

# **Indigenous Women’s Engagement: Recommendations for the National Energy Board Modernization Review**

A Summary Report

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## **Introduction**

The Native Women's Association of Canada (NWAC) is a national Indigenous organization representing the political voice of Indigenous women throughout Canada. NWAC works to advance the wellbeing of Indigenous women and girls, as well as their families and communities, through advocacy, policy, and legislative analysis in order to improve policies, programs, and legislation.

NWAC recognizes the role of environment in the mental, physical, social, cultural, and spiritual wellbeing of Indigenous women, their families, and communities. Pollution and environmental degradation cause more than just severe health outcomes; they impact the community's ability to partake in traditional cultural and spiritual activities, such as hunting, fishing, and collection of traditional medicines and ceremony.

While Western-based risk assessments primarily focus on biochemical and biological data, the impact on cultural activities and risk to communities' traditions and ways of life must likewise be considered.<sup>1</sup> Therefore, this report will focus on Indigenous Engagement from the perspectives of women and highlight current and recent practices of the Crown's approach to fulfilling the *Duty to Consult* on National Energy Board-regulated projects, and the Crown's approach to engaging and consulting with Indigenous groups on National Energy Board-regulated projects in the context of renewing a nation-to-nation relationship. Lastly, this report will make recommendations toward strengthening the National Energy Board (NEB) and the *National Energy Board Act*<sup>2</sup> within the context of Indigenous Engagement.

## **Methodological Approach**

In order gain insight on the topic of Indigenous Engagement, a brief literature review of peer-reviewed journal databases was conducted to study the Crown's approach to both the duty to consult principle and to incorporating Indigenous knowledge in that process, with a focus on gender. This informed the development of both the Forum on Indigenous Engagement as well as

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<sup>1</sup> Mary Arquette et al, "Holistic Risk-Based Environmental Decision Making: A Native Perspective" (Apr., 2002) 110:2 Environmental Health Perspectives pp. 259-264.

<sup>2</sup> *National Energy Board Act*, RSC 1985, c N-6 [*NEB Act*].

the online survey. The views expressed and highlighted during the Forum and from the results of the online survey inform the findings and recommendations found in this report.

## **Indigenous Engagement**

### *Overview*

Indigenous communities are particularly vulnerable to the negative impacts of natural resource development due to lower socioeconomic status in Canada. Many First Nations communities lack affordable and secure housing, are in remote rural areas, are subject to food insecurity, lack access to clean water, and lack community resources overall.<sup>3</sup> These communities not only lack the resources to address the impacts of pollution that are byproducts of natural resource extraction, but it is also more difficult to pursue legal action to enforce their rights.

Indigenous women are particularly vulnerable to the impacts of environmental degradation, because they experience the double socioeconomic burden of being a woman and an ethnic minority. Indigenous women are more likely to live in a food insecure household, and are more likely to be single parents, than Indigenous men. They are also more likely to live in overcrowded homes, experience higher rates of unemployment, and experience poorer health than their non-Indigenous counterparts. For these reasons, the experiences and knowledge of Indigenous women, not only Indigenous people, is crucial in informing the modernization process of the National Energy Board (NEB).

Currently, NEB-regulated projects require filing of an application, after which concerns regarding Indigenous groups or communities may be brought up and dealt with during the hearing process. While the NEB application requires companies to consult with affected Indigenous communities, the fact remains that companies are reporting on their own consultations and mitigation efforts. The reliance on self-reporting by companies with a vested financial interest in the outcome leaves room for misrepresentation, and token consultations in place of meaningful partnerships.

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<sup>3</sup> Charlotte Loppie Reading and Fred Wien, “Health Inequalities and Social Determinants of Aboriginal Peoples’ Health” (2009) National Collaboration Centre for Aboriginal Health, online: [http://www.nccah-ccnsa.ca/docs/social%20determinates/nccah-loppie-wien\\_report.pdf](http://www.nccah-ccnsa.ca/docs/social%20determinates/nccah-loppie-wien_report.pdf).

In cases where affected Indigenous communities have environmental concerns, they must next navigate the potentially prohibitive NEB hearing process. Throughout the hearing process, both parties file written evidence and are provided opportunities to question one another.<sup>4</sup> While communities are not required to have a lawyer to participate, they remain at a disadvantage to large companies with access to lawyers and resources to compile and prepare their evidence.

At the Forum, the perspective of many Indigenous women on the NEB process is lacking in mutual respect, financial support/investment, partnership building, and respect for cultural and traditional survivorship. If Indigenous women were to grade the NEB on their processes of engagement with Indigenous groups they would provide a failing grade.

#### *Current and Recent Past Practices*

The NEB was established by Parliament in 1959 as an independent federal regulator. It was created with the aim of depoliticizing and insulating the decision-making process concerning one of Canada's key resources from unbridled market competition and top-down bureaucratic control.<sup>5</sup> The NEB was given a mandate to regulate certain aspects of the energy industry under federal jurisdiction and to inform the government and public about energy matters. Its statutory responsibilities under the *NEB Act* and other legislation are both advisory and regulatory. The NEB's knowledge and expertise is used to report to and advise the federal Minister of Natural Resources on energy issues. This part of the NEB's mandate is premised on a close relationship with government.<sup>6</sup>

The NEB is also mandated to regulate in the Canadian public interest, which includes the interests of the Indigenous peoples of Canada. In the mandate letter to the Minister of Natural Resources, Prime Minister Trudeau called for "a renewed, nation-to-nation relationship with

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<sup>4</sup> National Energy Board, Participation and Lands, The Hearing Process, *National Energy Board Hearing Process Handbook* (Calgary: National Energy Board, 2016), online: <https://www.neb-one.gc.ca/prcptn/hrng/hndbk/pblchrngpmphlt-eng.pdf>.

<sup>5</sup> Earle Grey, *Forty Years in the Public Interest: A History of the National Energy Board* (Toronto: Douglas & McIntyre, 2000) at 13. See also Morris Popowich, "The National Energy Board as Intermediary between the Crown, Aboriginal Peoples, and Industry." (2007) 44 *Alta L Rev* 837 [*Popowich*].

<sup>6</sup> *Popowich*, supra note 5 at 848.

Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.”<sup>7</sup> Prime Minister Trudeau also called for “including provisions to enhance the engagement of Indigenous groups in reviewing and monitoring major resource development projects.”<sup>8</sup>

However, the NEB’s current model does not adequately fulfill the Crown’s requirement to adequately protect Indigenous rights and interests, as recognized and affirmed in Section 35(1) of the *Constitution Act, 1982*.<sup>9</sup> The process is prohibitive to Indigenous communities with limited capacity and favours resource rich industry.

Despite the efforts of section 35(1) and the subsequent Supreme Court of Canada (SCC) jurisprudence on recognizing and affirming Aboriginal rights; big energy industry and specialized tribunals have undermined section 35(1) and SCC decisions to minimize Aboriginal engagement and consultation<sup>10</sup> to the point of avoiding a *Haida* analysis<sup>11</sup> (also known as the duty to consult principle).

At the international level, Canada has yet to implement the principles of the United Nations Declaration on the Rights of Indigenous Peoples. Article 29.1 states:

*“Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.”- UNDRIP, 29.1*

There are many concerns regarding the recent and current practices of both the government of Canada’s constitutional obligations and the NEB’s mandate and statutory authority to safeguard the interests of Indigenous women. This summary report highlights the two predominate issues brought forward by Indigenous women at the Forum, but it is important to recognize that there is

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<sup>7</sup> Office of the Prime Minister, *Minister of Natural Resources Mandate Letter* (Ottawa: Office of the Prime Minister, 2015), online: Office of the Prime Minister: <http://pm.gc.ca/eng/minister-natural-resources-mandate-letter>.

<sup>8</sup> Ibid.

<sup>9</sup> *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

<sup>10</sup> See *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, [2010] 4 FCR 500 [*Standing Buffalo*], leave to appeal refused.

<sup>11</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 [*Haida*].

a much longer list of concerns that remains non-exhaustive.

### *Indigenous Engagement (Duty to Consult)*

Some Indigenous women interpreted ‘Indigenous Engagement’ to mean the Crown’s duty to consult, meanwhile others noted that while the duty is being applied in most cases, there is a major lack of resources and capacity to keep up with the number of NEB applications. For applicants (or companies) the process moves as quickly as possible leaving Indigenous communities scrambling to gather resources, information and evidence to participate in the process. The sense is that there is no time spared for Indigenous communities. It was also noted (as the leading concern brought forward) that it appeared that the NEB left it to the companies to ‘engage’ with Indigenous communities and that most Indigenous communities feel they are carrying the bulk of the work on engagement. To quote an Indigenous woman participant at the Forum: “It felt as though the [companies] tell us, ‘if you want to be consulted, then here, you do it.’”

The duty to consult and accommodate Indigenous people is a legal duty that arises from the protection of Aboriginal and treaty rights recognized in section 35(1) of the *Constitution Act, 1982* and rests with the federal and/or provincial Crown. In the landmark cases of *Haida* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,<sup>12</sup> the Supreme Court grounded this duty in the honour of the Crown. Theoretically, this created the potential for the Crown to recognize and protect asserted Aboriginal rights and interests even before those rights have been proven or recognized.<sup>13</sup>

The test for the duty has three elements: i) knowledge of the right or duty, ii) potential adverse effect on the right, and iii) contemplated Crown conduct.<sup>14</sup> The scope of the duty is proportionate and the content of the duty varies with the circumstances and must be determined on a case-by-case basis along a spectrum. At the low end of the spectrum, the Crown is expected to give

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<sup>12</sup> 2004 SCC 74, [2004] 2 SCR 550 [*Taku*].

<sup>13</sup> Kaitlin Ritchie, “Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation” (2013) 46 UBCL Rev 397 at 398; Lorne Sossin, “The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights” (2009) 23 Can J Admin L 8c Prac 93 at 101.

<sup>14</sup> *Rio Tinto Akan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 at 45-48 [*Carrier Sekani*].

notice, disclose information, and discuss any issues raised in response to the notice. At the high end of the spectrum, the Crown is expected to find a satisfactory interim solution, provide an opportunity to make submissions for consideration, allow for participation in the decision making process.<sup>15</sup> The duty is triggered at the earliest possible planning stages for a project and/or decision, as disagreements over the nature and scope of treaty rights can change the consultation obligations owed in the circumstances.

The Supreme Court in *Haida* clarified that the “honour of the Crown cannot be delegated” and that the Crown is legally responsible for consultation, and where necessary, accommodation.<sup>16</sup> The Crown retains responsibility for the consultation such as determining the scope of the consultation required or evaluating the adequacy of the consultation and accommodation. This means that “[t]hird parties cannot be held liable for failing to discharge the Crown’s duty to consult and accommodate.”<sup>17</sup> Even with this jurisprudence in place, the NEB decided to grant approval to an applicant for an Enbridge pipeline project where an Indigenous community protested and requested the board to compel the Crown to engage in their duty to consult.<sup>18</sup>

In sa recent case, *Chippewas*, Enbridge made an application to re-reverse the flow of heavy oil in a pipeline and to increase the capacity from 240,000 barrels per day to 300,000 barrels per day.<sup>19</sup> The NEB decided a hearing would take place and served Hearing Orders to the federal Crown as well as the Crowns of Ontario and Quebec. No Crown participated.

The majority in *Chippewas* held that the Board was not obligated to determine whether a *Haida* analysis was required where the Crown was not a participant.<sup>20</sup> The Federal Court of Appeal noted that because “the Crown was not a party to the Project approval proceedings, it is not clear

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<sup>15</sup> *Haida*, supra note 9 at 43-44.

<sup>16</sup> *Ibid.*, at para 53.

<sup>17</sup> *Ibid.* See also *West Moberly First Nation v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, [2011] 3 CNLR 343 at paras 100-108, where the BCCA considered whether the Crown can delegate its duty to consult and accommodate to parties that do not have the decision making power to deal with the impacts on First Nations.

<sup>18</sup> *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222 [*Chippewas*] leave to appeal granted. Hearing held November 30, 2016.

<sup>19</sup> *Ibid.*, at para 6.

<sup>20</sup> *Ibid.*, at para 33.

that the *Haida* Determinations were “properly before” the Board in these proceedings.”<sup>21</sup> It was also held that compelling the Crown to participate would not “have been an appropriate way to promote the reconciliation of interest called for in *Haida Nation*.”<sup>22</sup>

The Board ultimately decided that because of the lack of participation of the Crown and any explanation for its absence, the Board assumed that possibility that the “Crown was of the view that Enbridge’s application entailed no Crown conduct that could engage the *Haida* duty.”<sup>23</sup> The Board also noted that it required Enbridge to engage in “extensive dialogue with the” Indigenous group and other Indigenous communities, thereby satisfying its constitutional obligations under section 35(1).<sup>24</sup>

*Recommendation:*

The *Chippewas* case is a familiar case with Indigenous women and has been interpreted as problematic when trying to ensure the Crown’s duty to consult is fulfilled. Regardless of the findings of the Federal Court of Appeal (FCA) or whatever may be found at the Supreme Court of Canada; the current process to ensuring the Crown’s duty is followed is more resource draining and expensive than it needs to be. The jurisprudence indicates that if an Indigenous group wants a *Haida* determination (and where it cannot get one through a tribunal) they can simply go to the courts. Going to the courts doubles the amount of time and money for an Indigenous community where the NEB application process already moves at too fast of a pace. Indigenous women see this jurisdictional problem as an additional barrier to prevent their concerns from being heard, especially where both the government of Canada and the NEB are currently mandated to build a reconciliatory relationship with Indigenous people.

Therefore it is recommended that amendments to the *NEB Act* or its regulations be put into place that increase the jurisdictional authority for the NEB to determine whether a *Haida* analysis is required and ensuring that it is fulfilled by the Crown and not to the devises of corporations and/or companies.

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<sup>21</sup> Ibid., at para 42.

<sup>22</sup> Ibid., at para 46.

<sup>23</sup> Ibid., at 57.

<sup>24</sup> Ibid., at 62.

### *Renewing the Nation-to-Nation Relationship*

Some of the issues brought forward at the Forum were issues surrounding lack of respect for communities or community government structures, financial support/investment, and respect for cultural and traditional survivorship.

At the forefront was the criticism of both the Government of Canada and the NEB's lack of commitment towards renewing Canada's nation-to-nation relationship with Indigenous people, especially where renewing the nation-to-nation relationship is a platform promise made by Prime Minister Trudeau. Even with the help of section 35(1) jurisprudence on Aboriginal rights and title, the NEB appears to make great efforts to evade any responsibility towards fulfilling the Liberals' mandate to take Indigenous peoples' interests into account.

The predominant belief of Indigenous women at the Forum is that the NEB remains far too focused on its general mandate of making decisions based on the public's interest only. This "public interest" approach ends up being a majoritarian approach that ignores Indigenous rights, interests and concerns. Even if Indigenous groups are given an opportunity to vocalise their interests, they are heard well after the application process had begun.

It is the belief of Indigenous women that to renew the nation-to-nation relationship, a respect for Indigenous groups or communities must be re-built. It is not possible to build a healthy and productive nation-to-nation relationship when the NEB places greater consideration on Canadians' interests/needs over Indigenous people.

The recent case, *Chippewas*, continues to serve as an example of the NEB evading any involvement in a *Haida* analysis or compelling further investigation into whether a duty to consult is owed by the Crown. The lay-person's understanding of that decision is that the NEB will evade (or avoid) a *Haida* analysis if the Crown chooses to be absent from an NEB hearing. The NEB then interprets the non-involvement as there being no need for consultation with Indigenous groups.

Furthermore, the NEB has issued policy directives that indicate the responsibilities of applicants filing an application.<sup>25</sup> These applicants (or companies) are left with the responsibility to initiate consultation with affected or potentially affected Indigenous groups. Where the company does not carry out consultation, they are expected to explain why consultation was unnecessary. Whatever is submitted forms the basis of the NEB's evaluation of the company's Indigenous engagement activities, a process that is problematic.

Indigenous women brought forth their experiences and understanding of this process and pointed out that companies do not have the same legal obligation as the Crown to act in good faith. As previously mentioned, the Crown cannot delegate their responsibility. The question then becomes: *What can Indigenous groups and communities do when the NEB is reluctant to compel the Crown to participate when it is absent from the process, especially when consultation and accommodation regarding Aboriginal rights and title are a part of the renewal process of rebuilding the nation-to-nation relationship?*

The *NEB Act* is silent with respect to the duty to consult. However, section 12(2) of the Act gives the board "full jurisdiction to hear and determine all matters, whether of law or of fact."<sup>26</sup> Additionally, in his dissent in *Chippewas*, Justice Rennie indicated that the majority had created a duty to consult scapegoat based on the majority's application of *Standing Buffalo*.<sup>27</sup> Justice Rennie disagreed with the majority and distinguished *Chippewas* from *Standing Buffalo* and found the NEB was required to consider whether consultation was required and whether it had taken place.<sup>28</sup>

The NEB is a tribunal with the authority to consider constitutional questions related to section 35(1) and is authorized to evaluate whether the duty to consult with Indigenous peoples has been met. It can consider questions of law, has a mandate to evaluate impacts to rights including the effects of consultation, and has remedial powers that could be used to ensure consultation is

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<sup>25</sup> See subsection 3.4 of National Energy Board, "Common Information Requirements," *Filing Manual*, ch 3 at 3-3-3-11 online: <https://www.neb-one.gc.ca/bts/ctr/gnnb/flngmnl/fmch3-eng.html>.

<sup>26</sup> *NEB Act*, supra note 2.

<sup>27</sup> *Chippewas*, supra note 15 at para 81.

<sup>28</sup> *Ibid.*, at paras 82, 100-104.

achieved.<sup>29</sup>

*Recommendation:*

It is felt by Indigenous women and their communities that they are locked yet again in another jurisdictional battle between the Crown's constitutional obligations and the statutory authority of the NEB. The Crown is aware of its obligations and the test that triggers the duty to consult. The NEB is also aware of its constitutional obligations as well but places the onus on the Crown to fulfill its duty.

The FCA rejected the attempt of the Minister of Natural Resources to delegate its duty to consult. The Minister stated in a response letter: "The Government relies on the NEB processes to address potential impacts to Aboriginal and treaty rights stemming from projects under its mandate."<sup>30</sup> The problem here is that the response letter was received four months after a request was made by the Chippewas of the Thames First Nation for the Crown to intervene and initiate a consultation process. The hearing had concluded three months prior to the Crown's response letter.

Therefore it is recommended that to ensure a proper, healthy and positive renewal (and redevelopment) of a nation-to-nation relationship; legislative reform needs to be drafted to minimize jurisdictional barriers that will ensure the Crown's participation in a timely manner. As well as provide statutory authorization where the duty to consult should be determined by the NEB and ensure that it is fulfilled. Perhaps reform in this area could provide statutory authority for applications where the duty to consult is at the lighter end of the spectrum.

**Conclusion**

Indigenous women are uniquely impacted by natural resource development, and possess concerns, knowledge, and perspective, distinct from that of Indigenous men. Their full engagement and participation is crucial to a balanced and complete consultation, and is likewise critical to the National Energy Board modernization process.

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<sup>29</sup> *NEB Act*, supra note 2, s 55.2. For more information, see the National Energy Board, "National Energy Board Hearing Process Handbook (2016) online: <https://www.neb-one.gc.ca/prtcptn/hrng/hndbk/index-eng.html>.

<sup>30</sup> As cited in *Chippewas*, supra note 15 at para 67.

Efforts to modernize the National Energy Board should therefore integrate Indigenous perspectives into decision making, and implement concrete protective measures for Indigenous communities within NEB processes. Acknowledgement of the duty to consult is not sufficient; the NEB must incorporate a full understanding of the principles of consultation and Indigenous rights and title rights, and enforce meaningful engagement and respect for individual community consultation protocols.

## **Principal Themes at the Indigenous Women's Engagement: Recommendations for the National Energy Board Modernization Review**

- 1) In order to deter destructive environmental practices and encourage true accountability, companies should have to pay for reclamation/remediation before development begins
  - a. Accountability as a continuous process that carries through the initial stages to the final stages
- 2) What is reconciliation / nation-to-nation if sacred lands and burial sites have no protection and can have pipelines built across them?
  - a. Put value into Indigenous sacred sites and show that they are more important than corporate economic interests in energy extraction
- 3) While NEB cannot change or create legislation, it can create regulations – the group suggested regulation that any developer looking to make an application to NEB must build a respectful relationship (or respectful process as opposed to using language like “duty to consult” or “engagement”) with affected First Nations, and outline how to go about that in a way that follows protocol.
  - a. “Something that would cause the process to take a step back, something that would force them to think seriously about it” – weave in the seven grandfather teachings without categorizing them in a specific section of a paper (ie. Talk about respect, honour, humility, responsibility, partnership)
- 4) Recognition that Indigenous women are the owners of the lands and the waters and their knowledge should be at the centre of all environment-impacting plans and activities
- 5) Longer consultation times to allow more meaningful engagement with Indigenous communities. Currently, there is a lack of capacity and resources to manage all the short-timelines that are attached to the flow consultation applications. More time is needed to thoroughly gather evidence and information about the impacts of specific extractive projects.

## **Literature Review - Indigenous Engagement / Duty to Consult, Gender, and Traditional Knowledge**

**Jula Huges, “Gendering the Duty to Consult: Making Aboriginal Consultation Rights Meaningful to Aboriginal Women (Abstract Only) (2017) Urban Aboriginal Knowledge Network. Online: [http://uakn.org/wp-content/uploads/2016/01/UAKN-Atlantic-Abstract\\_Gendering-the-Duty-to-Consult\\_2016-1.pdf](http://uakn.org/wp-content/uploads/2016/01/UAKN-Atlantic-Abstract_Gendering-the-Duty-to-Consult_2016-1.pdf)**

Although this research project is ongoing (set to be completed in April 2017), this abstract provides a glimpse into the nuances of Indigenous and state relations in the context of duty-to-consult, particularly when those relations are complicated by gender and questions about the rights of off-reserve populations. Hughes notes that “while the Supreme Court of Canada has produced an expansive jurisprudence on Aboriginal and treaty rights[...]these rights have accrued exclusively with respect to land and land-based resources for on-reserve populations”, leaving out the “socio-economic, cultural and linguistic rights of off-reserve populations” (p. 1). Hughes argues that this “lopsided development of the law” (p. 1) has more heavily impacted Aboriginal women and people with mixed maternal ancestry. Hughes’ research, then, seeks to more clearly delineate the gendered impacts of the duty to consult. Despite the Urban Aboriginal women’s longstanding complaint that government engagement is often solely concerned with on-reserve populations (as this is who their Charter obligations lie with) and male-dominated political organizations, courts continue to not consider the “intersectional nature of off-reserve and female underrepresentation” (p. 2). Significantly for this study and this organization, the completed research project will include “a doctrinal review of the jurisprudence on s. 35 of the Constitution Act, 1982 and gender equality” (p. 2), with a particular focus on the 1994 Supreme Court case *Native Women’s Association v Canada* and its implications for duty to consult. Importantly, the research will be based largely on interviews with Aboriginal women leaders and organizations to help “identify and describe areas of high priority for Aboriginal women and Aboriginal descendants in the maternal line; to seek their expertise in advocating for urban Aboriginal women; and to document the consultative capacity and needs of urban Aboriginal women and their representatives” (p. 2).

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**Arn Keeling & John Sandlos, “Aboriginal Communities, Traditional Knowledge, and the Environmental Legacies of Extractive Development in Canada” (2016) 3:2 *The Extractive Industries and Society* 278-287**

Focusing on the case of arsenic contamination at Giant Mine in the Northwest Territories, Keeling and Sandlos examine the extent to which Indigenous traditional knowledge (TK) has been incorporated into approval processes for resource extraction projects and remediation. Although the proponents of the Giant Mine Remediation Project (which includes staff from Aboriginal Affairs and Northern Development Canada, Public Works and Government Services Canada and the Government of the Northwest Territories) expressed “a desire to incorporate TK into the reclamation project”, such incorporation has been inhibited by “the complex technical nature of the process [and] a fundamental misunderstanding of the epistemological basis of Indigenous TK, has prevented anything more than token inclusion of such knowledge” (p. 278).

As the authors delineate, resource extraction and their accompanying environmental regulations are compounded by the remoteness of northern areas, which are often targeted for such projects despite the common perception of these areas as pristine. As the authors note, the effects of these projects linger "partly because of the slow recovery rates of many high-latitude ecosystems, but also because of the material persistence of the environmental changes themselves" (pp. 278-79). Despite its indisputable value, Indigenous TK is often excluded and placed in subordinate opposition to scientific knowledge, and thus is not incorporated into studies on these processes. Despite the fact that Indigenous communities tend to be disproportionately impacted by the environmental fallout of these projects, Indigenous TK continues to be marginalized through remediation activities as they are viewed as "improvements or rehabilitation of the local environment, and thus above criticism or controversy" (p. 280). In keeping with the words of Indigenous women and organizations, Keeling and Sandlos characterize environmental assessment processes and engagement with Indigenous traditional knowledge as "shallow" despite the "growing institutional recognition of its importance to socially just and environmentally sustainable development in the region" (p. 285).

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**Priscilla Kennedy, "The Duty to Consult: Constitutional Recognition of Treaty and Aboriginal Rights" (2008) 33:1 Law Now 1-5**

Kennedy's article provides a brief overview of the legal challenges inherent to determining when and if the state has an obligation to consult with Indigenous peoples. Given that Aboriginal rights and lands are set out in treaties, Provincial legislation, and in the *Canadian Charter of Rights and Freedoms*, courts are left to parse the legal dissonance between the different levels of governance. In particular, Crown and corporate resource development activities tend to conflict with section 35 of the *Charter*.<sup>31</sup> Importantly, Kennedy provides an account of the *Haida v. British Columbia (Minister of Forests)*, [2004] case, in which the Supreme Court of Canada held that the Crown "had a legal duty to consult with the Haida regarding the harvesting of trees" and that the Haida had "claimed title to all of the lands of the Haida Gwaii [Queen Charlotte Islands] and the waters surrounding it for 100 years, but its title had not yet been legally recognized" (p. 3). Kennedy goes on to summarize a number of other Supreme Court cases which found that either the Crown or the province (or both) had failed to consult with Aboriginal peoples on "conduct that might adversely affect [Aboriginal right or title]" (p. 4). Concluding this overview, Kennedy notes that "the issue continues to be unsettled whether or not a province, lacking the constitutional capacity to extinguish Aboriginal and treaty rights, can for practical purposes ignore Aboriginal and treaty rights by deficiencies in their consultation process" (p. 5).

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**Marc G. Stevenson, "Indigenous Knowledge in Environmental Assessment" (1996) 49:3 Artic 278-291**

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<sup>31</sup> Section 35 reaffirms existing aboriginal and treaty rights in Canada, and, germane to discussions of Indigenous women's right to be included in consultations, specifically affirms that these rights are "guaranteed equally to male and female persons" (s. 35[4])

This article details the importance of balancing Indigenous traditional knowledge and Western science in modern resource extraction processes. Western scientific knowledge systems are too often viewed as being the only legitimate measures for environmental assessments. Stevenson highlights the male-centric nature of scientific tradition which has resulted in the silencing of Aboriginal women's voices and knowledge. Traditional knowledge keeps and Western science are seen as opposing forces, whereas Stevenson believes them to be complementary systems which can each bring a different cultural lens to environment management. Understanding the cultural context of Aboriginal knowledge is imperative to outsider appreciating the importance of these systems. "For many aboriginal people, knowledge is experience. Thus, knowledge has to be constructed for each individual and is not easily shared among individuals unless there is a mutual understanding and appreciation of that experience" (p. 6). Therefore, there must be a greater effort to not simply integrate Indigenous traditional knowledge into Western idea of the environment, but to build a strong cohesion of knowledge that is designed to work in "a delicate and natural balanced respect" (p. 7).

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### **Case Law**

*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222

*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511

*Rio Tinto Akan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650

*Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, [2010] 4 FCR 500

*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 2 SCR 550

*West Moberly First Nation v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247