Mokwateh

# Climate Change, Critical Minerals, and Indigenous Engagement with Regulatory Processes

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# Introduction

The intersection of Canada's climate change objectives and natural resource policies will define the country's economic prospects, Indigenous sovereignty, and environmental outcomes for future generations. To prepare Canada and its trading partners for the global low-carbon transition, the country must substantially produce more minerals and more renewable energy sources than it has done in the past. Canada has long been a critical cog in the global mineral supply chain, supporting industrial development in Canada and abroad. For Indigenous communities to secure an equitable share in Canadian prosperity and to gain a substantial measure of influence over resource extraction, there must be a viable and profitable mining industry. This is the essence of the dilemma regarding Canada's rapidly expanding critical minerals sector: embedding Indigenous and treaty rights into the resource development process is both complicated and essential.

The stakes could not be higher. Developing future clean growth projects could generate significant sources of economic prosperity for both local communities and the country as a whole, while enabling the energy transition. Yet, all of these projects will be located on Indigenous lands—either on traditional territories, treaty lands, or near Indigenous communities. The creation of new energy infrastructure with the same business-as-usual approach from decades past risks extracting resources with continued environmental and socio-economic damage that will provide limited benefits for Indigenous communities. Moving forward, it is necessary that projects deliver inclusive, equitable, and effective engagement with Indigenous Peoples, and be grounded in the principles of free, prior, and informed consent.

This process is occurring in the context of the long-overdue and hard-won recognition of Indigenous rights and autonomy, a struggle waged strongly in the resource sector. The re-empowerment of Indigenous Peoples is one of the most important political and legal developments in the past quarter

century and resource development has been the leading edge of the assertion of Indigenous and treaty rights. While the advent of Indigenous political and treaty rights relating to resource development has added additional layers to an already complex and often convoluted approval and monitoring process, these measures have provided Indigenous communities with a real and potent voice in resource-centered decision making. That it is taking time for the broader systems to adapt to newly established Indigenous authority is no surprise, for the acceptance and integration of Indigenous and treaty rights into the resource development process is both complicated and essential. Over time, as the Indigenous resource laws are finalized and as Indigenous roles in federal and territorial processes are clarified and, in particular, as participants gain experience with Indigenous engagement, approval processes will likely focus on Indigenous-centered systems.

Managing the transition to clean energy requires an upgrade to the regulatory processes established by federal, provincial, territorial, and Indigenous governments. It is essential, therefore, to explore ways to adapt and improve the impact assessment and permitting processes for clean growth projects (defined as clean energy and critical minerals) across Canada to better suit Indigenous needs and capacities, and to reinforce Indigenous rights and decision making. In this paper we:

- explore Indigenous perspectives on recent and relevant regulations and legislations across different jurisdictions;
- present case studies of electricity and mining projects that were developed in poor or good partnerships with Indigenous Peoples, and;
- present recommendations to governments and industry as this landscape evolves in the near and distant future.

Thus far, the regulatory, permitting, review, and approval process of clean growth projects have been solely in the hands of federal, provincial, and territorial governments—almost completely ignoring Indigenous governments and nations who have rights and titles to the land. Some reforms have been implemented, but there is still work to be done. Importantly, the regulatory process requires decolonization, especially as the demands of the energy transition in Canada intensify.[1]

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1. Wright, Laura, and Jerry P. White. 2012. "Developing Oil and Gas Resources on or Near Indigenous Lands in Canada: An Overview of Laws, Treaties, Regulations and Agreements." International Indigenous Policy Journal 3 (2). https://doi.org/10.18584/iipj.2012.3.2.5;
Dana, Léo-Paul, Bob Kayseas, Peter W. Moroz, and Robert B. Anderson. 2016. "Toward a better understanding of Aboriginal/Indigenous rights and their impact on development: an application of regulation theory." In *Academy of Management (AOM)*. https://hal.science/hal-02089156/document;
Anderson, Robert B., Leo Paul Dana, and Teresa E. Dana. 2006. "Indigenous land rights, entrepreneurship, and economic development in Canada: "Opting-in" to the global economy." Journal of world business 41 (1), 1:45-55. https://doi.org/10.1016/j.jwb.2005.10.005.

Critical minerals such as copper, lithium, nickel, cobalt, and rare earth elements are essential components in clean energy technologies and demand for these minerals is growing quickly—an immense opportunity for both the Canadian mining sector and Indigenous nations. Indeed, Canada and the world need a great deal more energy—some forecasts say two to three times the current production—to complete the transition to a clean economy. Although the critical minerals market is a large sector—it has contracted by 10 per cent in the last year due to falling prices in battery minerals—demand will reach US $325 billion in 2023 and $770 billion by 2040.[2] This, in turn, will require some $30 billion in additional investment in critical mineral production to meet the surging demand.[3] The low-price environment may foster additional deployment of clean energy technologies in the medium term but pose financial challenges to industry in the short term.[4]

Yet, "the only road to net zero runs through Indigenous lands,"[5] meaning that all clean growth projects will be built on treaty lands, land claim areas, traditional territories, or within close proximity to an Indigenous community. This unique moment in time can affirm Indigenous rights to land and self-determination and encourage meaningful partnership between Indigenous nations, industry, and government.

This moment in time is not just something that Canada is grappling with. Developing a response to global climate change presents fundamental challenges to other nations and the international community. It requires a dramatic shift away from fossil fuels and toward cleaner forms of energy generation and consumption.[6]

Global pressure to radically transform the very foundations of the world's energy systems and economy, however, has placed Indigenous Peoples' lands within the sights of developers and national economic priorities. Desperately sought-after minerals are found on Indigenous lands, often in thinly populated and remote parts of the world. Indigenous communities will often say yes to

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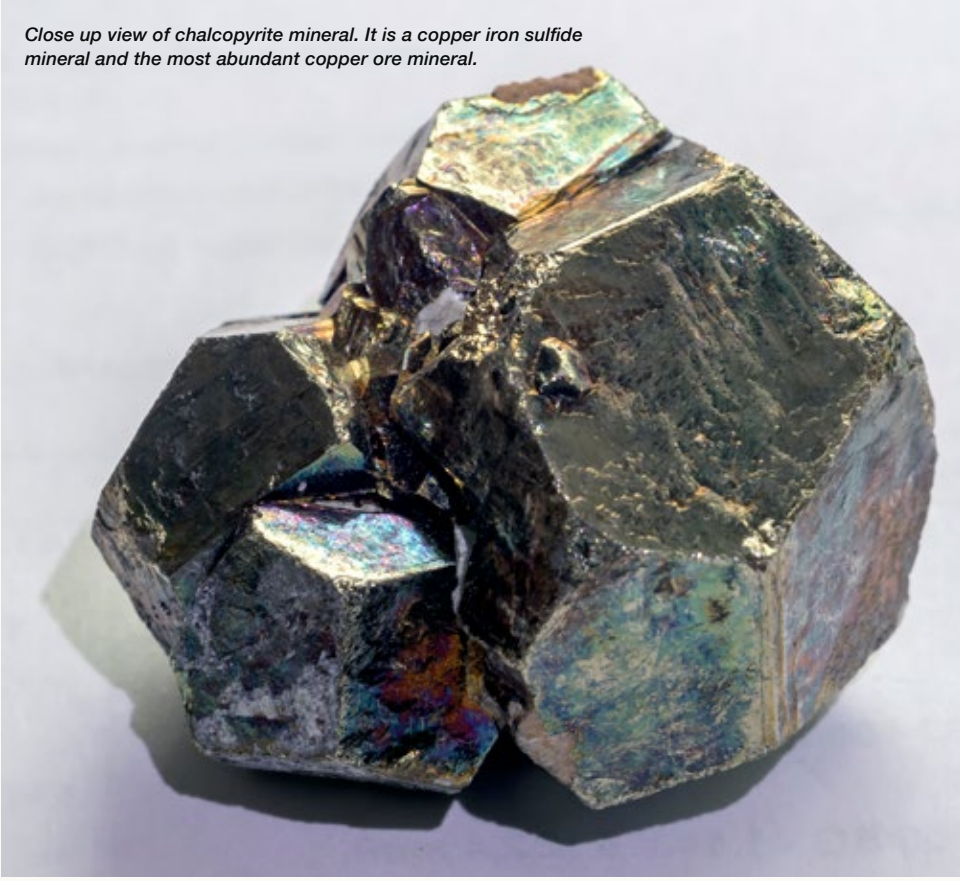
2. International Energy Agency. 2024. "Global Critical Minerals Outlook 2024." https://www.iea.org/reports/global-critical-minerals-outlook-2024/market-review
3. Trottier-Chi, Calvin. 2024. "Canada's energy transition will demand $16 billion worth of critical minerals by 2040." Canadian Climate Institute. https://440megatonnes.ca/insight/canada-critical-minerals-clean-energy-transition/.
4. Ibid
5. The First Nations Major Projects Coalition. 2022. "The Only Road to Net Zero Runs Through Indigenous Lands: Indigenous equity ownership of major projects." https://fnmpc.ca/wp-content/uploads/FNMPC_Post-Conf_11022022_web.pdf.
6. Reed, Graeme, Nicolas D. Brunet, Deborah McGregor, Curtis Scurr, Tonio Sadik, Jamie Lavigne, and Sheri Longboat. 2022. "Toward Indigenous visions of nature-based solutions: an exploration into Canadian federal climate policy." Climate Policy 22 (4): 514-33. https://doi.org/10.1080/14693062.2022.2047585;
Tsosie, Rebecca. 2007. "Indigenous people and environmental justice: the impact of climate change." University of Colorado Law Review 78. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1399659.

certain projects, but they will often say no to other projects.[7] While this intersection holds the potential for tensions between the recognition of Indigenous rights and the need for critical minerals, creating clear rules and processes that emphasize Indigenous autonomy makes collaboration possible.[8] This context between recently re-empowered Indigenous Peoples, global ecological requirements, commercial interests, and national and subnational economic policies will be one of the defining policy environments of the 21st century.



*Close up view of chalcopyrite mineral. It is a copper iron sulfide mineral and the most abundant copper ore mineral.*

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7. Burton, John, Deanna Kemp, Rodger Barnes, and Joni Parmenter. 2024. "Mapping critical minerals projects and their intersection with Indigenous peoples' land rights in Australia." Energy Research & Social Science 113: 103556. https://doi.org/10.1016/j.erss.2024.103556;
Herring, Rachel, Keaton Sandeman, and Lyuba Zarsky. 2024. "Decarbonization, critical minerals, and tribal sovereignty: Pathways towards conflict transformation." *Energy Research & Social Science* 113:103561. https://doi.org/10.1016/j.erss.2024.103561;
Heffron, Raphael J. 2020. "The role of justice in developing critical minerals." The extractive industries and society 7(3): 855-63. https://doi.org/10.1016/j.exis.2020.06.018.

8. Lennox, Corinne. 2012. "Natural resource development and the rights of minorities and indigenous peoples." In State of the World's Minorities and Indigenous Peoples 2012. Minority Rights Group International. https://www.researchgate.net/publication/299858988_Natural_Resources_Development_and_the_Rights_of_Minorities_and_Indigenous_Peoples;
Anaya, James. 2005. "Indigenous peoples' participatory rights in relation to decisions about natural resource extraction: The more fundamental issue of what rights indigenous peoples have in lands and resources." Arizona Journal of International and Comparative Law. https://repository.arizona.edu/handle/10150/659115.

# Our research approach

This scoping paper used mixed methods to provide nuanced analyses and recommendations. First, we reviewed relevant academic and professional literature on the net zero transition and Indigenous economic development in the resource sector. Then we conducted a scan of relevant legislation and regulations that affect impact assessment in Canada and studied them to understand how they impact Indigenous rights and decision-making, which included a review of legal and Indigenous critiques and responses. To add more local knowledge, we interviewed nine experts from five provinces and territories that have direct experience in impact assessments with Indigenous communities. With a mix of government, industry, and community perspectives from Indigenous and non-Indigenous people, we were able to tease out common experiences and regional differences, and brainstorm new pathways forward for impact assessment in Canada. The direct quotes included in this paper are taken from these conversations. To protect the anonymity of our interviewees these quotes remain unattributed.

This paper is designed to provide an overview of Indigenous involvement, expectations, and preferences in resource development and its associated impacts. It is informed by a recognition of the authority and preeminence of Indigenous and treaty rights, as interpreted on an ongoing basis by Canadian courts, and by the growing importance of Indigenous-corporate relations in shaping future resource developments.[9]

9. Coates, Ken and Brian Lee Crowley. 2013. "New Beginnings How Canada's Natural Resource Wealth Could Re-shape Relations with Aboriginal People." Macdonald-Laurier Institute. https://www.macdonaldlaurier.ca/files/pdf/2013.01.05-MLI-New_Beginnings_Coates_vWEB.pdf.

*Abandoned leach ponds being reclaimed at the Barrick Nickle Plate gold mine in the interior of BC, Canada.*

# Part 1: Context

## A troubled legacy: Indigenous Peoples and the natural resource economy

Indigenous Peoples and governments have long wrestled with the question of resource development on their traditional lands. For generations, industrial nations treated Indigenous lands as terra nullius, or empty and unoccupied land. This 'cant of conquest' was used by colonial governments to justify the unchecked use and commodification of Indigenous lands for commercial purposes and convince colonial and national governments to authorize the construction of roads and railways, forestry operations, and mining projects. Indigenous Peoples were not consulted, and their economic, social, and ecological needs and rights were systematically violated in the name of what was commonly described as "progress" by western colonial governments and society. Nations like Canada flourished economically, producing thousands of jobs for newcomers and often substantial profits for many of the resource companies.[10]

Successive waves of development reinforced and continued the colonial and intensely discriminatory approach to resource development. Most of the mining projects proceeded, at least until the 1970s, with little regard to ecological sustainability and consideration of Indigenous rights, title, or community safety.[11] Rivers and lakes were diverted and harmed; in many instances, chemicals

10. The best overviews of these processes are: 1) Miller, James Rodger. 2018. Skyscrapers hide the heavens: A history of native-newcomer relations in Canada. University of Toronto Press and 2) Dickason, Olivia Patricia and David McNab. 2008. Canada's First Nations: A History of Founding Peoples from Earliest Times. Oxford University Press.
11. Bainton, Nicholas. 2020. "Mining and Indigenous peoples." In Oxford Research Encyclopedia of Anthropology. https://doi.org/10.1093/acrefore/9780190854584.013.121;
Sandlos, John, and Arn Keeling. 2015. Mining and communities in Northern Canada: History, politics, and memory. University of Calgary Press. https://doi.org/10.11575/prism/34601.

from industrial processes leached into the water systems, harming the fish, wildlife, and communities as local drinking supplies became unusable. Cultural practices were also disrupted as hunting and fur trapping activities were displaced by heavy equipment operations, blasting, road construction, and sustained extraction activities.[12] The environmental dislocations were more than matched by social upheaval. For example, the arrival of hundreds, if not thousands, of miners overwhelmed the small and often isolated Indigenous communities with little if any investment back in the community.[13] Mining extracted minerals from the ground, but it also extracted wealth from the territory and distributed it, in substantial measure, to people and communities far removed from the Indigenous lands. The disruptions of personal lives, families, and settlements because of the colonial and discriminatory approach to resource development had decades-long implications causing enormous harm and generational trauma.[14] Little if any of the wealth produced by the industry found its way into Indigenous hands or produced income or opportunities for Indigenous communities.

The expansion of the resource economy was one of the factors that led to the catastrophic decline in social and economic independence and cultural and linguistic strength of nations and Indigenous communities.[15] While the quality and management of the resource projects improved over time as new regulations were implemented, the social and environmental impact of the earlier developments lingered for generations. For example, communities that were located near mine sites, such as Ross River in the Yukon and Lubicon Cree in Alberta,[16] recovered slowly from devastating, immediate, and wide-ranging

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12. Piper, Liza. 2010. The industrial transformation of subarctic Canada. University of British Columbia Press. https://doi.org/10.59962/9780774815345;
Keeling, Arn, and John Sandlos. 2009. "Environmental justice goes underground? Historical notes from Canada's northern mining frontier." Environmental Justice 2(3):117-25. https://doi.org/10.1089/env.2009.0009;
Hall, Rebecca. 2013. "Diamond mining in Canada's Northwest Territories: A colonial continuity." Antipode 45 (2): 376-93. https://doi.org/10.1111/j.1467-8330.2012.01012.x.

13. Weinstein, Martin. 1996. "The Ross River Dena: A Yukon Aboriginal Economy." Ottawa: Royal Commission on Aboriginal Peoples. https://publications.gc.ca/collections/collection_2016/bcp-pco/Z1-1991-1-41-23-eng.pdf;
Keeling, Arn, and John Sandlos. "Ghost towns and zombie mines: The historical dimensions of mine abandonment, reclamation, and redevelopment in the Canadian North." In University of Calgary Press, 377–420. https://doi.org/10.1515/9781552388563-011.

14. Hamilton, John David. 1994. Arctic revolution: social change in the Northwest Territories, 1935-1994. Dundurn. https://www.dundurn.com/books_/t22117/a9781550022063-arctic-revolution;
Duffy, Quinn. 1988. *The Road to Nunavut: The Progress of the Eastern Arctic Inuits Since the Second World War*. https://www.mqup.ca/road-to-nunavut--the-products-9780773533721.php;
Irlbacher-Fox, Stephanie. 2010. Finding Dahshaa: Self-government, social suffering, and Aboriginal policy in Canada. University of British Columbia Press. https://www.ubcpress.ca/finding-dahshaa.

15. Frideres, James S. 1984. "Government Policy and Indian Natural Resource Development." The Canadian Journal of Native Studies 4(1): 51-66. https://cjns.brandonu.ca/wp-content/uploads/4-1-frideres.pdf;
James Frideres. 1974.Canada's Indians: Contemporary Conflicts. Prentice Hall.

16. Weinstein, Martin. 1996. "The Ross River Dena: A Yukon Aboriginal Economy." Ottawa: Royal Commission on Aboriginal Peoples. https://publications.gc.ca/collections/collection_2016/bcp-pco/Z1-1991-1-41-23-eng.pdf;
Ferreira, Darlene Abreu. 1992. "Oil and Lubicons don't mix: A land claim in northern Alberta in historical perspective." Canadian Journal of Native Studies, 12(1):1-35;
Huff, Andrew. 1999. "Resource development and human rights: A look at the case of the Lubicon Cree Indian Nation of Canada." Colorado Journal of International Environmental Law and Policy, 10:161.

consequences. In other places, located further away from the extractive activities, the impacts were smaller and more incremental. Negative experiences associated with mining and other resource projects, including mistreatment of Indigenous women, the juxtaposition of the miners' wealth and Indigenous poverty, and the disruption of the environment, became seared into the collective memories of many Indigenous communities, a stark and often ever-present reminder of one of the ways Indigenous Peoples have been marginalized and harmed by unchecked resource development.[17]

## The evolution of Indigenous legal recognition and environmental regulations

The response of some Indigenous Peoples to the devastating colonial approach to resource development, the intrusion on their lands and the concept of terra nullius, was to demand formal recognition of Indigenous and treaty rights, advocate for modern treaties in areas previously unceded, and assert specific Indigenous interests in the management resource use on traditional territories.[18] [19]

Understanding treaties is crucial to understanding Canada's natural resource history. The expansion of Canada has been legitimized by the Crown through the establishment of historic treaties, even though they have been widely misinterpreted, misunderstood, and neglected, and parts of Canada are still unceded and unsurrendered.[20] Historic treaties were signed in the 17th, 18th , and 19th centuries between the British Crown and Indigenous nations and outline the different obligations, rights, and responsibilities of the relationship.[21] Successive colonial governments deliberately misunderstood and misinterpreted the treaties to show that signatory Indigenous nations had ceded,

17. O'Faircheallaigh, Ciaran. 2013. "Extractive industries and Indigenous peoples: A changing dynamic?." Journal of Rural Studies 30:20-30. https://doi.org/10.1016/j.jrurstud.2012.11.003.
18. Castrilli, Joseph F. 2000. "Environmental regulation of the mining industry in Canada: an update of legal and regulatory requirements." University of British Columbia Law Review, 34:91;
Kuzior, Aleksandra, and Wes Grebski. 2022. "Mining Industry in Canada (Opportunities and Threats)." Acta Montanistica Slovaca 27: 407-16. https://doi.org/10.46544/ams.v27i2.10;
Russell, Bonita I., Daniel Shapiro, and Aidan R. Vining. 2010. "The evolution of the Canadian mining industry: The role of regulatory punctuation." *Resources Policy* 35 (3): 90-97. https://doi.org/10.1016/j.resourpol.2009.09.002.
19. Coates, Ken. 2004. A global history of indigenous peoples. Palgrave Macmillan UK. https://doi.org/10.1057/9780230509078;
Bodley, John H. 2014. *Victims of progress*. Rowman & Littlefield. https://rowman.com/ISBN/9781442226944/Victims-of-Progress-Sixth-Edition.
20. Yellowhead Institute. 2022. "An annotated guide to the (mal)interpretation of confederation era treaties in Canada." Yellowhead Institute. https://yellowheadinstitute.org/wp-content/uploads/2022/05/annotated-treaty-factsheet-yellowhead-institute.pdf.
21. Miller, James R. 2009. Compact, contract, covenant: Aboriginal treaty-making in Canada. University of Toronto Press. https://utppublishing.com/doi/book/10.3138/9780802095152.

released, and surrendered their land to the Crown.[22] The cultural and linguistic differences between First Nations and Europeans led to very different understandings of treaties. For example, First Nations do not believe in ownership or human domination over the land and therefore would not have agreed to surrendering land to the Crown.[23] So, for over a hundred years since the first treaties were signed and Confederation in 1867, Indigenous rights and title to land were purposefully ignored in order to make way for the newcomer society and seemingly free, available resources for the Crown to extract.

> "The government itself continuously uses the formal [legal] process and the First Nation has to go to court to make its case. Unfortunately, this does cause more of a division between the two levels of government and also, quite frankly, costs. First Nations spend a lot of money to go through the process itself. At the end of the day, even though we've had some pretty significant rulings in our favor over the past few years, the precedent [of going to the courts] has been set, especially here under our agreements. So it really baffles my mind that we continuously go down this road."
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> ~ Yukon First Nations expert

This colonial, paternalistic, and coerced interpretation of the treaties paved the way for "legitimized" settler colonialism by the Crown and highly disruptive and devastating consequences resulting from resource development on Indigenous lands such as the Giant Mine in the Northwest Territories[24] and mercury poisoning caused by the effluent from pulp and paper mills in Ontario from 1913-1970s affecting Grassy Narrows First Nation.[25] It was not until the

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22. Yellowhead Institute. 2022. "An annotated guide to the (mal)interpretation of confederation era treaties in Canada." Yellowhead Institute. https://yellowheadinstitute.org/wp-content/uploads/2022/05/annotated-treaty-factsheet-yellowhead-institute.pdf.
23. Living Sky School Division. N.d. "Treaty 6 – Interpretations and Misunderstandings." https://www.livingskysd.ca/treaty6-interpretations.
24. Beckett, Caitlynn. 2020. "Beyond remediation: Containing, confronting and caring for the Giant Mine Monster." Environment and Planning E: Nature and Space 4: 1389-1412. https://doi.org/10.1177/2514848620954361; Sandlos, John, and Arn Keeling. 2016. "Toxic legacies, slow violence, and environmental injustice at Giant Mine, Northwest Territories." *The Northern Review* 42:7-21. https://doi.org/10.22584/nr42.2016.002.
25. Ilyniak, Natalia. 2024. "Mercury poisoning in grassy narrows: Environmental injustice, colonialism, and capitalist expansion in Canada." McGill Sociological Review 4:43-66. https://www.mcgill.ca/msr/msr-volume-4/mercury-poisoning-grassy-narrows;
Philibert, Aline, Myriam Fillion, and Donna Mergler. 2020. "Mercury exposure and premature mortality in the Grassy Narrows First Nation community: a retrospective longitudinal study." *The Lancet Planetary Health* 4. https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196(20)30057-7/fulltext;
Rothenberg, Sarah E. 2023. "Invited Perspective: Linking the Intergenerational Impacts due to Mercury Exposure in Grassy Narrows First Nation, Canada." *Environmental Health Perspectives* 131(7). https://doi.org/10.1289/EHP12721.

wave of Indigenous and environmental activism in the 1960s and 1970s that significant legislation and regulations were put in place.[26]

That Indigenous nations had ceded, released, and surrendered their land to the Crown has been disproven through oral and archival records of treaty negotiations that described promises of sharing lands, jurisdiction, and mutual aid.[27] More recently, the long-overdue innovation of treaty re-interpretation is happening in provincial courts across the country, where First Nations are bringing their interpretation of the treaty obligations forward as well as the injustices that have occurred since the signing of the treaties.[28]

Across all provincial, territorial, and federal jurisdiction, there are nearly 700 specific claims in progress submitted by Indigenous groups.[29] The Government of Canada is presently engaged in discussions with Indigenous groups at over 186 negotiation and discussion tables across the country to negotiate comprehensive land claims.[30] These various claims are likely to have some impacts on the development process of the clean economy in Canada. The outstanding claims create uncertainty around project development and more importantly, delay justice and compensation to the Indigenous communities. Governments must prioritize negotiating and settling the claims, and then respecting and integrating the outcomes in a timely manner.

## Indigenous rights[31]

Indigenous Peoples in Canada have fundamental rights to sovereignty, nationhood, and self-determination, although they are often not recognized by federal, provincial, and territorial authorities. These rights affirm Indigenous Peoples' position in project review, approval, and permitting process and are embedded in different ways. Understanding how they are embedded

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26. Castrilli, Joseph F. 2000. "Environmental regulation of the mining industry in Canada: an update of legal and regulatory requirements." University of British Columbia Law Review 34: 91.
27. Yellowhead Institute. 2022. "An annotated guide to the (mal)interpretation of confederation era treaties in Canada."An Annotated Treaty Factsheet." Yellowhead Institute. https://yellowheadinstitute.org/wp-content/uploads/2022/05/annotated-treaty-factsheet-yellowhead-institute.pdf.
28. Gray, Christina, Q.C. Janes, Tejas Madhur, Brianna McCann, David Taylor Gill, Kaelan Unrau, Hayden King, and Gull Bay First Nation. 2022. "Treaty Interpretation in the Age of Restoule." Yellowhead Institute. https://yellowheadinstitute.org/wp-content/uploads/2022/05/Restoule-Special-Report-YI-May-2022.pdf.
29. Report generated from: Government of Canada, "Reporting Centre on Specific Claims," https://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx
30. Government of Canada. N.d. "Negotiations in progress. " https://www.rcaanc-cirnac.gc.ca/eng/1100100030285/1529354158736.
31. Throughout the history of Canada, the terminology used to refer to the original inhabitants of this land have frequently changed. In 1982, the term Aboriginal was considered the respectful and correct collective noun for Indigenous peoples in Canada. Today, the Government of Canada respects the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) in Canada and recognizes the original inhabitants of this land as Indigenous. Ideally, terminology for self-description is determined by Indigenous Peoples themselves.

will frame how governments of different orders can meaningfully centre Indigenous Peoples in the impact assessment process across Canada.[32]

- **Inherent rights pre-colonization**: Indigenous nations that existed on Turtle Island pre-colonization were organized as sovereign nations with variations of contemporary government jurisdiction over land and property[33] and their own sets of laws and rights to govern their lands and territories.[34] These rights were ignored with devastating consequences, but they were never extinguished.

- **Royal Proclamation, 1763**: Issued by King George III to claim British territory in North America and set out guidelines for European settlement on Indigenous lands. In the Proclamation it explicitly states that Aboriginal title has existed and continues to exist and that all land would be considered Aboriginal land until ceded by treaty.[35] Although this proclamation was unjust in its nature, most Indigenous and legal scholars recognize the Royal Proclamation as an important first step toward the recognition of existing Indigenous rights and title, including the right to self-determination. The Royal Proclamation set a foundation for the process of establishing treaties, which prove to be very relevant in modern day impact assessment processes.[36]

- **Treaties** are agreements signed between specific groups of First Nations, Métis, or Inuit and the Crown (government) that recognize certain rights and obligations for all parties. Broadly speaking, there are two types of treaties: historic treaties which were signed between 1701-1975, and modern treaties that have been signed since 1975 to the present day.[37] Treaty rights vary depending on the treaty and the time and circumstances in which they were negotiated. For example, in historic treaties, treaty rights and benefits often include reserve land allocation, money to be paid to a First

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32. Borrows, John. 2002. Recovering Canada: The resurgence of indigenous law. University of Toronto Press. https://utppublishing.com/doi/10.3138/9781487516581;
Ali, Saleem H. 2009. *Mining, the environment, and indigenous development conflicts.* University of Arizona Press. https://uapress.arizona.edu/book/mining-the-environment-and-indigenous-development-conflicts;
Papillon, Martin, and Thierry Rodon. 2017. "Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada." *Environmental Impact Assessment Review* 62:216-24. https://doi.org/10.1016/j.eiar.2016.06.009.
33. Borrows, John. 2010. Canada's Indigenous constitution. University of Toronto Press. https://utppublishing.com/doi/book/10.3138/9781442610385;
Borrows, John. 2005. "Indigenous legal traditions in Canada." Washington University Journal of Law and Policy 19 (1): 167–223. https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1380&context=law_journal_law_policy.
34. Centre for First Nations Governance. N.d. "Our Inherent Rights." https://fngovernance.org/our-inherent-rights/
35. Indigenous Foundations UBC. N.d. "Royal Proclamation, 1763." https://indigenousfoundations.arts.ubc.ca/royal_proclamation_1763/.
36. Fenge, Terry, and Jim Aldridge. 2015. Keeping promises: The Royal Proclamation of 1763, Aboriginal rights, and treaties in Canada. McGill-Queen's Press-MQUP. https://www.mqup.ca/keeping-promises-products-9780773545878.php.
37. Government of Canada. N.d. "About treaties." https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231.

Nation every year known as annuities, and hunting and fishing rights on unoccupied Crown land, among others. Modern treaties negotiated with Indigenous groups often include benefits such as consultation and participation requirements, ownership of land, wildlife harvesting rights, and self-government, among many other provisions.[38] Today, these obligations, specifically in historic treaties and sometimes in modern treaties, have been interpreted differently by the parties involved and continue to be discussed, negotiated, and settled through the federal, provincial, and territorial court systems.[39] In practice, as the following example illustrates, Indigenous engagement results in dramatically different approaches to land use and project evaluation:

"[We had a] traditional land use and occupancy study done with a company that has done this work with our elders. Our hereditary chiefs brought them out onto the land and they just loved it, because you know, they sit at home and are lonely. So, they brought them out onto the territory where the project was supposed to go and they said this is a no-go zone. They brought them to their fishing sites, their hunting sites, and they were able to inform our report on our cultural practices and where our traditional hunting practices were on the territory. The report was given to the company and government and it says, "This is who we are." This is how we practice our traditions and cultural practices on the land."

~ Indigenous Western Canadian resource leader

38. Government of Canada. N.d. "About treaties. " https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231.
39. Miller, James R. 2009. Compact, contract, covenant: Aboriginal treaty-making in Canada. University of Toronto Press. https://utppublishing.com/doi/book/10.3138/9780802095152.

- **Section 35 of the Constitution Act, 1982,** formally entrenches Aboriginal and treaty rights into Canadian law, applicable to First Nations, Métis, and Inuit in Canada. Aboriginal rights include Aboriginal title,[37] which is based on the historic communal occupation and possession of the land by Indigenous people, as well as rights to activities such as the rights to practices, customs, traditions, hunting, and fishing.[40] This was a significant milestone for Indigenous rights because it became a tool that Indigenous groups could use to enforce their rights as they were infringed on by the government.[41]
- **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)** is an international human rights instrument that sets out the rights of Indigenous Peoples around the world. It has 46 articles that describe a variety of collective and individual rights. UNDRIP is not legally binding, however some nations, such as Canada, have committed to enshrining it into federal law. In 2021, Bill C-15 was passed which requires the government to prepare and implement an action plan to implement UNDRIP into Canadian law. The central themes of UNDRIP include the right to self-determination, the right to be recognized as distinct people, the right to free, prior, and informed consent, and the right to be free from discrimination.[42]

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40. Centre for Constitutional Studies. N.d. "Aboriginal Rights: Section 35. " https://www.constitutionalstudies.ca/the-constitution/aboriginal-rights/.
41. Slattery, Brian. 1982. "The constitutional guarantee of Aboriginal and treaty rights." Queen's Law Journal 8: 232. https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2176&context=scholarly_works;
Macklem, Patrick. 2001. *Indigenous difference and the Constitution of Canada*. University of Toronto Press. https://www.jstor.org/stable/10.3138/j.ctt1287t1k;
King, Hayden, and Shiri Pasternak. 2018. "Canada's emerging Indigenous rights framework: A critical analysis." *Yellowhead Institute*. https://yellowheadinstitute.org/rightsframework/.
42. Coates, Ken, and Carin Holroyd. "Indigenous internationalism and the emerging impact of UNDRIP in Aboriginal affairs in Canada." Centre for International Governance Innovation. https://www.jstor.org/stable/pdf/resrep05242.5.pdf;
Favel, Blaine, and Ken S. Coates. 2016. "Understanding UNDRIP: Choosing action on priorities over sweeping claims about the United Nations Declaration on the Rights of Indigenous Peoples." *MacDonald-Laurier Institute*. https://www.macdonaldlaurier.ca/files/pdf/MLI-10-UNDRIPCoates-Flavel05-16-WebReadyV4.pdf;
Craft, Aimée, Brenda L. Gunn, Cheryl Knockwood, Gordon Christie, Hannah Askew, John Borrows, Joshua Nichols et al. 2018. "UNDRIP implementation: more reflections on the braiding of international, domestic and indigenous laws." *Centre for International Governance Innovation*. https://www.cigionline.org/publications/undrip-implementation-more-reflections-braiding-international-domestic-and-indigenous/.

# Milestones: Recognition and affirmation of Indigenous rights

In more recent times, there has been a dramatic increase in the recognition, clarification, and affirmation of Indigenous rights in Canada. The following timeline illustrates the marquee events and journey towards centering Indigenous rights in Canada's natural resource sector.

- **Disregard and infringement of Indigenous rights (contact–1960s):** Although Indigenous rights have always existed, they were purposefully ignored and infringed upon. That began to change during the launch of the Indigenous legal rights campaigns in the 1960s. Until this point, colonial governments actively and purposely chose to ignore and infringe upon Indigenous rights.[43]
- **Indigenous legal activism (1960s):** Through a series of court challenges that started in the mid-1960s, Indigenous Peoples gradually and selectively secured legal acknowledgement of Indigenous rights, focusing initially on harvesting activities and use of traditional lands.[44]
- **Acceptance of the need for modern treaties (late-1960s):** In the late-1960s, the Government of Canada contemplated eliminating Indian status as a legal category, with the goal of encouraging integration into the Canadian mainstream and ending government-mandated separation.[45] Within five years, due to intense Indigenous resistance, the federal authorities started negotiating treaties with First Nations and Inuit living on unceded lands. The treaties came slowly but, at Indigenous insistence, the agreements included substantial involvement with the approval and oversight of resource development, along with water and land management. By the early 2000s, most of Canada outside of British Columbia was covered by modern or historical treaties.[46]

43. McNab, David T. 2009. "A brief history of the denial of indigenous rights in Canada." In A History of Human Rights in Canada: Essential Issues.
44. Eudaily, Seán Patrick. 2004. The present politics of the past: indigenous legal activism and resistance to (neo) liberal governmentality. Routledge.https://www.routledge.com/The-Present-Politics-of-the-Past-Indigenous-Legal-Activism-and-Resistance-to-NeoLiberal-Governmentality/Eudaily/p/book/9780415651042;
Woo, Grace Li Xiu. 2011. *Ghost dancing with colonialism: Decolonization and Indigenous rights at the Supreme Court of Canada*. University of British Columbia Press.https://www.ubcpress.ca/ghost-dancing-with-colonialism;
Sanders, Douglas. 1990. "The Supreme Court of Canada and the" legal and political struggle" over indigenous rights." *Canadian Ethnic Studies* 22(3):122.
45. Weaver, Sally M. 1981. Making Canadian Indian Policy: The Hidden Agenda 1968–1970. University of Toronto Press. https://utppublishing.com/doi/book/10.3138/9781487584849.
46. From the perspective of the Assembly of First Nations on modern treaties, see: Assembly of First Nations. N.d. "Modern Treaties in Canada, 1975 to present." https://education.afn.ca/afntoolkit/web-modules/plain-talk-4-treaties/1-treaties-and-why-they-are-important/modern-treaties-in-canada-1975-present/.
See also: Government of Canada. N.d. "Modern Treaties." https://www.rcaanc-cirnac.gc.ca/eng/1677073191939/1677073214344.

- **Duty to consult and accommodate (2004):** Frustrated by the continued intrusions of resource development on their lands, Indigenous Peoples petitioned the courts for an even greater role in the management of their territories. After winning a long series of court decisions, the victories in the 2004 Supreme Court decisions in Haida and Taku established the "duty to consult and accommodate," which ensured Indigenous Peoples of an ongoing role in the oversight and approval of resource projects.[47] The legal provisions meant that governments (federal, provincial, and territorial) and private companies had formal obligations to consult formally with Indigenous communities before authorizing a project and to provide adequate compensation for any disruptions and dislocations of traditional territories or Indigenous lifeways.[48]

- **Tsilhqot'in Nation v British Columbia (2014):** For some Indigenous groups, the limited recognition of their treaty and Aboriginal rights by the courts fell far short of full acknowledgement. The Tsilhqot'in Nation in central British Columbia argued that they had never surrendered or lost Aboriginal title to the land. They prevailed in the Supreme Court of Canada in 2014, with the court recognizing the continued existence of Aboriginal title over a portion (much smaller than the First Nation claimed) of their traditional territories. This judgment altered the national understanding of the extent of Indigenous rights on non-treaty lands, although it also established significant barriers to the assertion of those rights. In the resource sector, the decision signaled the reality that Indigenous claims remained significantly untested and, therefore, far from resolved.[49]

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47. Tzimas, E. Ria. 2005. "Haida Nation and Taku River: A commentary on Aboriginal consultation and reconciliation." In The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference, 29(1). https://digitalcommons.osgoode.yorku.ca/sclr/vol29/iss1/22/.
Olynyk, John M. 2005. "The Haida nation and Taku river Tlingit decisions: Clarifying roles and responsibilities for aboriginal consultation and accommodation." The Negotiator : 2-7. https://www.lawsonlundell.com/media/news/236_Negotiatorarticle.pdf.

48. Newman, Dwight G. 2009. The duty to consult: New relationships with Aboriginal peoples. University of British Columbia Press. https://www.ubcpress.ca/the-duty-to-consult;
Newman, Dwight G. 2019. *Revisiting the duty to consult Aboriginal peoples*. University of British Columbia and Purich Publishing. https://www.ubcpress.ca/revisiting-the-duty-to-consult-aboriginal-peoples.

49. Coates, Ken and Dwight Newman. 2014. "The End Is Not Nigh: Reason Over Alarmism in Analysing the Tsilhqot'in Decision." Macdonald-Laurier Institute. https://www.macdonaldlaurier.ca/files/pdf/MLITheEndIsNotNigh.pdf;
Borrows, John. 2015. "The durability of terra nullius: Tsilhqot'in Nation v. British Columbia." University of British Columbia Law Review 48. https://utoronto.scholaris.ca/server/api/core/bitstreams/b1515fdd-da24-4eab-befa-02e4c62b687a/content;
Hoehn, Felix. 2016. "Back to the future-Reconciliation and Indigenous sovereignty after Tsilhqot'in." University of New Brunswick Law Journal 67. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811276;
Racette, Renee. 2018. "Tsilhqot'in Nation: Aboriginal Title in the Modern Era." *Indigenous Justice: New Tools, Approaches, and Spaces:* 89-96. https://www.researchgate.net/publication/325251261_Tsilhqot'in_Nation_Aboriginal_Title_in_the_Modern_Era;
Ariss, Rachel, Clara MacCallum Fraser, and Diba Nazneen Somani. 2017. "Crown policies on the duty to consult and accommodate: Towards reconciliation?." *McGill International Journal of Sustainable Development Law and Policy* 13(1):1-55.

- **Nation-to-industry relations through contracts and equity investment (2010s):** The combination of treaty and legal rights empowered Indigenous Peoples to demand that their inherent rights be recognized in development processes, and encouraged companies and governments to be more forthcoming in their support for Indigenous involvement in the sector. In the 1960s, Indigenous Peoples participated minimally in the resource economy. By 2010, hundreds of communities had formal agreements and collaborations with resource companies. The projects hired many Indigenous workers, subcontracted substantial work to Indigenous-owned firms, and provided millions of dollars in community benefit and/or resource revenue sharing payments to participating communities. They participated under difficult circumstances, with few viable economic options outside resource development and great pressure from governments and corporations to support, or at least tolerate, developments on their territories.[50] The involvement is expanding and, in some projects, Indigenous governments have made equity investments in resource-related infrastructure (like transmission lines, energy storage facilities, and heavy equipment) and the trend continues to grow.

Over the last 50 years, some Indigenous Peoples experienced shifts in their relationships with the resource sector. Instead of neglect and marginalization, for some there was an increased rate of rights-based active participation and project oversight. However, this varies widely across the country, with the Inuit in Nunavut,[51] the Innu in Labrador,[52] and the First Nations and Métis in northern

50. Caine, Ken J., and Naomi Krogman. 2010. "Powerful or just plain power-full? A power analysis of impact and benefit agreements in Canada's north." Organization & Environment 23(1): 76-98. https://doi.org/10.1177/1086026609358969;
Fidler, Courtney, and Michael Hitch. 2007. "Impact and benefit agreements: A contentious issue for environmental and aboriginal justice." *Environments* 35(2). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1340057;
Prno, Jason. 2007. "Assessing the effectiveness of impact and benefit agreements from the perspective of their Aboriginal signatories." PhD dissertation. University of Guelph. https://atrium.lib.uoguelph.ca/items/fbb18bf2-1bb7-41a6-a1cf-48fc4fdb7c03;
Jones, Jen, and Ben Bradshaw. 2015. "Addressing historical impacts through impact and benefit agreements and health impact assessment: Why it matters for Indigenous well-being." *Northern review* 41: 81-109. https://thenorthernreview.ca/index.php/nr/article/view/472/507;
O'Faircheallaigh, Ciaran. 2020. "Impact and benefit agreements as monitoring instruments in the minerals and energy industries." *The Extractive Industries and Society* 7(4): 1338-46. https://www.sciencedirect.com/science/article/abs/pii/S2214790X20301581;
Cameron, Emilie, and Tyler Levitan. 2014. "Impact and benefit agreements and the neoliberalization of resource governance and indigenous-state relations in northern Canada." *Studies in political economy* 93(1): 25-52. https://doi.org/10.1080/19187033.2014.11674963.
51. Adebayo, Eric, and Eric Werker. 2021. "How much are benefit-sharing agreements worth to communities affected by mining?." Resources Policy 71: 101970. https://doi.org/10.1016/j.resourpol.2020.101970.
52. Gibson, Robert B. 2006. "Sustainability assessment and conflict resolution: Reaching agreement to proceed with the Voisey's Bay nickel mine." Journal of cleaner production 14(3): 334-48. https://doi.org/10.1016/j.jclepro.2004.07.007.

Saskatchewan[53] and northern British Columbia[54] being the most active. In other areas, First Nations have protested and slowed resource development due to concerns for the environment, water, quality of life, and in some cases, the ongoing disregard for the First Nations' right to self-determination in the consultation and engagement process. While current legal and political arrangements stop short of conveying a veto to Indigenous Peoples over mining and other major projects, the reality is that little resource development will proceed without substantial and sustained Indigenous involvement and community consent.[55]

## The rise of environmental awareness and the tightening of regulations

### *Impact Assessment Act*

One of the most important pieces of recent legislation is the federal Impact Assessment Act, which was passed in June 2019. Parts of the Act were ruled unconstitutional by the Supreme Court of Canada in 2023, although more for reasons of provincial and territorial rights than Indigenous concerns.[56] The bill expanded regulatory oversight and review processes, which some in the resource sector found to be excessive. The Government of Canada introduced new measures in the 2024 federal budget (Section 28: Impact Assessment Act) to address the constitutional questions while also increasing opportunities for Indigenous participation, cooperation, and partnership with government in impact assessment decision-making.[57] As legal commentary observed, "The Impact Assessment Act Amendments appear to make only "surgical" changes that keep the current impact assessment scheme relatively intact." [58]

The new amendments, viewed unevenly by Indigenous communities, environmentalists, and resource companies, add considerable complexity to the project approval and oversight processes. While the original intent of the Impact Assessment and Canada Energy Regulator Act was, in part, to advance

53. Poelzer, Gregory. 2023. "Corporate Engagement Strategies in Northern Mining: Boliden, Sweden and Cameco, Canada." Environmental Management 72(4): 838-49. https://doi.org/10.1007/s00267-023-01854-5.
54. Fidler, Courtney Riley. 2008. "Aboriginal participation in mineral development: Environmental assessment and impact and benefit agreements." PhD dissertation. University of British Columbia. https://dx.doi.org/10.14288/1.0066787.
55. Moody's Investors Service. 2020. "Indigenous Rights are growing increasingly important for Canadian project execution and corporate activities."
56. Dryden, Joel. 2023. "Supreme Court rules environmental impact legislation largely unconstitutional." CBC News. https://www.cbc.ca/news/canada/calgary/supreme-court-richard-wagner-impact-assessment-act-1.6993720.
57. See Division 28: Parliament of Canada. Bill C-69, First Reading. 44th Parliament, 1st Session. https://www.parl.ca/DocumentViewer/en/44-1/bill/C-69/first-reading.
58. Charlebois, Pierre-Olivier, Emilie Bundock, Kerry Kaukinen, and Sabrina Spencer. 2024. "Federal Government Proposes Amendments to Impact Assessment Act." Fasken. https://www.fasken.com/en/knowledge/2024/05/federal-government-proposes-amendments-to-impact-assessment-act.

Indigenous decision making in whether and how resource projects go ahead, they have also added more complexity to the process.[59]

Balancing these tensions has proven difficult. First Nations, Inuit, and Métis organizations place considerable priority on making the decisions regarding developments on their territories. The new regulations impose multiple layers of evaluation, differing by jurisdiction, and depending on the site of the projects, potentially involving more than a single province or territory. The new federal requirements emphasize downstream impacts, extend the requirement to consult to Indigenous communities much further from the development site, mandate a comprehensive review of potential social-cultural implications, expand the review processes to include gender elements, and strengthen scientific and biological standards. Project proponents are expected to respect and include Indigenous knowledge in their evaluations, while also attending to the still-imprecise duty to consult and accommodate standards established by the courts.[60]


*Judy DaSilva of Grassy Narrows (in wheelchair) leads a group in the Mother Earth Song during a rally to raise concerns and opposition to the Ontario provincial government's plans to expand mining operations in the so-called Ring of Fire region in Northern Ontario, in Toronto, Thursday, July 20, 2023. THE CANADIAN PRESS/Cole Burston*

59. Exner-Pirot, Heather. 2024. "Canadian competitiveness in resource development – A post-mortem." Macdonald-Laurier Institute. https://macdonaldlaurier.ca/canadian-competitiveness-resource-development-post-mortem-heather-exner-pirot-commentary/.
Impact Assessment Agency of Canada. 2024. "Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples." *Government of Canada*. https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-assessment-potential-impacts-rights-indigenous-peoples.html.
60. For a critical review from a Western Canadian perspective, see: Finlay, Martha Hall, and Marla Orenstein. 2019. "Bill C-69: We Can Get This Right." Canada West Foundation. 2019. https://cwf.ca/research/publications/report-bill-c-69-we-can-get-this-right/.

A 2021 commentary by the law firm Dentons on the Impact Assessment Process provides a sense of its comprehensive nature:[61]

The key objectives of the Impact Assessment Act (IAA) are to provide more certainty, coordination, efficiency, inclusiveness, and transparency in the federal review process for assessing the impacts of major resource development projects and projects carried out on federal lands. The desired effect of the IAA is to build trust and confidence in the decision making processes to be conducted by the new Impact Assessment Agency of Canada (the Agency) based on evidence, science, sustainability, public engagement, and Indigenous participation. The new Canadian Impact Assessment Registry website (Registry) also provides the public with access to information regarding the assessment type and the current phase of the proposed project, as well as the key documents filed by the proponent and the Agency, including the Agency's notice of impact assessment decisions with reasons.

Under the IAA, an assessment is required for "designated projects", which can be determined in two ways: (i) projects described in the Physical Activities Regulations (commonly referred to as the Project List) and (ii) projects designated through the use of ministerial discretion (where the Minister of Environment is of the opinion that the physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation).

The IAA contains five phases to impact assessment: planning, impact statement, impact assessment, decision making, and post-decision. The new planning phase is intended to create efficiencies, both in time and cost, early in the process with more predictable timelines and outcomes on next steps for mining proponents. Where the Agency determines that an impact assessment is required for a "designated project" and the Agency will proceed with an impact assessment, the Agency must advise the proponent of its reasons for the decision and the information it requires from the proponent to conduct its impact assessment. The IAA also provides the Minister with the authority to put an end to a proposed project before an impact assessment is even decided upon or commenced by the Agency if, in the Minister's opinion, the proposed project would cause unacceptable environmental effects within federal jurisdiction or that the proponent/the project will not be awarded key permits or approvals by other federal regulators.

61. Leanne Krawchuk, Robin Longe, and Sandy Walker. 2021. "Canada's new mining regulations: how will they affect the industry?."Dentons Mining Law Blog. https://www.dentonsmininglaw.com/canadas-new-mining-regulations-how-will-they-affect-the-industry/.

## *Treaties and other regulatory legislation*

Modern treaties, Indigenous self-government powers, and provincial and territorial legislation have added new complexities to impact assessment and project approval processes. Modern treaty provisions spell out specific responsibilities of governments and development firms and typically outline Indigenous roles in the approval processes. It falls on the provincial and territorial governments to come up with formal procedures and regulatory frameworks. These processes are relatively new and remain works in progress. On a more nuanced level, there are also numerous water, land, and construction permits required, general environmental licenses to be secured, and the ill-defined and informal "social license" that ensures that area communities support or at least accept the proposed project.[62] This requires batteries of lawyers, scientists, social scientists, community engagement personnel, and other specialists, who are supposed to work together to move a project proposal through the regulatory process, but are sometimes unsuccessful.[63]

## *Capacity constraints and the regulatory process*

Extensive—and expensive—field research is essential to convince regulators that full environmental and social impacts have been adequately assessed and evaluated. Companies conduct their reviews and are often expected, sometimes with government financial support, to pay for Indigenous assessments and research. Wealthier First Nations, Inuit, and Métis communities, such as certain Nations involved in oil sands development or Inuit communities in northern Quebec, often have the resources and experience necessary to coordinate effective engagement in the regulatory process.[64] Sometimes Indigenous communities are lacking in capacity and funding, and have less regulatory experience, which can lead to a disadvantage in navigating the regulatory process. In some situations, there may be disagreement within Indigenous communities as to whether to support a project development, which can cause internal delays and debates. Other intervenors, including a growing number of environmental non-governmental organizations (ENGOs), also weigh in on the deliberations.

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62. Prno, Jason, and D. Scott Slocombe. 2012. "Exploring the Origins of 'Social License to Operate' in the Mining Sector: Perspectives From Governance and Sustainability Theories." Resources Policy 37 (3): 346–57. https://doi.org/10.1016/j.resourpol.2012.04.002.
63. The latest detailed critique of mining over-regulation was produced in June 2024 by the C.D. Howe Institute: C.D. Howe Institute. 2024. "Smoothing the Path: How Canada Can Make Faster Major-Project Decisions." https://cdhowe.org/publication/smoothing-path-how-canada-can-make-faster-major-project-decisions/.
64. Westman, Clinton N., and Tara L. Joly. 2019. "Oil Sands Extraction in Alberta, Canada: A Review of Impacts and Processes Concerning Indigenous Peoples." Human Ecology 47 (2): 233–43. https://doi.org/10.1007/s10745-019-0059-6;
Wyatt, Stephen, Martin Hébert, Jean-François Fortier, Édouard-Julien Blanchet, and Nathalie Lewis. 2019. "Strategic Approaches to Indigenous Engagement in Natural Resource Management: Use of Collaboration and Conflict to Expand Negotiating Space by Three Indigenous Nations in Quebec, Canada." Canadian Journal of Forest Research 49 (4): 375–86. https://doi.org/10.1139/cjfr-2018-0253.

Another consideration is that some of the larger ENGOs and community-led movements are extremely effective with public outreach and social mobilization, working to increase pressure on the regulators and government decision makers by loudly opposing the project, which often can slow a project's approval process.[65] This, of course, squares off with the messages in support of a project by the companies and, in some jurisdictions, the sub-national governments.

Reports filed by various scientists and social scientists with different conclusions and perspectives can lengthen the assessment procedures and add to the complexity of the review procedures. It can also make it difficult for community members to make sense of the often-contradictory data that is presented in the specialist language of professional consultants. Companies have to share their reports with the affected Indigenous communities, few of whom have the technical experts and time necessary to complete comprehensive assessments of the voluminous technical material. This collective exercise has proven to be both time-consuming and expensive, and opinions are mixed as to whether the surfeit of data and analysis produces improved analysis or better decisions.

Canada's resource development cycle, reflecting a convergence of Indigenous, federal, provincial, and territorial legislation and processes results in mine approvals taking 12 to 15 years. In 2024, the Government of Canada indicated it wanted to reduce this to five years.[66] Critics of current policy argue that billions of dollars of investment have been diverted to resource projects in countries where the approval process takes less time, with consequences for tax revenue, Canadian employment, and general Canadian prosperity.[67]

In the past, the cancellation of these projects would have had little impact on Indigenous communities. Under current arrangements, delays in securing project approvals can stop the flow of substantial benefits to Indigenous communities. However, many Indigenous communities also weigh the tension between economic and related benefits and the potential environmental and social costs as the development process unfolds.

65. Carroll, William K., Nicolas Graham, and Mark Shakespeare. 2020. "Foundations, ENGOs, clean growth networks and the integral state." The Canadian Journal of Sociology 45(2): 109-42.
66. The Editorial Board. 2024. "A Critical Push to Speed up Mine Approvals." The Globe and Mail. https://www.theglobeandmail.com/opinion/editorials/article-a-critical-push-to-speed-up-mine-approvals/.
67. Exner-Pirot, Michael Gullo and Heather. 2024. "Michael Gullo and Heather Exner-Pirot: Finally, We All Agree Canada Must Get More Major Projects Built." The Hub. https://thehub.ca/2024/05/27/michael-gullo-and-heather-exner-pirot-we-all-agree-canada-must-get-more-projects-built/.

"I think the current process to get better outcomes is failing miserably, or else we would have had global investment already coming in and knocking at your door non-stop. That's not what's happening. The current process of policies implemented by the government has scared investment away. And it's hurting our GDP. Everybody's going south to our friends in the States or they're going elsewhere. Because the process of getting anything done or getting money in the country is daunting. It's long. It's stringent, but more importantly, it makes it impossible to get [things] built with current policies."

~ Indigenous British Columbia resource developer

**The Indigenous experts interviewed for this report were unanimous in agreeing that the procedures laid out in the amended federal Impact Assessment Act, and other federal and subnational legislation, are too onerous and do not recognize and support Indigenous aspirations appropriately.**

Indigenous Peoples have been marginalized in the resource development process. Dissatisfied at being kept out of project review, they fought for and secured both legal and political recognition of their rights and took their rightful place in the approval system. The process has changed, in dramatic and important ways, providing much better scientific, cultural, and Indigenous evaluations of proposed resource projects than in the past.

However, the Indigenous experts interviewed for this report were unanimous in agreeing that the procedures laid out in the amended federal Impact Assessment Act, and other federal and subnational legislation, are too onerous and do not recognize and support Indigenous aspirations appropriately. They worry, as do many commentators in the sector, that the current procedures are too complex, take too long, cost too much, and do not produce more effective or informed outcomes than in the past.

The respondents additionally agreed that the wide-open processes of the 1950s and 1960s produced great harm in Indigenous communities, leaving the environment and communities vulnerable to dramatic, and sometimes catastrophic, damage. But the pendulum has, in the eyes of many Indigenous observers, swung too far in the opposite direction, deflecting investment, limiting work and business opportunities, and extending the poverty of far too many Indigenous communities.

To a surprising degree, and largely because there are few other economic opportunities in most remote and isolated parts of the country, the main option for development involves active engagement with properly executed natural resource development. A number of Indigenous communities are participating actively in natural resource development in ways that respect Indigenous rights, protect the environment, and satisfy federal, provincial, and territorial regulations and assessment procedures.

*N.W.T. Premier Caroline Cochrane speaks during a news conference in Yellowknife on Wednesday March 29, 2023. The Northwest Territories government has introduced a bill to guide implementation of the United Nations Declaration on the Rights of Indigenous Peoples, which it says will advance reconciliation in the territory. THE CANADIAN PRESS/Emily Blake*

# Part 2: Analytical review

There are several important political and legislative components in Canada that affect the impact assessment process for Indigenous Peoples.

## The effects of the Impact Assessment Act and UNDRIP

### *Effects of the Impact Assessment Act*

The greatest challenge in recent decades has been the fluid and unpredictable nature of the review and regulatory processes in Canada, the nature of which continues to evolve through provincial and territorial policy, federal legislation and, increasingly, Indigenous initiative. As articulated above, the now amended Impact Assessment Act expanded the regulatory environment in multiple directions: geographically (by enlarging the study areas), thematically (by including a broader scope of inquiry), conceptually (by including gender-based analysis), and temporarily (by calling for a comprehensive cumulative effects investigation that reviews earlier projects and forecasts long-term impacts).

Most expansions or changes add to the cost and time associated with these investigations. On one hand, these requirements rendered otherwise commercially viable projects uneconomic; on the other hand, provincial government-controlled approaches, like those instituted in Alberta and Saskatchewan, can push projects forward in a way that does not always consider or allow inclusive and informed decision making with Indigenous Peoples. In 2023, for example, provincial opposition critic for First Nations and Métis Relations Betty Nippi-Albright condemned the Saskatchewan government's policy as a "trinkets and beads" approach that saw substantial exploration permits awarded

with minimal First Nations input.[68] In all instances, the changes in the Impact Assessment Act add to the complexity and uncertainty of the process, and to the project risk, making approval more costly.

"The technical nature of the review processes empowers governments, companies, and project proponents and provides too little space for Indigenous knowledge and community input. It gives us no ability to actually be a part of the process. It always seems that they let us respond at the 11th hour. The First Nation doesn't feel like they're a part of the process or their voices are heard, maybe because they are not speaking [about] scientific and technical data. The First Nation is talking about seasonal cycles. We use our own cultural knowledge to understand what time of the year we should harvest or what time of the year we should go after wood. They have never taken our traditional knowledge into consideration. They just used all technical and scientific expertise without understanding the territory they want to work on."

~ Indigenous British Columbia resource developer

68. Warick, Jason. 2023. "First Nations sick of Sask. government's 'trinkets and beads' approach to resource development: Opposition." CBC. https://www.cbc.ca/news/canada/saskatoon/first-nations-sick-governments-trinkets-beads-approach-1.6910351.

The revised process, released in 2024, tinkered with rather than transformed the founding legislation. Legal analysts of the impact assessment process did not see a major change in the government's plans and priorities. Lawyers with Osler (a Canadian firm specializing in business law), argued that the constitutional challenges have not been fully addressed, stating that:

"The 32 proposed amendments do the minimum to address the most significant concerns identified by the Supreme Court of Canada. Most notably, the amendments:

1. revise the unconstitutionally overbroad definition of "effects within federal jurisdiction," which impacts key decisions under the Act
2. impose new constraints on screening decisions
3. restructure the Act's final decision making procedure
4. increase opportunities for cooperation with assessments led by other jurisdictions."

~ Indigenous British Columbia resource developer

To the Osler analysts, the changes sought to address the limitations of the initial Act and did not represent a fundamental re-evaluation of the legislation. The Impact Assessment Act reflected the Government of Canada's environmental priorities, but critics of the legislation saw an anti-development agenda from the federal authorities. Government officials rejected this label and argued that other measures were facilitating greater resource activity.

These legislative initiatives, while well-intentioned in their focus on the social, cultural, and broader implications for resource development, had unexpected impacts due to their expansion. First Nations favourably inclined to a resource project found that their approval could be contested by an Indigenous community a considerable distance away that held concerns around cumulative or downstream effects near them. Working with multiple Indigenous groups with overlapping or adjacent territories rightfully increases the complexity of Indigenous consultation and resource development.

Conversely, Indigenous groups who felt their livelihoods or well-being were infringed upon by a significant project upstream or some distance away welcomed the opportunity to be heard as part of the assessment process. Indigenous groups that had serious doubts about a specific project or development in general appreciated the expanded oversight. The greatly enhanced review processes resulted in a rapid expansion in the "project evaluation

industry", a well-paid, largely non-Indigenous sector that made considerable money producing the biological, geological, social, economic, cultural, and other evaluations required by the regulators.[69]

## *Effects of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*

In 2021, the Government of Canada made a commitment to adopt the principles of UNDRIP. This work remains in progress; the Government of Canada launched an ambitious implementation process, although without a great deal of public engagement to date. British Columbia moved faster with its comprehensive implementation plan, although with significant non-Indigenous push back. The federal UNDRIP initiative remains at the consultation stage, although proponents of greater Indigenous authority believe that the free, prior, and informed consent provision potentially represents a major advance.

UNDRIP is having considerable impact on community and public conversations, but not yet on law and regulatory practice. As one Saskatchewan Indigenous leader commented, "Free, prior and informed consent is now part of the Canadian vocabulary, but no one really knows what it means in practice. Many community members think we have a veto over development." These open-ended promises by governments have not made things any easier, described by some as simply "a promise to make promises." Most Indigenous governments rely on other ways of asserting sovereignty over their traditional territories.[70]

Some Indigenous people argue that UNDRIP-type promises are not the highest priority. Existing Indigenous authority, including the duty to consult and accommodate court judgements, modern treaties, and collaboration agreements with resource firms may provide as much or more than UNDRIP implementation would offer. In either case, UNDRIP's free, prior, and informed consent provision is not a robust replacement for "duty to consult and accommodate," or for existing treaty provisions and Indigenous resource laws, all of which have more details and supportive case law than UNDRIP. Therefore, while adoption of UNDRIP is appropriate, it is only a starting point for expanding and enshrining the rights of Indigenous Peoples within Canadian law.

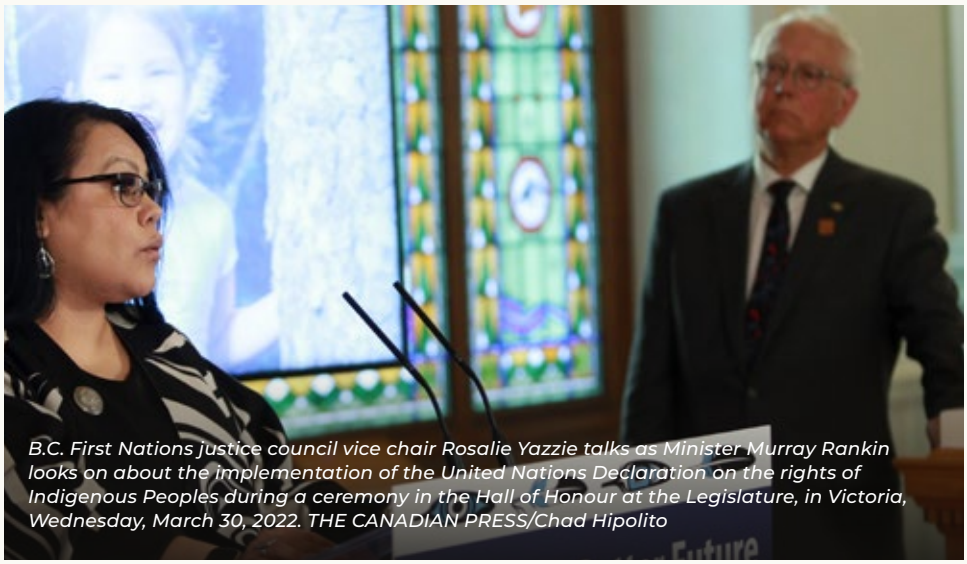
British Columbia's experience with UNDRIP offers a cautionary tale. The province's implementation plan is bold, extensive, complicated, and diverse. The Government of British Columbia announced, as part of its broad implementation plan, that

69. Noble, Bram F. 2009. "Promise and dismay: The state of strategic environmental assessment systems and practices in Canada." Environmental Impact Assessment Review 29(1): 66-75.
70. Coates, Ken. 2024. "Can Canada fulfil the promises imbedded in the UN's declaration on indigenous rights." National Newswatch. https://nationalnewswatch.com/2024/06/21/can-canada-fulfil-the-promises-imbedded-in-the-uns-declaration-on-indigenous-rights.

Indigenous input would be sought at the initial stage of land use planning and development. The initiative was designed to demonstrate the seriousness of the government's commitment to Indigenous recognition and empowerment.[71]

The public reaction was stronger than the Government of British Columbia anticipated. Two opposition parties rejected the idea and made it clear that they would oppose the initiative. Public sentiment ran so strongly against the government's implementation strategy that the proposal was withdrawn shortly thereafter. In an audacious move, the B.C. government recognized the Haida's ownership of Haida Gwaii. One journalist observed, "This is the first time in Canadian history that the colonial government has recognized Indigenous Title across an entire terrestrial territory, and it's the first time this kind of recognition has occurred outside of the courts. Experts say it marks a new path toward Indigenous reconciliation."[72]

The B.C. Conservative Party's opposition to UNDRIP featured prominently in the October 2024 provincial election, which was the most overt political critique of UNDRIP and Indigenous rights in recent years; and it is notable that the party's position did not carry major political liabilities. Governments and Indigenous communities in Canada continue to face opposition regarding public acceptance of Indigenous rights over land and resource development.



*B.C. First Nations justice council vice chair Rosalie Yazzie talks as Minister Murray Rankin looks on about the implementation of the United Nations Declaration on the rights of Indigenous Peoples during a ceremony in the Hall of Honour at the Legislature, in Victoria, Wednesday, March 30, 2022. THE CANADIAN PRESS/Chad Hipolito*

71. Government of British Columbia. 2024. "Declaration Act Action Plan." https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples/implementation.
72. Renner, Serena. 2024. "On Haida Gwaii, a colonial government is no longer lord of the land." The Narwhal. https://thenarwhal.ca/haida-get-their-land-back/.

# Part 3: Learning from experience: Case studies of Indigenous engagement with government regulatory processes

It is vital to have a basic understanding of the variety and nature of Indigenous relationships with the natural resource sector and to gain a sense of the way approval and oversight approaches have evolved in recent decades. Each of these relationships is complex and multi-directional. It is not uncommon for communities with collaboration agreements with resource firms to also be facing off against them in legal proceedings relating to their contracts and corporate obligations. Each of the case studies described below demonstrates the complexity of these processes with numerous contracts, legal agreements, and different perspectives from Indigenous communities, the various levels of government, companies, environmental organizations, and other interested parties. They also explore how certain approaches are working or could work better than others.

# The James Bay Cree and Inuit of northern Quebec

***Key takeaway: Modern treaties can reaffirm and strengthen Indigenous rights and title to land and allow for sharing of the benefits and risks of clean energy development.***

As late as the 1970s, governments contemplated massive projects without specific reference to Indigenous Peoples. The Province of Quebec had ambitious plans for the electrification of the province, which required the flooding of vast tracks of northern Indigenous lands. The James Bay Cree, destined to be displaced by the construction and flooding, fought back, insisting on the negotiation of a modern treaty for their previously unceded and unsurrendered land. Faced with unfavourable court rulings, Quebec went to the negotiating table, signing an agreement in 1975. Under the accord, the James Bay Cree received a substantial financial settlement, greater recognition of Indigenous rights, and a significant role in future resource and infrastructure approvals. The modern treaty made the James Bay Cree a partner in subsequent development, raising the stakes for Indigenous legal claims and treaty negotiations and changing the nature of practical and applied Indigenous rights in Canada.

While it took years of political negotiations and legal battles to reach this level of accommodation and collaboration, northern Quebec factored prominently in the second Quebec referendum on sovereignty association, with the Government of Quebec making major commitments to northern autonomy and Indigenous involvement in decision making. Over the next two decades, northern Quebec became an excellent example of Indigenous engagement with resource development. Cree- and Inuit-owned development corporations dominate service delivery and construction, and are actively involved with mineral exploration and development. Returns to the communities are substantial, bringing new levels of economic opportunity.

Assessment processes in northern Quebec have been consistently professional and non-confrontational. The authority exercised by the James Bay Cree and Inuit is acknowledged and accepted by the resource companies. Collaboration outside formal assessment processes has been strong and cooperative, including extensive engagement with the region's dominant hydro-electric industry. The Cree and Inuit have strong environmental priorities and have pressed government and private sector developers to recognize Indigenous concerns.

The James Bay Agreement made the northern Indigenous Peoples (including comparable arrangements with the Inuit in northern Quebec) substantial partners in development. Major recent plans for the expansion of infrastructure in the region, articulated in the *Northern Action Plan, 2023-2028*, include roads, new transportation initiatives, and other services. The $4.7 billion initiative has full Indigenous engagement, including extensive consultation and planning, Indigenous employment and contracting, and has been presented as a collaborative venture.

# Beaufort Sea oil and gas and the Mackenzie Valley Pipeline

***Key takeaway: Indigenous engagement and decision-making can reshape resource development processes and increase Indigenous equity, but commercial and environmental challenges may still undermine project viability and outcomes. Balancing these interests is important for shared success.***

In the 1970s, the proposed development of oil and gas resources in the Beaufort Sea held enormous promise for national prosperity. The planned construction of a pipeline down the Mackenzie River valley offered jobs and commercial activity along the pipeline corridor and significant, if largely unspecified, benefits to the First Nations, Métis, and Inuvialuit communities in the area. Proponents offered general, albeit vague, plans for jobs and local financial returns. The project was large and the environmental impacts uncertain. The combination of social and ecological risks worried both the regional Indigenous communities and the country's emerging environmental movement.

The Government of Canada established the Mackenzie Valley Pipeline Inquiry in 1970, headed by Justice Thomas Berger. They hosted well-publicized and well-attended community meetings that provided Indigenous Peoples with an opportunity to express their concerns about the pipeline. In a set of recommendations that changed the trajectory of Indigenous engagement on resource and infrastructure proposals in Canada, the Berger inquiry recommended in 1977 that the construction of the pipeline be delayed until land claims in the region had been settled. In this case, therefore, the engagement of Indigenous Peoples changed expectations and understandings of what Indigenous participation in decision making should and could look like.

Public understanding of the process and recommendations were less than ideal. Most Indigenous and non-Indigenous communities were ambivalent about the new development—determined to avoid the environmental disruptions of past projects but also eager for the jobs, business opportunities, and community benefits. Extensive discussions between project proponents, communities, and Indigenous groups—informed by outside regulatory processes—led to discussions about extended Indigenous involvement and equity investment.

While plans to develop the Beaufort Sea oil deposits faded, companies associated with the Norman Wells oil field in the Northwest Territories developed a smaller proposal—to build a pipeline from Norman Wells to the oil pipeline grid in Alberta. This initiative drew on the scientific reviews and community consulta-

tions undertaken for the Mackenzie Valley Pipeline. The experience with the Mackenzie Valley Pipeline process meant First Nations and Métis groups knew what to expect out of the new process. The project attracted little public attention and the project proceeded through to completion in 1985, successfully operating for decades without the negative environmental effects forecast by project opponents.

The energy industry did not abandon the Beaufort Sea region. Attention shifted back to natural gas and the substantial deposits identified in the Beaufort Sea. In the early 2000s, project proponents developed new plans for the gas pipeline through the Mackenzie Valley. However, the battlelines re-emerged, with substantial environmental and some Indigenous opposition, the debate engulfing the region in heated and intense conversations. Again, regional Indigenous groups pushed for a greater role in the project, emphasizing a combination of community equity, jobs, and commercial opportunities. They sought, and secured, Indigenous involvement in environmental oversight and remediation.

In 2003, the revived plan for a pipeline, the Mackenzie Gas Project, arranged for 34 per cent Indigenous ownership of the pipeline, with the prospect of substantial ongoing revenues.[73] The pipeline firm, TransCanada PipeLines Ltd.Corp, worked with Indigenous communities and supported the emergence of the Aboriginal Pipeline Group, which in turn negotiated a one-third ownership of the project with a consortium of companies, including Imperial Oil Resources Ventures Ltd., Exxon Mobil Canada Properties, Shell Canada Ltd., and ConocoPhillips Canada Ltd.

However, formal approval processes, which included multiple delays, changing standards for approval, and extensive involvement by external environmental organizations, dragged on, frustrating proponents and raising commercial concerns about the viability of the project. The Government of Canada eventually approved the pipeline in 2011, after many regulatory reviews, but the extended delays undermined the commercial viability of the project, as well as Indigenous planning for economic growth.

As Indigenous communities were preparing for a new approach to northern development, the economics of the industry changed, largely due to the development of shale gas fields. This undermined the commercial foundations of the project, resulting in the cancellation of the pipeline by the project proponent in 2017. The cancellation of the Mackenzie Gas Project disrupted the plans of Indigenous communities to capitalize, for the first time, on the economic potential of a major resource development. The Mackenzie Valley Pipeline debate unfolded under the glare of national media attention, but the focus slipped when the main project was cancelled.

In the end, the natural gas project experienced the same fate as the Mackenzie Valley Pipeline Project. Commercial considerations, tied primarily to the advent of fracking and the development of vast new fields in southern Canada and the United States, undermined the business case for Northwest Territories' energy development. The gas pipeline project was abandoned in 2017 to the distress of many of the Indigenous communities that counted on revenue from the pipeline to revitalize and sustain themselves. As an Indigenous leader from the Northwest Territories told us, "the abandonment of this project undermined economic plans for a whole set of communities".

73. Munzur, Alaz. 2021. "Canadian northern corridor special series: Mackenzie valley gas pipeline in retrospect." University of Calgary. https://www.policyschool.ca/wp-content/uploads/2021/11/NC27A_Mackenzie-Valley-Gas-Pipeline_Munzur.pdf.

# The Innu and Voisey's Bay, northern Labrador

***Key takeaway: Successful resource development depends on meaningful negotiation and collaboration between mining companies and Indigenous communities, resulting in mutually beneficial agreements that respect Indigenous practices and create long-term economic opportunities.***

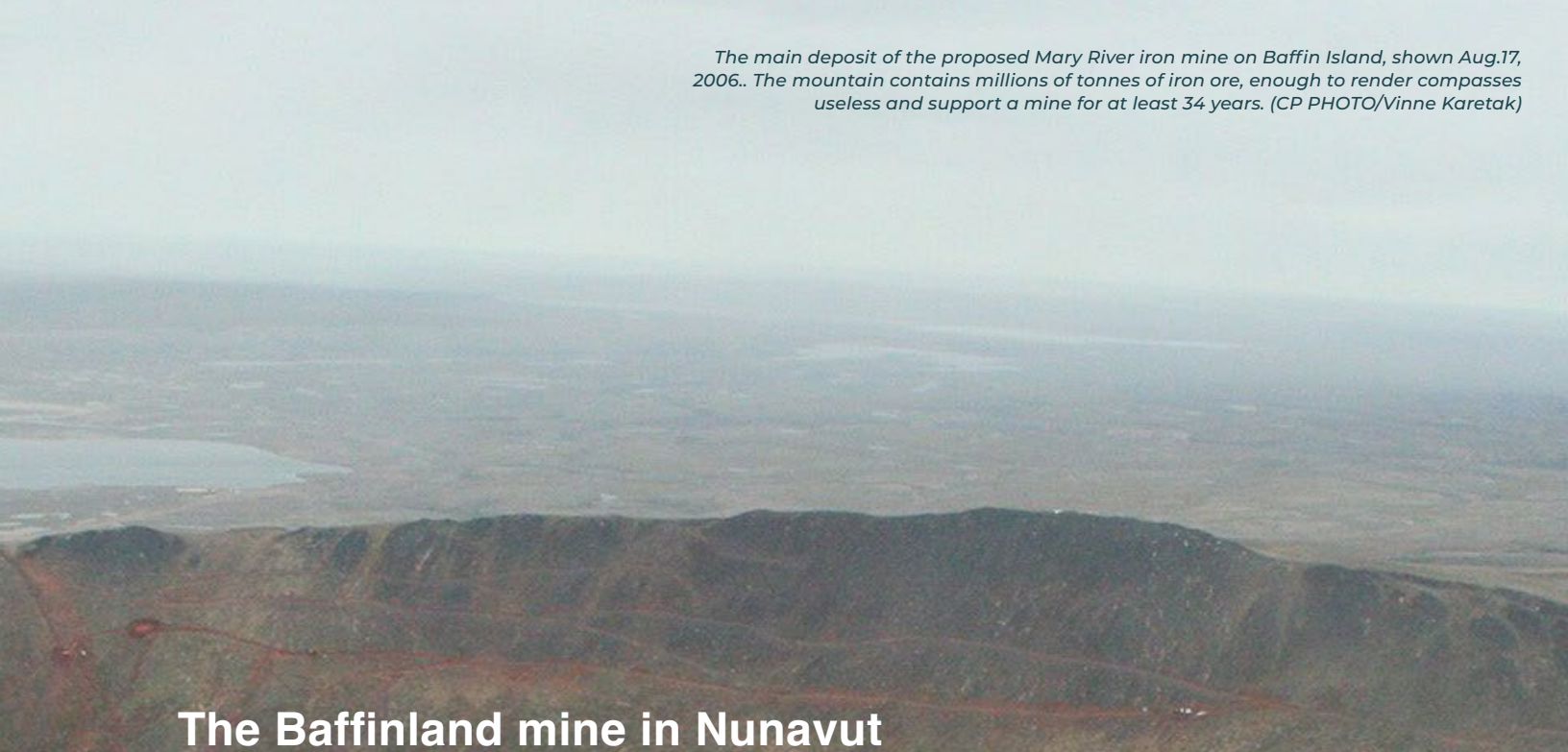
Voisey's Bay, one of the world's most impressive nickel deposits in the world, is located in northern Labrador in the homeland of the Innu. In the early years, before Vale, one of the world's largest mining companies, assumed control of the property, relations between the miners and Indigenous Peoples unfolded poorly, largely due to very different expectations.

Most mining exploration is done by small companies. When they identify a promising property, they raise money for early-stage development and face the challenge of proving that the discovery represents a viable mine. The small firms often raise the expectations of local Indigenous Peoples as they seek community approval to proceed to the next level.

Vale purchased the property in 2006 and changed the conversation dramatically. Having proven the impressive nickel deposits in the Voisey's Bay property, the company was prepared to invest hundreds of millions of dollars, but it could not proceed without strong relations with Indigenous Peoples. Through long and often difficult negotiations, Vale and the Innu reached an agreement that included substantial accommodations to support Indigenous harvesting and cultural practices. Both sides had to put aside the commitments made by the initial discoverers of the mineral deposit, which Vale felt were unrealistic and unmanageable.

The company and its Indigenous partners negotiated commercial agreements, which the Innu used as a foundation for business development and activities that promised to support and sustain people and communities. The collective creativity is shown in measures such as allowing the loading of ocean-going ore freighters without stopping Innu hunters' use of the fjord crossing and using the resources of the mining company to ensure continued harvesting activity. Contracts with the mining company to provide cafeteria services became the foundation for a comparable contract with the Labrador ferry service, expanding job and commercial opportunities for the Indigenous communities. It is vital to note that the size and anticipated longevity of the mine (recently extended to 2035) gives the mining company and the Indigenous communities the confidence and financial security to negotiate more comprehensive and community-friendly agreements.

The Voisey's Bay project passed through all of the required regulatory and approval processes, but the strength of the development rested on the non-mandatory discussions. These conversations were defined by Innu articulation of their needs and priorities, and Vale's willingness to adjust corporate operations, where appropriate and fiscally feasible, to integrate Innu into mining processes and systems. The arrangements have not been without occasional bumps and challenges, but the trajectory has generally been positive and a demonstration of what can be accomplished when there is goodwill and a desire for positive collaboration. Indeed, one of the best signs of successful cooperation is the absence of public conflict and legal disputes, a situation that continues to hold around the Voisey's Bay property.



*The main deposit of the proposed Mary River iron mine on Baffin Island, shown Aug.17, 2006.. The mountain contains millions of tonnes of iron ore, enough to render compasses useless and support a mine for at least 34 years. (CP PHOTO/Vinne Karetak)*

# The Baffinland mine in Nunavut

***Key takeaway: Indigenous consultation and engagement is not a single event or process, not a "tick the box" exercise to be completed at the front end of development. It is, instead, an integral part of the resource development process that must be attended to throughout the life of the mine and beyond through remediation. Indigenous support, when granted, can be withdrawn and approval revoked.***

Indigenous concerns about resource development are rarely resolved in a single round of negotiations and commercial settlements. The development of the Baffinland mine in Nunavut, one of the world's largest and most valuable iron ore deposits, is a case in point. After extensive negotiations with Inuit regional and territorial authorities, agreements were reached that allowed the first major phase of the project to proceed. This is a large development that required access to an ocean port, mining roads, and, potentially, a railway. The regional Inuit population is small but remains heavily committed to harvesting activities.

The Government of Nunavut has been engaged with lengthy devolution negotiations with the Government of Canada, including discussions about territorial control of land and resources. The final stage in the process, completed early in 2024, gave the Government of Nunavut province-like control over the development process. The first phase of the Baffinland mine was completed when the territory played a lesser role; future stages will have much greater Inuit and territorial oversight. The prospect and reality of an Indigenous-controlled regional government co-developing resource development projects attracted considerable attention.

Lengthy hearings, based on both scientific studies of project impacts, Inuit testimony about potential effects, and permissions to expand activities were held. Formal territorial, Inuit, and federal approval processes, which included multiple delays, changing community standards for approval and operations due to the scale and potential disruptions associated with the mine, and extensive involvement by external environmental organizations, dragged on, frustrating proponents, and raising commercial concerns about the long-term viability of the project. However, the project was eventually approved,

with numerous conditions the different parties agreed to meet. The Baffinland mine opened, proof that corporate concerns, environmental standards, community interests, and government objectives could be met, even with considerable frustration and uncertainty, if the appropriate time is taken for an open, transparent, and thorough process.

After several years of operation, the mining company sought permission to substantially expand the extraction of minerals and transportation infrastructure. These discussions took place in the face of growing Inuit concerns about the socio-economic and environmental consequences of the expanded development. Local Inuit communities and Inuit harvesting organizations opposed the development; the Nunavut government, mine workers, and some community leaders were generally supportive. The mine had produced hundreds of jobs for local Inuit. To the surprise of many, including the mining company, some of the locally employed workers—with new and higher incomes, training, and skills—eventually relocated their families to southern cities while continuing to work in the mine under a fly-in fly-out arrangement with northern employers. The regional debate involved the company pushing hard for approval to improve the project's economy of scale and the financial returns to the company. Hunters, in particular, resisted the expansion.

The second round of assessments and evaluations led to a rejection of the company's plan despite the mine operator's threat that jobs and regional economic opportunity could not be assured moving forward. Local hunters, with support from the scientific investigations, concluded that the risk of proceeding was too great. The Government of Nunavut, eager to create financial independence from the Government of Canada, worried about lost revenues. The Qikiqtani Inuit Association, which would have received substantial resource revenues, also supported the project. But the Inuit harvesters prevailed, convincing the Nunavut Impact Review Board (NIRB) that the ecological and cultural risks associated with the project were too great. The company pursued the mine expansion by trying to show how they would address the risks that concerned the hunters. In November 2023, the company received approval from the Government of Canada. Approval came only after the Nunavut Impact Review Board satisfied itself that regional Inuit supported the expansion.

Inuit concerns had been heard and, to the satisfaction of the NIRB, addressed. The impact review process had worked, in that both proponents and local residents found a resolution that met their needs.


*The underground mine during a Cameco media tour of the uranium mine in Cigar Lake, Wednesday, September 23, 2015.THE CANADIAN PRESS/Liam Richards*

# Uranium mining in northern Saskatchewan

***Key takeaway: Meaningful and respectful consultation and agreements between industry and Indigenous Peoples are crucial for successful resource development and long-term cooperation. Good partnerships, in turn, can create long-term employment opportunities and substantial business opportunities.***

The initial stages of uranium mining in northern Saskatchewan proceeded with little or no Indigenous involvement. Disruptions of First Nations and Métis communities were numerous and considerable including: interference with harvesting; the construction of new roads, airfields and townsites; income and lifestyle disparities between local residents and the newcomers; and the introduction of alcohol and drugs into the communities. The mine did increase the availability of decently paid work for some members.

The situation changed dramatically in the 1990s, with the identification and development of the world's richest uranium properties in northern Saskatchewan. The main company, Cameco, understood that the full and stable development of the region required better partnerships with Indigenous communities. Regulatory approval was not the issue, in part because of the pro-development strategies and regulations of the Government of Saskatchewan.

A pattern of respectful and open consultations in the region resulted in a series of impact and benefit agreements with individual First Nations and Métis communities. The Athabasca district, the northernmost part of the province, became the focus for cooperative discussions, leading in the early 2000s to an extensive 10-year, multi-community accord. Cameco committed to providing $2 billion in benefits, including employment and upgrading opportunities, business contracts, and community payments. Cameco could make such an accord because of the wealth and size of the uranium deposits, the general reliability of markets (despite a sharp downturn in the early 2000s), and the nature of the company (previously a Crown Corporation), which had a strong sense of responsibility to the region and the Indigenous Peoples in the North. Cameco's Impact Benefit Agreement went above and beyond the requirements of the provincial regulations, demonstrating the value they place in meaningful Indigenous partnerships.

The Saskatchewan collaboration is widely seen across northern Saskatchewan and in the mining industry more generally as a positive and constructive arrangement. In this instance, the additional regulations associated with the nuclear industry are also in play, because of the high toxicity of uranium. First Nations participate in these reviews and involve the Indigenous communities in their approach to politicians and government officials in Ottawa. Their joint appearances show that Indigenous communities can be responsive to resource development on their traditional territories. The First Nations and Métis are not in control of the mining company but they do not hesitate to challenge Cameco over any infraction of government regulations or any breach of the agreement.

The northern Saskatchewan situation suggests that a willingness to have constructive and mutually beneficial arrangements with regional Indigenous People and governments ultimately carries considerable weight in ensuring a successful project review, approval, permitting, and licensing processes.

# Yukon treaties and mining developments

***Key takeaway: Modern treaties and regulatory frameworks in the Yukon have significantly increased Indigenous authority over resource development, leading to more rigorous and often lengthy approval processes that reinforce Indigenous rights and interests. Treaty realities resulted in the development of inclusive project evaluation systems that frustrated mining companies, lengthened approval processes and slowed—but did not stop—resource development.***

Modern treaties dramatically changed the parameters for resource development. The Yukon is one of the most mining-intensive regions in the country. The Umbrella Final Agreement of 1993 and Self-Government Agreements signed with 11 out of 14 First Nations in the Yukon transformed the regulatory environment. While there is an important territory-wide system, operated by the Yukon Environmental and Socio-economic Assessment Board (YESAB), individual First Nations have substantial authority over development on their traditional lands and effective veto power over activities on settlement lands. Mining companies must collaborate closely with the affected First Nations, most of which struggle with issues of professional capacity and the ability to work equitably with the mining firms and government agencies, both of which have much greater resources. The result has been a slowdown in approvals, corporate frustration with the length of time needed to get permission to develop, and territorial government concerns about delays in implementing regional economic development plans. As time passes, the YESAB and local First Nations' approval processes have been clarified and, in limited ways, streamlined and improved. From the perspective of the resource firms, the existing structures are weighted against the mining industry, adding to costs, deterring investments, and weakening interest in territorial mining activities.

At present, both the mining industry and the First Nations are critical of the existing regulatory process. First Nations assert their right to be the primary decision makers but they appreciate the need to include western scientific and professional research and intervention, largely because of major challenges with legacy mines such as the Faro mine, where a multibillion-dollar remediation program has been required to address the damage done by years of pollutants leaching into the water system. Today, Indigenous Peoples in the Yukon are actively involved in the regulatory and approval processes, which they use to reinforce their rights and way of life, and secure sustainable economic benefits, including the massive Casino project, the now-controversial Victoria Gold Project near Mayo, and a number of potential mines near Mayo and Ross River.

Even with rigorous overview, mining operations have proceeded, particularly on the Victoria Gold Corp. properties in the north central Yukon. The Na-Cho Nyäk Dun First Nation is heavily involved in the overview and operations. The economic development corporation has numerous contracts and joint ventures with exploration firms and local mining companies, to the point that their workforce cannot come close to meeting the demand for mine and service workers. The First Nation, with a population of under 450 and many key citizens living away from the main community of Mayo, has limited professional capacity to manage the review and engagement requirements and focus their efforts on First Nations-company relations. Therefore, the company contracts a considerable amount of its service, supply, and sub contracting work to other First Nations and locally-owned companies, creating an expanded partnership and additional avenues for collaboration. This also helps support the assessment and review procedures as they remain complicated and extensive, with much of the effort focused on the YESAB procedures.

Another Yukon First Nation, Tr'ondëk Hwëch'in First Nation, has hundreds of placer mine operations (mining of stream bed deposits for minerals) on their territory and has been actively involved with a controversial territorial redrafting of the Yukon Mining Act.

The territorial government is actively engaged with First Nations on the development of legislation that privileges and recognizes Indigenous and treaty rights. The mining industry is nervous about the plans, which elevate First Nations' interests over those of the sector, potentially altering a multi-generational structure within the territory. Put simply, First Nations demand the right to be involved with and compensated for all mining activity, which includes early-stage exploration, and expect to be able to stop projects that harm harvesting activity or that threaten culturally important sites. The mining sector, used to more unfettered access to lands, particularly for exploration, has pushed back strongly against the new legislation.

Yukon First Nations are not opposed to mining and other developments, although they did reject all of the proposed Yukon sites for additional hydroelectric development, despite the territory's urgent need for clean electricity. They have also used the assessment and approval processes to register their displeasure with major developments.

One of the largest mining projects ever undertaken in the Yukon, the Casino copper mine, is on the territory of the Tr'ondëk Hëwch'in First Nation. The mine has struggled to secure basic approvals; a request to build an access road was delayed by at least five years. Major decisions, such as the need for transportation to the coast (likely in Skagway, Alaska) and the approval of the full development, still lie

ahead. The Tr'ondëk Hëchw'in have made their concerns known, including about the environmental impacts and the disruption of the First Nation. Their support for the larger initiative is uncertain, at best. This project additionally demonstrates the complexity of large-scale mining projects in relation to Indigenous lands and interests, as it impacts the lands of different Indigenous communities:

> **"The mine site and a portion of the access road are located within the traditional territory of Selkirk First Nation. A portion of the access road is located within the traditional territory of Little Salmon/Carmacks First Nation, and Casino's water supply pipeline is located within the traditional territory of Tr'ondëk Hwëch'in. Kluane First Nation's traditional territory is located downstream of the proposed mine and aspects of the project are within the asserted traditional territory of the White River First Nation."[74]**

In signing a 2015 agreement to work with mining proponents, Chief Roberta Joseph said cautiously, "Tr'ondëk Hwëch'in are pleased to be able to provide effective input into the proposed Casino project. We are committed to forging partnerships to support and ensure responsible mining within our traditional territory."[75] This First Nation uses the complicated assessment and permitting systems to review every step in a multi-stage development process and to make sure that the project proceeds on their schedule, not the company's or the government's, and in accordance with their needs and interests.

74. Casino Mining Corporation. N.d. "Project Overview." https://casinomining.com/project/.
75. Casino Mining Corporation. 2015. "Western Copper and Gold and Tr'ondëk Hwëch'in Sign Co-operation Agreement for Casino." https://casinomining.com/news-archive/western-copper-and-gold-and-trondek-hwechin-sign-co-operation-agreement-for-casino/.

# Tahltan First Nation in northwest British Columbia

***Key takeaway: Tahltan First Nation has successfully balanced resource development with cultural and environmental protection by engaging extensively with industry on their own terms, resulting in significant economic benefits while also maintaining First Nations control over sensitive areas.***

Following intense and difficult arguments, with the opposition led by the Elders within the Tahltan First Nation about the nation's relationship with the mining industry, the Chief and Council opted for substantial engagement with the sector. Separately, Tahltan Elders battled to protect vital cultural and economic zones from a proposed plan by Shell to pursue fracking and the Fortune mine on the Nation's territory. In the following two decades, the Tahltan became among the most active peoples in resource development outside the Alberta oil sands, while also being known for their willingness to push back against projects in ecologically or culturally sensitive areas. They negotiated with multiple companies about numerous properties in resource-rich northwest British Columbia, establishing successful Indigenous development companies, securing broad employment for citizens, and attracting significant own-source revenues (i.e. not from government transfers) for the nation. In November 2023, the Tahltan First Nation and the Government of British Columbia signed an agreement that gave the First Nation equal say in the final approval process for new resource projects.

The Tahltan developed a reputation for being a savvy, development-friendly First Nation, willing to share their story with other Indigenous communities contemplating engagement with resource companies. They look to the long-term, building companies, securing assets, creating prosperity, and establishing sustainable partnerships with resource firms and the government. To some critics, which include Elders in the community, the Tahltan have gone too far, working closely with mining companies and setting aside environmental and social concerns.

Other members of the Nation would disagree with such a characterization. They adhere to all formal assessment and approval processes, and their full engagement ensures that the regulatory steps proceed more smoothly and quickly. The First Nation also has clear standards and expectations. A mine proposed by Doubleview was too close to important harvesting and cultural zones, and the project ended up being cancelled when the Tahltan made their opposition known. As Tahltan Chief Chad Norman Day commented:

> **"Tahltans take pride in working meaningfully with industry partners and the Province, but this company has continually been disrespectful and resistant to following the protocols and processes we have in place with mineral exploration companies throughout Tahltan Territory. We will be taking all actions necessary to protect our land and resources, including keeping Doubleview from pursuing their interests in our Territory any further."[76]**

Full engagement and detailed understanding of the mining industry facilitated the Tahltan decision in this instance. The crux of the conflict with Doubletree lay in the company's refusal to agree with Tahltan protocols. As one journalist observed:

> **"The central government created an engagement framework, which ensures that mining activity on its territory is done in accordance with Tahltan law. The framework requires companies to meaningfully consult with the nation and respect its Rights and Title, which includes the right to declare areas off-limits to resource development. The framework also outlines communications protocols and policies on a collaborative decision-making process. More than 30 companies have signed onto the framework, but Day said Doubleview refused to do so."[77]**

The Tahltan experience is representative of a dominant trend in First Nations engagement with resource development: the Nation is open to extensive collaboration, but on its own terms. Many companies have found it possible to develop resource projects under these conditions, and the Tahltan have produced successful companies, provided employment for many members, and secured significant income for the Nation.

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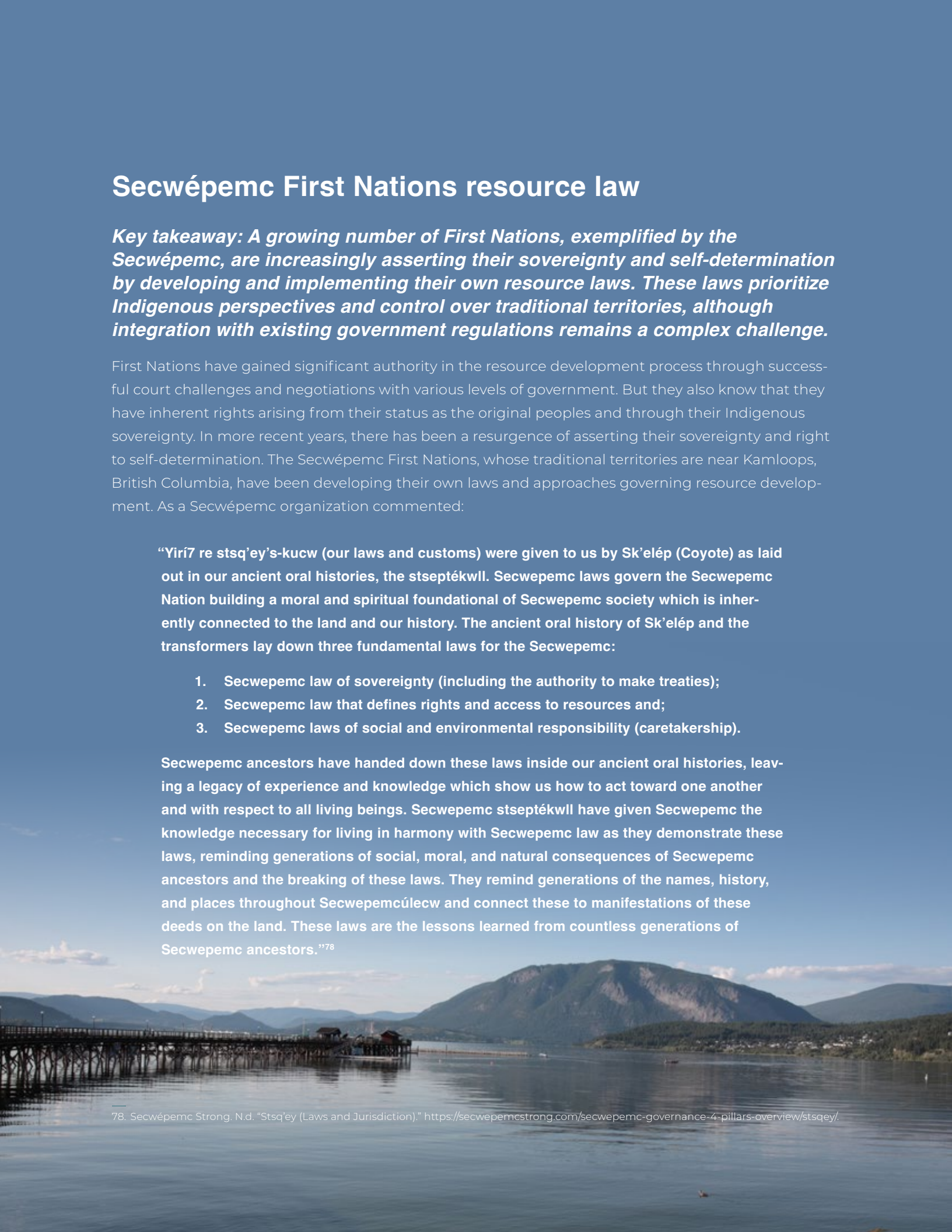
76. Tahltan Central Government. 2021. "Tahltan Nation Opposes Doubleview Gold Corps' Operations." https://tahltan.org/tahltan-nation-opposes-doubleview-gold-corps-operations/.
77. Simmons, Matt. 2021. "Tahltan Nation evicts Doubleview Gold from territory over refusal to respect Indigenous law." The Narwhal. https://thenarwhal.ca/tahltan-nation-evicts-doubleview-gold-corp/.

# Secwépemc First Nations resource law

***Key takeaway: A growing number of First Nations, exemplified by the Secwépemc, are increasingly asserting their sovereignty and self-determination by developing and implementing their own resource laws. These laws prioritize Indigenous perspectives and control over traditional territories, although integration with existing government regulations remains a complex challenge.***

First Nations have gained significant authority in the resource development process through successful court challenges and negotiations with various levels of government. But they also know that they have inherent rights arising from their status as the original peoples and through their Indigenous sovereignty. In more recent years, there has been a resurgence of asserting their sovereignty and right to self-determination. The Secwépemc First Nations, whose traditional territories are near Kamloops, British Columbia, have been developing their own laws and approaches governing resource development. As a Secwépemc organization commented:

> **"Yirí7 re stsq'ey's-kucw (our laws and customs) were given to us by Sk'elép (Coyote) as laid out in our ancient oral histories, the stseptékwll. Secwepemc laws govern the Secwepemc Nation building a moral and spiritual foundational of Secwepemc society which is inherently connected to the land and our history. The ancient oral history of Sk'elép and the transformers lay down three fundamental laws for the Secwepemc:**
>
> 1. **Secwepemc law of sovereignty (including the authority to make treaties);**
> 2. **Secwepemc law that defines rights and access to resources and;**
> 3. **Secwepemc laws of social and environmental responsibility (caretakership).**
>
> **Secwepemc ancestors have handed down these laws inside our ancient oral histories, leaving a legacy of experience and knowledge which show us how to act toward one another and with respect to all living beings. Secwepemc stseptékwll have given Secwepemc the knowledge necessary for living in harmony with Secwepemc law as they demonstrate these laws, reminding generations of social, moral, and natural consequences of Secwepemc ancestors and the breaking of these laws. They remind generations of the names, history, and places throughout Secwepemcúlecw and connect these to manifestations of these deeds on the land. These laws are the lessons learned from countless generations of Secwepemc ancestors."**[78]



78. Secwépemc Strong. N.d. "Stsq'ey (Laws and Jurisdiction)." https://secwepemcstrong.com/secwepemc-governance-4-pillars-overview/stsqey/.

A First Nation resource law can offer great certainty for both the Indigenous group and the project proponent, while giving Indigenous perspectives priority over regulatory and political considerations. Indigenous resource laws, as they are evolving in Canada and as is shown with Secwépemc processes, are assertions of Indigenous sovereignty and the right to control development on their traditional territories. They involve First Nations outlining the requirements for exploration and development to occur and they exist outside and separate from any provincial, territorial, or federal regulations. The concept is important, for it allows a First Nation to outline the parameters for acceptable use of Indigenous territories, providing direct guidelines to a resource firm and/or government agency.

Secwépemc regulations over lands and resources are still in development. Significant issues remain, including the willingness of provincial, territorial, and federal governments to recognize the assertion of Indigenous sovereignty and the First Nations' resource laws. Finding ways to integrate First Nations resource laws and other regulations will require considerable negotiation and work in the coming years. That the idea of an Indigenous resource law is not rejected out of hand and that First Nations are asserting their primacy over resource development is an important insight into the trajectory of Indigenous aspirations and resource development processes in Canada.

*Crews work to contain and clean up a pipeline spill at Nexen Energy's Long Lake facility near Fort McMurray, Alta., Wednesday, July 22, 2015. Alberta's research and development agency has a new program in the works that aims to improve pipeline monitoring and spill response by enlisting more indigenous people in the effort. THE CANADIAN PRESS/Jeff McIntosh*

# Part 4: Indigenous participation in impact assessments

**Indigenous peoples are not opposed to economic progress; rather, they prioritize their traditions, cultures, and values, which may or may not align with specific resource development projects.**

Going forward, accelerating the development of clean growth projects requires a shift in attitudes, the law, and public policy toward Indigenous Peoples to ensure that Indigenous rights are upheld and their sovereignty recognized. A rapidly growing list of successful corporate-Indigenous collaborations and the improving professional knowledge around resource development within Indigenous governments have combined to make collaboration easier, more reliable, and faster. But criticism of existing approval and oversight provisions remains strong, in part because First Nations' opposition to projects is seen as adding to the costs, uncertainty, and the time required to secure final approval. This is causing further tensions and challenges as many non-Indigenous peoples see Indigenous communities as standing in the way of economic growth. Importantly, however, Indigenous peoples are not opposed to economic progress; rather, they prioritize their traditions, cultures, and values, which may or may not align with specific resource development projects.

Few people involved in the process support the existing system unequivocally; most call for major overhaul of regulations and procedures. All of the Indigenous leaders interviewed for this project argued for substantial improvements in the regulatory systems and for the privileging of Indigenous input over external intervention in what Indigenous Peoples perceive as intensely local or regional decisions.

## Complex, changing, and disconnected regulations

One of the major challenges is the need to overcome the long-time regulatory neglect of Indigenous Peoples. Even long-time professionals in the resource sector have had difficulty keeping abreast of the changes in law and policy, partic-

ularly as Indigenous communities become empowered and develop their own land use and resource development policies. The constantly changing regulatory environment, accelerated in recent years by the Canadian adoption of UNDRIP as official federal law and, in select instances, provincial and territorial policy, has added to the difficulty of keeping up with these shifts. It's clear that Indigenous Peoples have substantial rights to be involved in the approval and monitoring of resource developments, and that Indigenous rights in the sector are real and substantial. What they are not at present is clearly and consistently understood, recognized, or upheld.

Some regions have strong modern treaties; in other areas there are locally developed Indigenous resource regulations. In regions covered by historic (pre–1970s) treaties, there are few treaty-based constraints on governments, business, and Indigenous groups. Each of the provinces and territories have different rules, regulations, and procedures; there are sweeping differences between Nunavut and Saskatchewan, for example.

Since natural resource development is regulated primarily at the provincial and territorial levels, the priorities of these sub-national governments are of utmost importance. The variety of approaches is substantial. Saskatchewan's pro-development government places few impediments in the way of resource projects. Ontario favours northern projects but has faced deep tensions, intense Indigenous resistance, and major challenges aligning their policy priorities with First Nations in the region. Quebec and the northern territories, in contrast, have major agreements with Indigenous groups and collaborate closely on project approval and oversight. New Brunswick, with fewer and smaller resource projects and weaker government-Indigenous connections and no modern treaty provisions, has fewer formal procedures and has found itself at loggerheads with First Nations over resource projects. The arrangements reflect the realities of settler colonial Canadian federalism, the allocation of responsibility for lands and resources to the territorial governments, and federal activism on environmental matters. This has heightened the regulatory diversity and administrative "chaos" as one Saskatchewan observer described in relation to the provincial situation.

The Fraser Institute's annual review of the best jurisdictions for mining routinely ranks Canada quite high. In 2023, Saskatchewan ranked third in the world, with Newfoundland and Labrador, Ontario, Manitoba, and Quebec all showing up in the top ten. Two jurisdictions with strong protections for Indigenous Peoples ranked much lower, with the Yukon registering 28th and the Northwest Territories 45th. The report concluded that "uncertainty surrounding protected areas, land claim disputes and environmental regulations continue to hinder mining

investment in various Canadian jurisdictions."[79] For resource firms working in different provinces and territories, the administrative and legal complexities of Canadian regulations deter engagement and add considerably to the costs and time involved with developing a resource project.

## Limited time and capacity

Many communities are approached repeatedly by resource companies and often feel inundated by the number and variety of requests for permission and approval. Most wrestle with the intensity and complexity of the requests, which only escalate as projects move from exploration towards development. One Yukon Indigenous resource professional, commenting after receiving several thousand pages of technical reports from a project proponent and given only two weeks to reply, described the process as both "unfair" and "overwhelming."

Current regulatory arrangements are costly, time consuming, and uncertain. Communities engaging with resource projects often secure funding from proponents and/or the regional government to assist with their participation in the review processes. But these assessment and approval systems are complicated. Scientists conduct studies in the territories, often paying Elders and workers for their time and effort. Reviewing the many and lengthy reports and participating in the formal hearings takes a great deal of the time of Chief and Council and professional staff, not all of which comes with compensation. For communities in favour of development and anxious to get jobs and business operations underway, the time consumed by studies and hearings is viewed as impediments to local social, educational, and economic plans and, therefore, as a cost to the community. If the hearings are delayed and if the initial (and even subsequent) rulings go against the project, the supportive community can be frustrated and disappointed. If negative rulings and/or the perceived cost of the evaluation convince the project proponents to abandon the development plan, the communities could lose a rare opportunity for local economic development. Perhaps the best example of this reaction is the lingering resentment in some quarters of the Mackenzie Valley where concerted external efforts, led primarily by people outside the north, resulted in the cancellation of the proposed multi-billion-dollar pipeline (see Part 3: Case studies, Beaufort Sea oil and gas and the Mackenzie Valley Pipeline) that was to be 34 per cent owned by Indigenous Peoples in the region. Several communities view this cancellation as contributing to the continued impoverishment and the social and cultural challenges now facing their people.

79. Mejía, Julio and Elmira Aliakbari. 2024. "Survey of Mining Companies 2023." Fraser Institute. https://www.fraserinstitute.org/sites/default/files/2023-annual-survey-of-mining-companies.pdf.

"The provincial system [in Saskatchewan] is okay if you're a proponent. It's really good. It's a fast track. You don't have to talk to nobody […] For Indigenous people, it stinks. It's awful. You don't get enough time. There's no money. Like it's awful and if you're doing anything that isn't federally regulated, like if you just want to cut it to that some simple level. It's terrible. What I can see going on in British Columbia and Ontario and even Manitoba and Alberta are better, which I mean, that's not saying a bunch but they're better. But when I see what's going on in other places, it's terrible here [in this province] it's just downright awful. Our people are not getting a chance to participate in a good way. The processes here are not set up for that, even though the province went and made some small revisions. Essentially, it's the same thing."

~ Indigenous Prairie resource business specialist

Herein lies one of the major challenges facing Indigenous communities seeking to determine their level of support or opposition to resource development. Indigenous communities that are faring better economically than others are, in general, either located in urban settings or near major resource and infrastructure projects. In many places, there are few economic alternatives on the horizon. Environmental groups, which have solid and sincere reasons for opposing specific projects, run the risk of being seen to advocate for an approach that imposes long-term poverty on communities that are already economically marginalized and seeking a path that improves their quality of life and that gives citizens opportunities to live and work in their traditional territory. This reflects the economic realities produced over centuries of resource development in Canada, with many Indigenous communities marginalized in their own homelands. At present, many First Nations, Métis, and Inuit communities have reluctantly concluded that the only apparent alternative to prolonged welfare dependency for Indigenous Peoples in remote and rural areas is cautious engagement in resource and infrastructure development. This reflects economic reality much more than Indigenous preference, of course, with many Indigenous communities struggling to slow the outmigration of their people to more prosperous locations.

# Part 5: Recommendations to incorporate Indigenous concepts and perspectives in regulatory processes in the clean growth sector

The current regulatory and approval processes, including the amendments to the federal Impact Assessment Act, across jurisdictions in the natural resource sector represent a major improvement over the arrangements in place in the 1970s and 1980s. Indigenous governments have secured substantial control and authority, producing extensive collaboration agreements with mining companies, pipeline firms, and other developers which, collectively, have brought billions of dollars in payments to Indigenous communities, thousands of jobs for Indigenous workers, and literally hundreds of business contracts for Indigenous and community-owned firms. They also, in some instances, used the right to say a firm "No" to proposed projects or to secure significant improvements in the development plans. As Heather Exner-Pirot, Director of Energy, Natural Resources and Environment at the Macdonald-Laurier Institute, commented, "If Indigenous peoples are viewed as needing protection, extra regulations may seem justified, but if they are seen as potential leaders in resource projects, these regulations can be problematic."

Indigenous work in this area is far from complete. The current emphasis on critical minerals and clean energy has convinced federal, provincial, and territorial governments to accelerate project approvals and to ramp up Canadian development overall. This, in turn, increases pressure on Indigenous communities to agree to the projects—the clean energy economy and Canadian economic security are at stake in this formulation—which could increase the risk (real

or perceived) of weakening national and regional ecological standards. New approaches, together with existing regulations and processes, must recognize Indigenous and treaty rights, secure community consent, meet environmental standards and priorities, support corporate efforts to develop commercially viable projects, and contribute to broader regional and national economic and social priorities. This is a complex and extensive set of priorities, but it is one that is widely shared across the country.

## Accept Indigenous laws and protocols

Indigenous re-empowerment and resurgence of their rights brought additional elements into play. Some Indigenous communities have prepared resource laws that outline—without reference to existing federal, provincial, and territorial regulations and procedures—the conditions that must be met to secure community support. Resource developers, perhaps surprisingly, welcome the resource laws, which provide a long-desired clarification of Indigenous requirements. These Indigenous laws do not have official standing before the courts and with governments but are particularly important in outlining a path to securing a community social license.

Governments and regulators must recognize Indigenous Peoples as self-governing nations and include their laws and protocols in broader regulatory processes. Governments have yet to acknowledge, with sincerity, shared sovereignty with Indigenous Peoples, except for areas with modern treaties in which Indigenous control of settlement lands is respected. However, modern treaties cover just over 40 per cent of Canada's land mass, leaving the rest of the country covered by historic, friendship, or no treaties at all, with less formal legal grounds for Indigenous Peoples to claim their authority in regulatory processes. But the steady expansion of Indigenous Protected and Conserved Areas, where Indigenous priorities have substantial authority and where Indigenous officials provide on-the-ground oversight of development activity and wilderness protection, is enlarging Indigenous engagement in rural and remote areas.

The impression lingers that Indigenous law represents a challenge to national, provincial, and territorial governments. This need not be the case. Agreement on shared jurisdiction, by which Indigenous authority would be recognized as co-equal with public government, would provide a high-profile indication of respect for Indigenous authority in a crucial field of jurisdiction and decision making. Therefore, Indigenous efforts to create local and regional resource laws should be encouraged and supported by all forms of government, and their resource laws should be reflected in approval processes.

## Respect the treaties

Modern treaties provide ever greater clarity—particularly with the added protection of constitutionally protected status. The treaties outline, in extensive detail, the specific responsibilities and rights of Indigenous Peoples regarding resource development and land use. They supersede other regulations and legislation and are crucial elements in the re-empowerment of Indigenous communities and governments. Treaty provisions also ensure Indigenous financial returns through revenue sharing regimes and a substantial role in formal project approval and monitoring processes. They provide assured Indigenous representation on major review and oversight boards and regulatory agencies. The treaties offer mechanisms for Indigenous involvement in all stages in the development and evaluation process, and ensure that Indigenous communities have a say on the use of their traditional lands.

Across all provincial, territorial, and federal jurisdiction, there are nearly 700 specific claims in progress submitted by Indigenous groups. The Government of Canada is also engaged in discussions with Indigenous groups at over 186 negotiation and discussion tables across the country to negotiate comprehensive land claims. These various claims are likely to have some impacts on the development process of the clean economy in Canada. These outstanding claims create uncertainty around project development and more importantly delay justice and retributions to the Indigenous communities. Governments must prioritize negotiating and settling the claims, and then respecting and integrating the outcomes in a timely manner.

## Build capacity support for Indigenous communities

Regulations, processes, and assessments are only effective if the Indigenous proponent has the capacity to meaningfully participate. Indigenous communities, often small and faced with multiple, overlapping social, environmental, economic, and political challenges, start at an unlevel playing field compared to industry and the government. Not to mention that some Indigenous communities are experiencing “consultation fatigue”, defined as the weariness and disinterest that occurs when a community is over- or poorly-consulted. The sheer volume of consultation from different sectors competing for their attention creates a strain on Indigenous communities’ resources and time. To address this imbalance, industry and governments should provide adequate

financial and human resources to boost Indigenous proponent's capacity to participate in the process on their own terms.

Appropriate funding is required to ensure that Indigenous involvement in engagement processes does not come at a high cost to the communities. Companies and governments must also respect the competing priorities that nations experience, and coordinate approaches to community consultation amongst themselves to reduce the unnecessary administrative burden on Indigenous communities. Governments should fund anticipatory work by Indigenous organizations (usually at the regional level) so that communities determine which areas are off limits for ecological, lifestyle, or cultural reasons ahead of exploration and early-stage development by resource companies.

"If I could change one thing, it would be that whether you're in Saskatchewan, or you're in New Brunswick, or you're in the Yukon, that we all have the same floor. I think if we could get everybody trying to implement the [Truth and Reconciliation] Calls to Action, trying to address the murdered and missing women final report in their calls to justice for the extractive industry. We could implement those things across the board, and have the proper capacity for communities to participate meaningfully, and everybody planned by more or less the same rules. I think you would see things just jet upwards in [my province], but I think it would be good for all of Canada really. I think if we could get to a point where everybody just understands that these policies, like UNDRIP, these modern thinking documents that come out that really show where the rights for Indigenous people should be if we could all adopt them, we could all have a commonality in terms of working together in the same way. I really think even in a non-perfect system, that would make a massive difference. I know that it would take [my province] from the dark ages to the modern world real fast if we could do that."

~ Indigenous Prairie resource specialist

## Move toward the establishment of Indigenous-led processes of evaluation, approval, monitoring, and remediation processes

Consideration should be given to a full and comprehensive adoption of Indigenous approval and monitoring processes. This would represent a radical departure in Canadian and international practice and should probably be started on a trial basis (for example, through the Squamish First Nation and the Woodfibre LNG project). The completion of devolution of federal powers, particularly over land and resources, from the federal government to the three northern Territories provides an excellent opportunity to reverse the current approach, which marginalizes Indigenous input and priorities. Indigenous judgements should have top priority and should not simply represent input into formal decision making processes. The country is moving slowly in this direction at great cost to Indigenous communities. It would be a leap of great courage and foresight for a public government to recognize and privilege Indigenous decision making in this manner. It would place large responsibilities (and resources) in Indigenous hands and would make interventions by special interests such as corporate and environmental non-governmental agencies lower priority. It would attract considerable international interest as the country would, for the first time in Canadian history, privilege Indigenous legal, treaty, and environmental authority on matters related to resource development.

"Well, I think the federal government needs to back Indigenous people. Because it's our territories that are going to be impacted. And I think that they should be consulting with Indigenous people first and then industry—you know, the people on the ground, businesses. I think, on how we can increase the speed of these regulatory processes, I think, the other thought is looking at other countries that are successful in that difficult process or how countries that have good environmental processes, making sure that they're doing their due diligence. I think those are the countries that we need to look at, and start aligning ourselves with those successful ones."

~ Indigenous Western Canadian business leader

*First Nations Partnerships Coordinator Nicole Norris, centre, looks on as Fish and wildlife management for the Penelakut Tribe Ken Thomas discusses the importance of the clam bed restoration while on a Salish sea garden tour on Russell Island, a 32-acre Gulf Island National Park near in Salt Spring Island, B.C., Thursday, Sept. 8, 2022. THE CANADIAN PRESS/Chad Hipolito*

# Conclusion

This paper demonstrates the need to collectively figure out the best path forward to not overburden the regulatory approval process but still recognize, understand, and uphold the rights of Indigenous Peoples and consider the positive and negative impacts they may experience from proposed projects. The recent ruling in 2023 on the Impact Assessment Act by Canada's Supreme Court made it clear that these criteria—in their current form—are too subjective and poorly defined to ensure they stay within federal jurisdiction. The recommendations in this report, many of which have been proposed by Indigenous groups over the years, must be reviewed and co-developed with all parties, led by Indigenous governments and Peoples. They must be coordinated with local and regional laws and regulations, must take existing treaties into account, and develop new, Indigenous-centered approaches that continue to transform the natural resource economy in Canada.

The current regulatory and decision making processes across Canada are an improvement on past practices, but they are too cumbersome and expensive, take too long, enrich outsider specialists and consultants more than Indigenous groups, are vulnerable to external interventions that push Indigenous priorities into the background, and do not produce outcomes that consistently meet Indigenous needs. Despite criticisms, not all Indigenous communities are opposed to resource development and, largely through their interventions, have shaped the regulatory standards, processes, and structures to reflect better Indigenous priorities. Empowering Indigenous people, communities, and governments does not stand in opposition to national climate priorities or the requirements for commercially viable and environmentally and socially sound development projects. For clean growth projects to occur, it should be undertaken in a more cautious, appropriate, and inclusive manner. Indigenous communities neither uniformly support nor automatically oppose resource development on their territories. However, they are united in

opposing bad or socially and/or ecologically destructive projects. Indigenous Peoples know their rights and are eager to assert and extend the recognition and respect for their authority. Many Indigenous communities that are interested in and/or already participating in resource development are determined to improve the processes and regulatory environment to the benefit of Indigenous Peoples, the country at large, and the environment.

Through modern treaties, major court decisions, and negotiated agreements, federal, provincial, and territorial governments have slowly, often begrudgingly, accepted expanded Indigenous authority. Real and sustained recognition of Indigenous priorities has come slowly, primarily in northern and non-metropolitan areas. Throughout the long and politically tortuous process, Indigenous communities and governments have been stalwart, determined and, to a significant degree, successful in their demands and efforts. Recent examples—a growing number—of Indigenous-corporate relations demonstrate that the emerging systems of consultation and the recognition of Indigenous rights and priority can both serve Indigenous interests and result in acceptable resource and infrastructure projects. The outline of a sustainable strategy for project approval, moving toward Indigenous-inspired and Indigenous-led regulatory and approval processes has emerged. Indigenous communities stand to benefit from these improved relations; Canada, too, can benefit from the cautious and respectful development of its natural resources if this vital economic enterprise is done in conjunction with Indigenous Peoples.