

From Participant to Partner: Applying Indigenous Understandings of Treaties to Canada's Environmental Impact Assessment Processes

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ABSTRACT

The following seeks to explore solutions forward amid increasing pressure to improve the quality of Indigenous involvement within environmental assessments (EAs). This paper describes the historical entanglements of resource development, colonialism, and limited recognition of Indigenous interests within EAs currently. It deconstructs the implications of the following: extractive methodologies habitually used within EAs; distinctions between Canadian and Indigenous legal systems; cultural variances in perceptions of power structures; and noticeable systemic issues within EA processes. Drawing from Indigenous understandings of treaties, this article brings forth some key considerations necessary to establishing meaningful Indigenous involvement during EAs. It positions treaties as a powerful, practical orientation towards envisioning a framework that utilizes practices which foster genuine collaboration and dialogue amongst all parties involved. To this end, this article contends with the importance of addressing gaps in quality of Indigenous involvement during EAs, particularly as calls for reconciliation and sustainable environmental decision-making continue.

Background¹

Environmental Assessments in Canada

Throughout much of Canada's colonial history, the resource extraction industry has firmly established itself as an anchor to our national, regional, and local economies. Presently, environmental assessments (EAs) play a fundamental role in gathering information to enable sound decision-making when determining whether an environmental development proposal should be permitted or not.²

In Canada, most large resource development projects are bound by the relatively new 2019 *Impact Assessment Act* (IAA) which replaced the 2012 *Canada Environmental Assessment Act* (CEAA). This Act

continues to legislate a "federal process for impact assessments and the prevention of significant adverse environmental effects."³ In other words, the EA process helps predict the potential complex environmental effects of proposed initiatives or projects *before* they occur. This process is triggered when a project is listed as a 'designated project', which is defined as "one or more physical activities that are (a) carried out in Canada or on federal lands; and (b) are designated by regulations made under paragraph 109(b) or designated in an order made by the Minister under subsection 9(1)."⁴

After confirmation that an EA is necessary, the proponent is required to undertake several essential



tasks that culminate to an impact assessment report. The Impact Assessment Agency of Canada will then conduct a technical review of the proponent's initial impact assessment report. Eventually, a public interest decision will be made by the Minister of Environment and Climate Change Canada (Minister) or Governor in Council. This is based on federal priorities and legislated factors found in section 63—which include “the extent to which the project contributes to sustainability” or “the impact that the designated project may have on any Indigenous group.”⁵

Despite the merits of this newer Act, some scholars would suggest that it is simply a renovation and not a rebuild of past legislation—pointing to long-standing EA critiques such as Indigenous interests and rights solely being “considerations” in the totality of project approval decisions.⁶

Treaties

Treaties have existed as formal agreements between sovereign nations for at least a thousand years.⁷ Such agreements were commonplace for various Indigenous groups prior to European arrival and generally focused on trade arrangement and settlement of conflicts with specific consequences for breaches of expectations.⁸ These treaties were living agreements that established an ongoing relationship of renewal with other signatories based on the premise that any relationship requires “constant care, negotiation and openness to change.”⁹

One of the most significant historical treaties is the Two-Row Wampum which was negotiated by the Haudenosaunee and the Dutch in 1613. Its importance lies in the fact that it still “remains the basis for all relationships with European powers since.”¹⁰ The clauses within centre around mutual respect, peaceful coexistence, and non-interference under the encompassing term, *kaswentha*.¹¹ Treaties like this and beyond have symbolized an active, ongoing, two-way relationship between Indigenous and non-Indigenous people—allowing for the creation of Canada, societal co-existence and the sharing of benefits from the land and resources.¹² Hence, treaties provide a relational space to understand our responsibilities and obligations towards one another in order to live with each other in a respectful way.

Introduction

As Canada strives to engage in reconciliation efforts that call for transformative change, we ought to explore how EAs can be more effectively employed to meaningfully enhance Indigenous involvement. How

might Indigenous Peoples and communities transition from positions of participation to positions of equal partnership with project proponents and the Canadian State during federal environmental assessments?

Historical residues and conflicts arising from ongoing colonialism in the resource sector suggest that this positional reconfiguration requires increased agency for Indigenous actors involved with federal EAs. To lay the framework for how this could manifest, I propose that we look to Indigenous understandings of treaties. Indeed, these Indigenous understandings reflect an intentional commitment to principles of respect, responsibility and renewal within any living relationship bound by treaty.¹³ I argue that by incorporating Indigenous understanding of treaties, Indigenous involvement during EA processes will be more meaningful and contextually relevant from an Indigenous standpoint. Fundamentally, we can look to existing treaties to adopt better partnership strategies based on specific protocols and understandings inherent during treaty negotiations. Building from this, we can use EAs as an opportunity to engage in treaty-like processes that similarly focus on long-term mutually beneficial goals, cooperation, and foster ongoing communication—effectively considering all visions, values or possibilities that can shape the future.

Defining ‘Meaningful’ Involvement

For this piece, I will position the word “meaningful” in the context of Indigenous involvement during EAs, which generally arises from the Crown's duty to consult.¹⁴ I will define meaningful involvement as the need for “genuine and sustained effort to pursue meaningful, two-way dialogue”¹⁵ every step of the way during an EA until a final verdict is determined, as established in *Tsleil-Waututh v. Canada*, 2018. Here, the key characteristics to making involvement *meaningful* are ‘genuine’ and ‘sustained effort’—demonstrating that meaningfulness does not emerge out of *how much* involvement, but the *quality* of it.

Tsleil-Waututh was a pivotal legal case that helped further define the parameters of adequately fulfilling the Crown's duty to consult. The case quashed an Order in Council approval of a proposed expansion of the Trans Mountain pipeline system because Canada fell “well short of the mark”¹⁶ laid out by the Supreme Court of Canada when it came to Phase III of its consultation framework. This was most notable in the lack of “testing and being prepared to amend policy proposals in light of information received, and providing feedback,”¹⁷ in addition to the brief and generic responses that did not further dialogue by Canada's representatives.¹⁸

To this effect, *Tsleil-Waututh v. Canada*, 2018 offers an

opportunity to realize areas where Indigenous understandings of treaties may assist in laying the foundation for a new way forward in how EAs are conducted. This is because treaties are highly relational agreements that embody the final verdict from this case law on what constitutes as meaningful involvement.

Conceptualizing the Current Issues and Treaty Understanding Solutions within EAs

Extractive Projects and Extractive Practices

As a country deeply focused on resource extraction as a means towards economic stability and growth, we know how important EA processes have become in making environmental management decisions. Within this though, Baker and Westman (2018), argue that the Indigenous involvement process during EAs is extractive given that it purposefully takes knowledge from communities and then strategically refines and distills it to meet consultation requirements whilst not giving back.¹⁹ Eckert et al. (2020) agree and offer further analysis on the extractive paradigm for using Indigenous knowledge, citing that “scientific knowledge and political systems rooted in historical imperialism have dominated EA processes and related dialogue.”²⁰ They critique that when Indigenous knowledge is integrated, it is often done in a way that reflects neo-colonization, which reimposes the command of colonial pressures and influence. During this process, Indigenous knowledge is simply melded into a source of data to be absorbed into western science and colonial cultural or political logics—disrupting the possibility for Indigenous control over their knowledge.²¹ Other scholars frame these behaviours as a ‘lip service’ for solely political reasons with no real intention to integrate traditional knowledge meaningfully.²²

Dr. Linda Tuhiwai Smith offers similar critiques to the contemporary, mainstream research environment and subsequent methodologies. Specifically, she classifies it as oppressive given its reliance on uncritical assumptions of western objectivity and neutrality, justifying claims to being the most ‘correct’ mode of making sense of the world and legitimizing decisions. By contrast, Indigenous accounts are not seen as inherently valuable or defensible on their own premises compared to the universalized western worldview. Smith explains how “authorities and outside experts are called in to verify, comment upon, and give judgments about the validity of indigenous claims to cultural beliefs, values, ways of knowing and historical accounts.”²³ As a result, Indigenous

worldviews are judged by the standards of dominant culture—reducing Indigenous knowledge ownership.

These extractive tendencies within EAs have recurrently diminished the effectiveness of Indigenous involvement and fuelled a decrease in willingness to share knowledge because of the perceived waste of resources and time to take part in a process that is going to have no effect on the course of approval. Indigenous people have frequently expressed skepticism in response to the EA process, viewing it as a “biased and flawed process, and often choose not to participate.”²⁴ Hesitations or refusals to participate often end up backfiring, as Baker and Westman (2018) allude to in their article. They state that when a First Nation refuses to consult with a proponent, their concerns are generally not recorded or considered.²⁵

Addressing Extractive Projects and Extractive Practices

Moving beyond the extractive methodologies within EAs will require a shift towards genuine collaboration, reciprocity, and respect for Indigenous knowledge systems. By looking at treaty, we can see how such agreements empowered Indigenous representatives to exert control over multiple aspects of the treaty process, thereby ensuring that the treaties directly benefited their communities and recognized their sovereignty in shaping their own practices and narratives. Indeed, treaties “were arrangements intended to recognize, respect, and acknowledge in perpetuity the sovereign character of each of the treaty parties.”²⁶ Treaties in Canada were entered on the presumption that Indigenous Peoples had Nations with distinct societies, and unique forms of political organizations.²⁷ This led the Crown to admit that Indigenous people were necessary actors within treaty negotiation to ensure such proceedings were legitimate and done in good faith.²⁸ Venne states that: “Each party accepted the other as equals capable of concluding a binding agreement.”²⁹ By returning to treaty principles, we can envision EA practices that respect the sovereignty of all parties involved. This approach ensures direct, unfeigned engagement with each participant, avoiding reliance on secondary translations or interpretations of their perspective, which may not accurately represent the information.

Inconsistencies with Canadian and Indigenous Law

In describing some of the subtle and prominent differences between Canadian and Indigenous law, I do proceed with caution as to not frame these two legal orders as entirely at odds with one another, because this would problematically negate the times

they have embraced each other over the years.³⁰ Despite commonalities that exist, Indigenous laws amongst various groups link back to the varied “social, historical, political, biological, economic, and spiritual circumstances of each group.”³¹

One key difference between Canadian and Indigenous law lies in the tendency for Indigenous groups to use stories and relationships with the physical and spiritual world as a source of law. For example, stories “record relationships and obligations, decision-making and resolutions, legal norms, authorities, and legal processes.”³² We can see this in the Anishinaabe story of the *Woman Who Married a Beaver*, which teaches us what building relationships of trust that uphold principles of respect, responsibility, and renewal look like. These understandings are denoted as follows: respect involves loving and speaking well of others; responsibility entails fulfilling our obligations to each other to maintain a reciprocal relationship grounded in cooperation and trust; and renewal involves our commitment to continually offering support, assistance, or aid to one another.³³

This story reveals how we ought to relate to each other in addition to the natural world through values of balance, empathy, and reciprocity. These priorities and conceptions of interconnectedness often exist under broader terms like Indigenous Natural Law or First Law, which is granted from the Creator and the land.³⁴ This story also serves as an opportunity to observe the fundamental differences within understandings of human-environment relationships that drive our interests and agendas within EAs.³⁵ Specifically, environmental assessments still operate within the confines of western, technical understandings of the environment—negating settler colonialism and racist realities that impact normative assumptions.³⁶ Hoogeveen (2016), applies this notion to how fish are framed within environmental assessments; they are reduced to being understood and described scientifically as ‘populations’, ‘species’, and ‘numbers’, existing only as a *resource* for capital accumulation, instead of as *living beings* with intrinsic value. This builds from assumptions of seeing humans outside of nature instead of integrated within a deep web of relations³⁷, and codifies perspectives that avoid centering human needs and experience as illegitimate to ‘real’, technical science. Fundamentally, Indigenous Peoples’ varying relationships to place are not sufficiently reconciled within the existing framework of current EA processes. In instances where this Indigenous knowledge is included, it is often tokenized and delinked from the particular people, sites and situations who shared it.³⁸ It is also typically diminished into a generic, one-size-fits-all or universal summary of findings.³⁹

Addressing Inconsistencies with Canadian and Indigenous Law

To address the inconsistencies between Canadian and Indigenous law, we can look to Indigenous perspectives on treaties to encourage a holistic approach that better respects Indigenous legal foundations. Treaties strategically reflect the interconnectedness of various factors to realize how we can live *with* the land in a good way and not merely *on* the land. They touch on the necessity to see ourselves as *part* of environmental systems and not above or below—linking back to how we should perceive our relationship to living beings such as fish.

Within this Indigenous understanding of interconnectedness is also a necessary acknowledgement of the broader responsibilities and obligations each party acquires as a result. A translation of Cree Elders’ perception on treaties with European nations describes treaties as “an act that has been taken where the parties or persons involved fulfil their mutual and reciprocal undertakings, duties, or responsibilities to one another.”⁴⁰ This notion of treaty describes a unique, multi-dimensional relationship where signatories are expected to commit to nurturing and protecting the relationship with the other. Incorporating this understanding to EAs could assist in better adapting EAs to integrate systems thinking and other knowledge systems or renderings of the world.⁴¹ Largely, this application of treaty encourages parties to see each other as interdependent partners and contributors capable of carrying responsibilities and duties to ensure collective well-being. It may also assist in ensuring Indigenous knowledge is included within its proper context or circumstance, and not in a disjointed, generalized or depersonalized fashion. Again, the imposition of mainstream colonial laws within the foundation and process of EAs has frequently clashed with the ability to accurately represent and meaningfully consider Indigenous worldviews, thereby limiting the potential for effective environmental decision-making and potentially perpetuating heightened levels of conflict and litigation.

Differences and Imbalances in Perceptions of Power

One of the most striking indicators of an imbalance in power in EAs is the unilateral decision-making power of the Minister/Governor in Council, which is largely contradictory to Indigenous perspectives on power dynamics. Pointedly, we can see how legal procedures for collective decision-making within Indigenous societies—which include specific processes of legal reasoning, deliberation, interpretation, and application—differ from Canadian ones.⁴² For the most part, “Indigenous societies were

non-state without formal centralized authorities or separate delegated class of legal professionals.⁴³ For example, Cree culture utilizes a system with four decision-making groups whose role and authority hinges on the type of legal decision required.⁴⁴ This differs from western legal perspectives where systems of authority and rule operates through top-down, centralized legal institutions that embody explicit command and control.⁴⁵

Under Canada's EA regime, full Indigenous consent is not protected or mandatory under the *Impact Assessment Act*. Instead, project approval is left up to the discretion of the Minister/Governor in Council. This implies that a project can move forward even in the presence of concerns or disapproval from Indigenous communities during consultation, if it is in the 'public interest' (as detailed in section 63) and the Crown has effectively fulfilled its duty to consult.⁴⁶ It is important to note; however, that fulfilling the duty to consult is *not* the same as Indigenous consent under the *Impact Assessment Act*. Although the Minister must consider the direct impacts of a potential project on any Indigenous group and any adverse impacts it may have on the Section 35 treaties and rights of Indigenous people in Canada (as recognized and asserted in the *Constitution Act 1982*), Ministers are not legislatively required to examine other potential effects on Indigenous communities more broadly. Under this reality, the impacts on Indigenous rights, interests and knowledge are ultimately considerations amongst four other key factors found in Section 63 of the *Impact Assessment Act*.⁴⁷

In addition, while there are parameters that allow for different aspects of the EA process to be potentially substituted with or delegated to an Indigenous Nation's practices and oversight, the ability for this to be done is precarious. This power is vested in the Minister/Governor in Council.⁴⁸ If exercised, it could allow for greater involvement in the evaluation of impacts for a designated project amongst Indigenous groups. Thus, promising initiatives for Indigenous-driven involvement or cooperative assessments are purely suggestive alternatives and *not* concrete, legal requirements.⁴⁹

All these factors designate Indigenous people as mere participants amongst other stakeholders, and political subordinates to the Minister/Governor in Council—diluting their power and influence in EA outcomes to the guidelines and parameters found within the *Impact Assessment Act*. As a result, if a project permit has been issued and a community still does not approve of a project after consultation, they will have to bring their legal objections and challenges to court and abide by Canadian rule of law. Much of this reflects a profound absence of equitable recognition of *both* Indigenous and Canadian law

within contemporary society. Overall, there is a lack of concrete legislative basis laid out by the *Impact Assessment Act* to appropriately address historical and continuing Indigenous interests such as Aboriginal rights, title and self-determination.⁵⁰

Addressing Differences and Imbalances in Perceptions of Power

Confronting the differences and imbalances in perceptions of power within EAs may be daunting because an inevitable shift in power is required. Nevertheless, it is important to note that enhancing EAs to better acknowledge and incorporate Indigenous principles does not necessarily translate to absolute Indigenous veto power over EA proposals. It would likely imply greater effort towards consensus-building and collective decision-making/deliberation models.⁵¹ Indeed, practices of debate and persuasion within community participation are integral to meaningfully upholding Indigenous legal traditions, procedures, and principles in *all* stages of decision-making.⁵² Reflecting on Indigenous approaches to treaty negotiations and deliberations, it becomes evident that a deliberate and sustained process of two-way dialogue is employed to cultivate emergent consensus, which arises organically from collaborative interaction. Many Indigenous communities used a political system which saw specific members of their citizenry (e.g. Chiefs) negotiate their best interests in agreements such as treaties.⁵³ What Chiefs advocated for grew out of dedicated, intentional community engagement held over a considerable amount of time because Chiefs were obliged to follow the direction of their peoples if they wanted to remain in power.⁵⁴ So, under Indigenous law and governance, unilateral decisions by one body were not common because the people have "the political and legal authority, and the Chiefs carry out decisions."⁵⁵

In applying this understanding to EAs, we can see the ways in which the current system and process fails to directly hold the Minister or Governor in Council accountable for their actions, because there is no direct linkage to a peoples they are responsible for. This may be more of a Canadian legal issue in that accountability of the Ministers is reliant on the Prime Minister's actions.⁵⁶ As a result, the ability for citizens of Canada to hold Ministers accountable is indirect given that they would have to first hold the Prime Minister responsible for his/her advice to the Governor General on the appointment of the Ministers he/she has in Cabinet.

Appointing an independent commission to oversee the EA process and make project decisions was recommended by an external expert panel during the working stages of finalizing the 2019 *Impact*

Assessment Act.⁵⁷ This plausibly demonstrates recognition for the potential conflict of interest in a Minister's decision given their role is largely contingent on both the Prime Minister and his/her party's satisfaction. Again, under the current model of EA, consideration of Indigenous interests in project approval is essentially dependent on how committed the current political party is to rebuilding good Indigenous relations. This perpetuates an uneven, decoupled political relationship, which is not reflective of how Indigenous people have understood the purpose or role of leadership within a Nation state—as apparent in Indigenous understandings of treaty processes. That said, it is important to re-link lines and positions of power to the people they affect the most.

Procedural Obstacles

Procedural obstacles within EAs can be defined through Eckert et al.'s (2020) evaluation of the system. They describe procedural obstacles as the inherent problems found within the design of EAs given that they are largely based on colonial and neoliberal presumptions of efficiency and capitalist values.⁵⁸

We can note the colonial, capitalistic design of EAs through the normative practice of utilising tight deadlines for accepting Indigenous knowledge and concerns; adopting a narrow scope for evaluating project impacts; and assuming universal understanding of English and technical terms in reports and meetings.⁵⁹ This ignores the distinctiveness of Indigenous cultures and worldviews. For example, Baker and Westman (2018) discuss the unrealistic nature of tight turnarounds for the environmentally sensitive and unique regions that EAs often assess in an oil extraction context. They discuss the reflections of a former Mikisew Cree First Nations chief who explained how difficult it is to “keep pace with development [and] intervene or review the different applications that come before the province for every one of these projects” due to the volume and time-consuming nature of work and lack of personnel to assist.⁶⁰

Another example of this colonial-Indigenous disconnect lies in the case of the Giant Mine proposal. In this scenario, the proponents advocated for a:

“narrow geographical and temporal scope for assessment, since the proposed activities focused on stabilizing and remediating the environmental hazards on and around the polluted mine itself [...] By contrast, community groups and the Yellowknives Dene First Nation argued vigorously for the review to consider the ‘full geographic extent of impacts on the environment by the mine over its lifetime,’

including impacts on local community health and land use (Yellowknives Dene First Nation, 2008).”⁶¹

This case was fraught with implications as it presented itself as an iteration of disempowerment for the Yellowknives Dene. Explicitly, the contours of power led to the invisibility of their knowledge capacities.

A final example occurred in the territory of a Cree community planned for oil extraction. In this case, Baker and Westman (2018) discuss the lack of Cree translation used in community discussions, despite the community having a significant number of non-bilingual, knowledgeable adults participating.⁶² Furthermore, most representatives had technical qualifications and backgrounds in science and engineering as opposed to social science—resulting in little regard for or knowledge of traditional land use in northern Canada.⁶³

These procedural obstacles simply brush the surface on the ways in which EAs have structurally restricted the capacity for *quality* involvement that seeks to incorporate Indigenous values, cultures, languages and expertise.

Addressing Procedural Obstacles

In overcoming the procedural obstacles arguably found within EAs, we can look to treaties to visualize how we may shift current norms and create new procedures that acknowledge cultural differences—cultivating a common ground to operate collaboratively. A treaty that may help illustrate this is the one captured in the Two-Row Wampum, which was described briefly in an earlier section.⁶⁴

This treaty reflected and affirmed the separation of settler and First Nation societies.⁶⁵ This separation is illustrated through two rows of purple on the belt that demonstrate two paths or independent vessels traveling down the same river together, but in a manner that does not steer into the other vessel.⁶⁶ This imagery confirms early visions and beliefs that peace and friendship could thrive even amid sharing space with those who are different from oneself. This reality was reaffirmed fifty-four years after its initial creation during a meeting between the First Nations and British Crown representatives which maintained Indigenous protocol.⁶⁷ Thus, this treaty demonstrates the presence of continuous strong communication and building of trust between parties as well as the ability for both parties to negotiate terms how, when, why and where they want to be.

The general premise of peacefully co-existing, navigating diplomatic processes, and negotiating relations with a different other is also understood in

other treaties such as those found in Treaty Six. Namely, “treaties affirm the continuity of different ways of being in shared spaces and provide a framework to help navigate those tensions and inconsistencies as they arise over time.”⁶⁸ In this way, we can look to treaty understandings to see the necessity to rebuild the principles underlying EAs. First, such understandings underscore the importance of acknowledging diverse ways of existence while concurrently placing trust in the legitimacy of the knowledge systems from which these understandings arise. This could be reflected in the greater acceptance and regard for alternative methods of knowledge sharing during EAs, such as oral transmission, which is integral to many Indigenous communities.⁶⁹ Second, treaty understandings call for the necessity to intentionally work through any friction and incongruencies as they come on an ongoing basis. This could translate into creating a more inclusive, common language that properly includes other geographical and temporal scopes for assessment as was brought up as a concern in a past assessment involving the Yellowknives Dene. It could also include considering more generous turnarounds to complete certain portions of EAs to allow for submission of Indigenous input on a more realistic timeline. It could also include mitigating financial constraints for communities to participate in the ways they wish to participate.

Navigating tension and inconsistencies in shared spaces may also call upon other foundational aspects of Indigenous perspectives on treaty. Illustratively:

“treaties created relationships among nations. They established relationships of trust. That trust did not end with the completion of a written document; it merely began with it. However, it was the responsibility of all parties involved to maintain the relationships established through treaty making. The sustainability of these agreements was dependent upon each nation adhering to the principles of respect, responsibility and renewal.”⁷⁰

Based on these reflections on treaty, we can see how EAs ought to be seen as an intentional, enduring relationship with *all* that are involved. Further to this, that relationship must be thought of as one that lasts in perpetuity under principles of respect, only ceasing to exist if all parties agree. From a western perspective, this may fundamentally change the way we think given that the bulk of EAs are based on short-term interactions and accountability—tending to consider the assessment process as done once the project decision is made. Resisting contemporary ideals of maximum efficiency and profits is paramount to widening conversational space for

meaningful Indigenous involvement to unfold. Part this requires the mitigation of multiple procedural obstacles currently laden with EA processes. This will ensure Indigenous communities are also empowered within project landscapes to determine, negotiate and benefit from the outcomes long-term.

Conclusion

While Canada’s EA process does bring notable, positive changes in engagement and consultation with Indigenous communities compared to previous legislation, it still fails to characterize Indigenous Peoples as partners throughout the project. Instead, Indigenous Peoples and their rights, title, values, interests, etc., are distilled into trivial considerations. This reality persists in an imbalanced political terrain that favours colonial authority and legal methodology. As it stands, more authentic collective collaboration amongst parties involved is greatly restricted by the unilateral decision-making power of the acting Minister or Governor in Council. By looking to Indigenous understandings of treaties, some of these tensions may be relieved. By changing the parameters for accountability and collaboration between Indigenous and non-Indigenous actors, we may finally witness meaningful consultation (as defined in *Tsleil-Waututh v. Canada*), which reflects purposeful, ongoing two-way dialogue on a more regular basis during EAs. Looking to Indigenous understandings of treaties impels us to revitalize nation-to-nation relationships and blaze a new path forward. It also allows us to generate a concrete roadmap towards a much-needed paradigm shift to allow for more equal power-sharing opportunities across the resource industry. Principles such as respect, responsibility and renewal have always been in many Indigenous understandings of how relationships ought to be conducted on earth, but they have seldom been effectively applied in colonial contexts. EAs are an opportunity to renew this tense landscape and transform Indigenous communities from participants to the partners they should have always been. This is especially important as we look to hold our federal government true to their endorsement of the United Nations Declaration on the Rights of Indigenous Peoples as a partial means of committing to reconciliation in Canada.⁷¹

Notes

¹This article utilises a mix of terminology. 'Indigenous' is used when speaking broadly about the First Nation, Métis, and Inuit people in Canada. 'Aboriginal' is used when speaking to concepts such as 'Aboriginal law' which is a body of law made by the Canadian courts and legislatures highlighting the unique relationship and constitutional rights between Indigenous Peoples and the Crown. This is different from reference to 'Indigenous law' which captures the legal orders rooted in Indigenous societies and cultures themselves: existing apart from the common and civil legalities in Canada. 'First Nation' is used when talking more specifically about certain aspects of treaties because First Nations people signed treaty while both Métis people and Inuit were excluded. Specific First Nation names/groups are used when possible.

²Bram F. Noble, *Introduction to Environmental Impact Assessment: A Guide to Principles and Practice* (Oxford: Oxford University Press, 2010), 11.

³*Impact Assessment Act*.

⁴*Ibid.*

⁵*Ibid.*

⁶David V. Wright, "Public Interest Versus Indigenous Confidence: Indigenous Engagement, Consultation and "Consideration" in the Impact Assessment Act," *Journal of Environmental Law and Practice* 33, no.3 (2020): 185, <https://dx.doi.org/10.2139/ssrn.3692839>.

⁷Chelsea Vowel, *Indigenous Writes: A Guide to First Nations, Métis, and Inuit Issues in Canada* (Winnipeg: Portage & Main Press, 2016), 244.

⁸*Ibid.*

⁹*Ibid.*

¹⁰*Ibid.*, 245.

¹¹*Ibid.*

¹²*Ibid.*

¹³Heidi Kiiwetinepinesiik Stark, "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada," *American Indian Culture and Research Journal* 34, no. 2 (2010): 153, <https://turtletalk.files.wordpress.com/2008/01/stark-respect-responsibility-and-renewal.pdf>.

¹⁴The duty to consult flows from the Honour of the Crown and is derived from section 35 of the *Constitution Act, 1982*. This section recognizes and affirms Aboriginal and treaty rights. This paper is *not* about whether the duty to consult should be triggered more frequently than it currently is. Rather, this paper aims to discuss the nature of ensuring Indigenous involvement is meaningful once the EA process *has already* been affirmed as necessary. Please see *Haida Nation v. British Columbia, 2004*; *Taku River Tlingit First Nation v. British Columbia, 2004*; *Mikisew Cree First Nation v. Canada, 2005*; *Beckman v. Little Salmon/Carmacks First Nation, 2010*; and/or *Rio Tinto Alcan Inc. Carrier Sekani Tribal Council, 2010*; should the nature and scope of duty to consult interest you.

¹⁵*Tsleil-Waututh v. Canada (Attorney General)*, 2018 FCA 153, para. 756.

¹⁶*Tsleil-Waututh v. Canada (Attorney General)*, 2018 FCA 153, para. 551.

¹⁷*Tsleil-Waututh v. Canada (Attorney General)*, 2018 FCA 153, para. 499-507.

¹⁸*Tsleil-Waututh v. Canada (Attorney General)*, 2018 FCA 153, para. 756-757.

¹⁹Janelle M. Baker, and Clinton N. Westman, "Extracting Knowledge: Social Science, Environmental Impact Assessment, and Indigenous Consultation in the Oil Sands of Alberta, Canada," *The Extractive Industries and Society* 5, no.1 (2018): 145, <https://doi.org/10.1016/j.exis.2017.12.008>.

²⁰Lauren E. Eckert, Nick X. Claxton, Cameron Owens, Anna Johnston, Natalie C. Ban, Faisal Moola, and Chris Darimont, "Indigenous Knowledge and Federal Environmental Assessments in Canada: Applying Past Lessons to the 2019 Impact Assessment Act.," *Facets* 5 (2020): 68, <https://doi.org/10.1139/facets-2019-0039>.

²¹*Ibid.*, 73.

- ²²Dawn Hoogeveen, "Fish-hood: Environmental Assessment, Critical Indigenous Studies, and Posthumanism at Fish Lake (Teztan Biny), Tsihqot'in Territory," *Environment and Planning D: Society and Space* 34, no. 2 (2016): 366, <https://doi.org/10.1177/0263775815615123>.
- ²³Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Zed Books, 1999), 72.
- ²⁴Rachel Arsenault, Carrie Bourassa, Sibyl Diver, Deborah McGregor, and Aaron Witham, "Including Indigenous Knowledge Systems in Environmental Assessments: Restructuring the Process," *Global Environmental Politics* 19, no.3 (2019): 124, https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3892&context=scholarly_works.
- ²⁵Baker and Westman, "Extracting Knowledge: Social Science, Environmental Impact," 145.
- ²⁶Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000), 41.
- ²⁷Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, ed. Michael Asch (Vancouver: University of British Columbia Press, 1997), 185.
- ²⁸Ibid.
- ²⁹Ibid, 191.
- ³⁰See example of Aboriginal Legal Services of Toronto in "John Borrows, *Canada's Indigenous Constitution* (Toronto: Toronto University Press, 2010)."
- ³¹Borrows, *Canada's Indigenous Constitution*, 23–24.
- ³²Val Napoleon and Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions Through Stories," *McGill Law Journal* 61, no.4 (2016): 725–754, <https://doi.org/10.7202/1038487ar>.
- ³³Stark, "Respect, Responsibility, and Renewal," 145–147.
- ³⁴Nicole Redvers, Anne Poelina, Clinton Schultz, Daniel M. Kobei, Cilia Githaiga, Marlikka Perdrisat, Donald Prince and Be'sha Blondin, "Indigenous Natural and First Law in Planetary Health," *Challenges* 11, no. 2 (2020): 3, <https://doi.org/10.3390/challe11020029>.
- ³⁵Samantha Darling, Blane Harvey, and Gordon Hickey, "Advancing Pluralism in Impact Assessment Through Research Capacity: Lessons from the Yukon Territory, Canada," *Journal of Environmental Assessment Policy and Management* 24, no. 2 (2022): 2, <https://doi.org/10.1142/S1464333222500260>.
- ³⁶Hoogeveen, "Fish-hood: Environmental Assessment," 358.
- ³⁷Ibid, 357–358.
- ³⁸Bethany Haalboom, "Pursuing Openings and Navigating Closures for Aboriginal Knowledges in Environmental Governance of Uranium Mining, Saskatchewan, Canada," *The Extractive Industries and Society* 3, no.4 (2016): 1012, <https://doi.org/10.1016/j.exis.2016.09.002>.
- ³⁹Ibid.
- ⁴⁰Ibid, 53.
- ⁴¹Darling, Harvey, and Hickey, "Advancing Pluralism," 26.
- ⁴²Borrows, *Canada's Indigenous Constitution*, 35.
- ⁴³Val Napoleon, "What is Indigenous Law? A Small Discussion," *Indigenous Law Research Unit at the University of Victoria Law*, 2016, https://dal.ca.libguides.com/ld.php?content_id=36430437.
- ⁴⁴Ibid.
- ⁴⁵John Borrows, "Indigenous Legal Traditions in Canada," *Washington University Journal of Law and Policy* 19 (2005):176–177, <https://journals.library.wustl.edu/lawpolicy/article/id/1608/>.
- ⁴⁶Wright, "Public Interest Versus Indigenous Confidence," 205.
- ⁴⁷Ibid, 188.
- ⁴⁸*Impact Assessment Act*.

- ⁴⁹Meinhard Doelle and A. John Sinclair, "The New IAA in Canada: From Revolutionary Thoughts to Reality," *Environmental Impact Assessment Review* 79 (2019): 6, <https://doi.org/10.1016/j.eiar.2019.106292>.
- ⁵⁰Wright, "Public Interest Versus Indigenous Confidence," 188.
- ⁵¹Napoleon and Friedland, "Inside Job," 748.
- ⁵²Borrows, *Canada's Indigenous Constitution*, 42–43.
- ⁵³Venne, "Understanding Treaty 6: An Indigenous Perspective," 173.
- ⁵⁴Ibid, 179.
- ⁵⁵Ibid.
- ⁵⁶Prime Minister of Canada Justin Trudeau, "Open and Accountable Government," Updated November 27, 2015, <https://www.pm.gc.ca/en/news/backgrounders/2015/11/27/open-and-accountable-government>.
- ⁵⁷"UCalgary Law Mini Lecture: Environmental Impact Assessments in Canada - Highlights and "Lowlights," produced by UCalgary Law, July 8, 2020, YouTube video, 44:08, <https://www.youtube.com/watch?v=6dMjyl1x-oU>.
- ⁵⁸Eckert et al., "Indigenous Knowledge and Federal Environmental Assessments," 77.
- ⁵⁹Ibid.
- ⁶⁰Baker and Westman, "Extracting Knowledge: Social Science, Environmental Impact," 150.
- ⁶¹John Sandlos, and Arn Keeling, "Aboriginal Communities, Traditional Knowledge, and the Environmental Legacies of Extractive Development in Canada, *The Extractive Industries and Society* 3, 281, <https://doi.org/10.1016/j.exis.2015.06.005>.
- ⁶²Baker and Westman, "Extracting Knowledge: Social Science, Environmental Impact," 148.
- ⁶³Ibid.
- ⁶⁴See 'Treaties' under the 'Background' section.
- ⁶⁵John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, ed. Michael Asch (Vancouver: University of British Columbia Press, 1997), 164.
- ⁶⁶Ibid.
- ⁶⁷Ibid.
- ⁶⁸Starblanket, "The Numbered Treaties," 455.
- ⁶⁹Smith, "Decolonizing Methodologies," 33.
- ⁷⁰Stark, "Respect, Responsibility, and Renewal," 156.
- ⁷¹Crown-Indigenous Relations and Northern Affairs Canada, *Archived – Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (Gatineau, QC: Crown-Indigenous Relations and Northern Affairs Canada, 2010), <https://www.rcaanc-cirnac.gc.ca/eng/1309374239861/1621701138904>.

References

- Arsenault, Rachel, Carrie Bourassa, Sibyl Diver, Deborah McGregor, and Aaron Witham. "Including Indigenous Knowledge Systems in Environmental Assessments: Restructuring the Process." *Global Environmental Politics* 19, no.3 (2019): 120–132. https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3892&context=scholarly_works.
- Baker, Janelle M., and Clinton N. Westman. "Extracting Knowledge: Social Science, Environmental Impact Assessment, and Indigenous Consultation in the Oil Sands of Alberta, Canada." *The Extractive Industries and Society* 5, no.1 (2018): 144–153. <https://doi.org/10.1016/j.exis.2017.12.008>.
- Borrows, John. *Canada's Indigenous Constitution*. Toronto: Toronto University Press, 2010.
- Borrows, John. "Indigenous Legal Traditions in Canada." *Washington University Journal of Law and Policy* 19 (2005): 167–223. <https://journals.library.wustl.edu/lawpolicy/article/id/1608/>.
- Borrows, John. "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government." In *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, edited by Michael Asch, 155–172. Vancouver: University of British Columbia Press, 1997.
- Cardinal, Harold and Walter Hildebrandt. *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations*. Calgary: University of Calgary Press, 2000.
- Crown-Indigenous Relations and Northern Affairs Canada. *Archived – Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*. Gatineau, QC: Crown-Indigenous Relations and Northern Affairs Canada, 2010. <https://www.rcaanc-cirnac.gc.ca/eng/1309374239861/1621701138904>.
- Darling, Samantha, Harvey, Blane and Gordon Hickey. "Advancing Pluralism in Impact Assessment Through Research Capacity: Lessons from the Yukon Territory, Canada." *Journal of Environmental Assessment Policy and Management* 24, no. 2 (2022): 1–35. <https://doi.org/10.1142/S1464333222500260>.
- Doelle, Meinhard and A. John Sinclair. "The New IAA in Canada: From Revolutionary Thoughts to Reality." *Environmental Impact Assessment Review* 79 (2019): 1–9. <https://doi.org/10.1016/j.eiar.2019.106292>.
- Eckert, Lauren E., Nick X. Claxton, Cameron Owens, Anna Johnston, Natalie C. Ban, Faisal Moola, and Chris Darimont. "Indigenous Knowledge and Federal Environmental Assessments in Canada: Applying Past Lessons to the 2019 Impact Assessment Act." *Facets* 5 (2020): 67–90. <https://doi.org/10.1139/facets-2019-0039>.
- Haalboom, Bethany. "Pursuing Openings and Navigating Closures for Aboriginal Knowledges in Environmental Governance of Uranium Mining, Saskatchewan, Canada." *The Extractive Industries and Society* 3, no.4 (2016) 1010–1017. <https://doi.org/10.1016/j.exis.2016.09.002>.
- Hoogeveen, Dawn. "Fish-hood: Environmental Assessment, Critical Indigenous Studies, and Posthumanism at Fish Lake (Teztan Biny), Tsilhqot'in Territory." *Environment and Planning D: Society and Space* 34, no. 2 (2016): 355–370. <https://doi.org/10.1177/0263775815615123>.
- Impact Assessment Act*, S.C. 2019, c.28, s.1.
- Napoleon, Val and Hadley Friedland. "An Inside Job: Engaging with Indigenous Legal Traditions Through Stories." *McGill University Law Journal* 61, no.4 (2016): 725–754. <https://doi.org/10.7202/1038487ar>.
- Napoleon, Val. "What is Indigenous Law? A Small Discussion." *Indigenous Law Research Unit at the University of Victoria Law*. 2016. https://dal.ca/libguides.com/ld.php?content_id=36430437.
- Noble, Bram F. *Introduction to Environmental Impact Assessment: A Guide to Principles and Practice*. Oxford: Oxford University Press, 2010.
- Prime Minister of Canada Justin Trudeau. "Open and Accountable Government." Updated November 27, 2015. <https://www.pm.gc.ca/en/news/backgrounders/2015/11/27/open-and-accountable-government>.
- Redvers, Nicole, Poelina, Anne, Schultz, Clinton, Kobei, Daniel M., Githaiga, Cicilia, Perdrisat, Marlikka, Prince, Donald, and Be'sha Blondin. "Indigenous Natural and First Law in Planetary Health." *Challenges* 11, no. 2 (2020): 1–12. <https://doi.org/10.3390/challe11020029>.
- Sandlos, John and Arn Keeling. "Aboriginal Communities, Traditional Knowledge, and the Environmental Legacies of Extractive Development in Canada." *The Extractive Industries and Society* 3 (2016): 278–287.

- <https://doi.org/10.1016/j.exis.2015.06.005>.
- Smith, Linda Tuhiwai. *Decolonizing Methodologies: Research and Indigenous Peoples*. New York: Zed Books, 1999.
- Starblanket, Gina. "The Numbered Treaties and the Politics of Incoherency." *Canadian Journal of Political Science* 52 (2019). 443–459. <https://doi.org/10.1017/S0008423919000027>.
- Stark, Heidi Kiiwetinepinesiiik. "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada." *American Indian Culture and Research Journal* 34, no. 2 (2010): 145–164. <https://turtletalk.files.wordpress.com/2008/01/stark-respect-responsibility-and-renewal.pdf>.
- Tsleil-Waututh v. Canada (Attorney General)*, 2018 FCA 153.
- "UCalgary Law Mini Lecture: Environmental Impact Assessments in Canada - Highlights and "Lowlights." Produced by UCalgary Law. July 8, 2020, YouTube video, 44:08. <https://www.youtube.com/watch?v=6dMjyl1x-oU>.
- Venne, Sharon. "Understanding Treaty 6: An Indigenous Perspective." In *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference*, edited by Michael Asch, 173–207. Vancouver: University of British Columbia Press, 1997.
- Vowel, Chelsea. *Indigenous Writes: A Guide to First Nations, Métis, and Inuit Issues in Canada*. Winnipeg: Portage & Main Press, 2016.
- Wright, David V. "Public Interest Versus Indigenous Confidence: Indigenous Engagement, Consultation and "Consideration" in the Impact Assessment Act." *Journal of Environmental Law and Practice* 33, no.3 (2020): 185–210. <https://dx.doi.org/10.2139/ssrn.3692839>.