion on ownership is one to help achieve autonomy and how to best achieve independence through REP. In some instances, ownership was a secondary goal, as a first goal was to displace diesel. Furthermore, full ownership has different meanings, for example, the Lutsel K'e Dene First Nations, opted to sell electricity rather than own the renewable system. Therefore, some Indigenous power proponents have been considering what it would mean to own the technology both to generate electricity and to store it. (Fitzgerald & Lovekin, 2018) Having full ownership may be too risky or financially difficult for certain Indigenous power proponents so developing a project with multiple partners with equity sharing may be more suitable. (Fitzgerald & Lovekin, 2018)

Federal Investment

Government-announced funding initiatives and pathways are driving the utilities and Indigenous power proponents to collaborate in a concrete manner. Both federal and provincial governments are encouraging parties to work together and ensure early collaboration is present. With the recent Federal Directive on Clean Growth Projects, we can presume that there will be a stronger and more easier decision-making process for the public sector and to increase efficiency on the execution of energy-based projects. Joint funding and direction on these projects allow for opportunities that would not have otherwise prospered, and allow for quick and efficient implementation. With various programs administered by several different federal ministries, sometimes it is a challenge to know whether a program funding can be combined, this could now be addressed with this new directive to ease in the decision-making. (Fitzgerald & Lovekin,

their lands or territories and other resources, particularly in connection with the **development**, utilization or exploitation of mineral water or **other resources**

CHALLENGES AND BARRIERS, OPPORTUNITIES

Access to Capital

United Nations

-Lack of capital, storage facilities

-Costs are a major barrier to doing energy efficiency work, and Indigenous communities are facing housing shortages and rising costs, and this does not make energy efficiency a priority. For instance, the "Ontario Aboriginal Housing Services currently provides services to 11,000 **Indigenous people** but estimates the actual **need is closer to 90,000** -Cost barriers are compounded for rural and remote communities in terms of shipping materials and bringing in experts

Capacity

-Access to funds stem from the inability to complete the paperwork, and resources needed to access these funds or hire contractors, legal barriers and roadblocks

Regulator Processes

-Barriers of **foreign companies not being able to adequately engage** with stakeholders are a few challenges for private corporations

-Rigidity of programs and application processes are a barrier for individuals and communities applying for funding pathways

Alignment

Trust

-Energy goals differ from community to community

-Remote energy solutions, these are seen as immediately accessible ways to meet some of these goals and create energy security and sovereignty

-Lack of cultural awareness: partners need to build trust and provide care with service including qualified trusted contractors that communities can rely on

-Abandonment from REP and the high cost of electricity among remote communities

power, energy expertise of utilities and feeling of **inadequacy and a non-equal footing**

Overall the outlook is looking better, capacity is growing and projects are situational. The settlements of land claims have allowed for the immediate needs to be resolved, such as funding towards education, health care, and poverty. We see that change is happening, but if a First Nation requires support, it is going to need to get legal representation or advisory services which can be very costly. There is a growing number of NGOs offering assistance, such as the Indigenous Center for Cumulative Effects, and more resources related to advisory services to help in economic development and ways to move forward. Each First Nation is dealing with its own individual problems, needs, and goals, these are different from each other. When developing the projects stakeholders require a broad and comprehensive perspective to succeed. Overall there is not enough research into the relationships and longterm impacts of REP on FNL and specifically working relationships with Indigenous Peoples. Therefore, there is still a lot of work that needs to be done, but change is occurring. (Dr. Suzanne von der Porten and Mark Podlasly, 2023)

Land	Finance	Technical
Where will the project go?-private land, and or reserve lands and if they want a stake in the project, need to consider FNL and Land Designation.	What grants, loan guarantees, borrowing, and bonds can be used?	The knowledge, capacity, building, and decisions around business structure and long- term feasibility are important to decide if a project
Consider: When building on FNL more regulatory		should go ahead.

(G. of C. C.-I. R. and N. A. Canada, 2020)



Financial Capabilities and Implementation

Power Purchase Agreements (PPAs) and long-term PPAs are used to secure financing to develop REP. In Northern Canada there is limited experience in negotiations and only one PPA between an Indigenous community and a utility, Lutsel K'e Dene First Nations, and NTPC for a PPA of a 35 kW solar installation in NWT in 2015. Flexibility and perseverance were described as qualities needed for unfamiliarity and unpredictable circumstances to adjust and manage expectations outside a formal PPA negotiation.

Successes

2018)

We have seen an increase in interest and engagement from Indigenous governments on REP and partnerships proposed. Indigenous communities are making good use of mentors, consultants, and territorial government representatives to navigate the uncertainty and enhance negotiation skills to correct power imbalances as they become leaders in clean energy. As a result, Indigenous power proponents are leading the way in bringing REP to their communities and utilities are increasingly committed to seeing the development of REP. (Fitzgerald & Lovekin, 2018)

Overall the Nation should negotiate the best possible deal in a REP and what is right for one Nation may not be right for another. -Karan Wadhwani

and lack of results from industry and consultants

requirements are in place -Indigenous communities are **uncertain about whom to trust**, lack in legacy and over solicitation and if the land is needed for people to live, fish, hunt for business, is this -Power imbalances that make it challenging to trust utilities, this includes the size, organizational just an economic opportunity? Every FN -Dynamics of utilities owned and governed by governments add to the present-day colonialism is different, and their needs are different.

References

Dr. Suzanne von der Porten and Mark Podlasly. (2023). The Values Driven Economy Post Conference Report. https://fnmpc.ca/wpcontent/uploads/FNMPC_TVDE_Conference_Overview_09222023-1.pdf Lafleur, C., & Director, A. (n.d.). Designations under the Indian Act Helpful Hints. Land Codes • First Nations Land Management Resource Centre (RC). (n.d.). First Nations Land Management Resource Centre (RC). Retrieved February 25, 2024, from https://labrc.com/resource/landcodes/#:~:text=Land%20Codes%20Drafted%20and%20approved%20by%20the%20community <u>%2C</u> Fitzgerald, E., & Lovekin, D. (2018). Renewable Energy Partnerships and Project Economics Research supporting Indigenous-utility partnerships and power purchase agreements.

https://www.pembina.org/reports/re-partnerships-and-project-economics.pd Yalamala, R. S., Zurba, M., Bullock, R., & Diduck, A. P. (2023). A review of large-scale renewable energy partnerships with Indigenous communities and organizations in Canada. Environmental Reviews, 31(3), 484–497. https://doi.org/10.1139/er-2022-0011