Introduction

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Indigenous[1] Peoples have become an important participant in natural resource development across the globe. The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which calls for the free, prior and informed consent (FPIC) of Indigenous Peoples in decisions that involve or affect them, reflects and solidifies this role. While Canada was one of only four countries that dissented at the time of adoption, Canadian Prime Minister Justin Trudeau's Liberal government fully endorsed the declaration in 2016. Part of the reason Canada was initially reticent to sign was because it was unclear how the principles of FPIC sit with Canadian constitutional recognition of Aboriginal rights (Coates and Favel 2016). In the mid-2000s, a handful of decisions by the Canadian courts established that to maintain the honour of the Crown in its relations with Indigenous Peoples, governments in Canada have a fiduciary duty to consult and accommodate Indigenous Peoples' concerns in decisions or activities that could affect their rights or territories. Indeed, constitutional scholar Peter Hogg states that "no area of Canadian law has been so transformed in such a short period of time as the law of aboriginal rights" (Hogg 2009).

Indigenous People are being empowered in decision making to the point where they have been referred to as "resource rulers" in Canada (Gallagher 2011). Given the Canadian economy's

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[1] We note that Canadian governments have recently begun to use the word 'Indigenous', though the term 'Aboriginal' has a specific legal meaning and is used in the context of Canada's Constitution and includes First Nations, Inuit, and Métis. We use the term Indigenous as it is the most inclusive collective noun, as recommended by Indigenous Foundations (2017) and Joseph (2016). Our use of alternative terms reflects the use of those terms in works cited in order to maintain scholarly accuracy and the intent of the original work.

strong resource base, it is not a stretch to argue that Indigenous People now have an increasingly important role in the country's economic future. In addition, resource development provides a means to addressing the lack of opportunity Indigenous Peoples experience in Canada. Importantly, this opportunity is not necessarily limited to economic development and can include improvements in health, social, and cultural conditions. But the role that Indigenous Peoples play in resource development can range from protester to partner and many other forms in between. The purpose of this edited volume is to understand what leads to the establishment of a mutually beneficial relationship and what causes resource development projects to result in protests or legal challenges from Indigenous Peoples.

The contributors to this book answer this question — what leads to the establishment of a mutually beneficial relationship and what causes resource development projects to result in protests or legal challenges? — by investigating a cross-section of resource development projects in Canada in which Indigenous Peoples have played a critical role. While a variety of influences are addressed, the chapters focus on the institutions, mechanisms and processes used to consult and engage Indigenous communities as an important factor in whether these communities support resource development projects or not. In this introductory chapter we have two purposes. First, we provide a brief review of the context relevant to Indigenous Peoples and resource development in Canada. The extent to which political and legal developments in Canada and at the international level have empowered Indigenous communities in decision-making or allowed them to share equally in the wealth Canada's resources provide is not clear. Slow and uneven progress in developing equitable and mutually acceptable relationships and outcomes among Indigenous communities, resource development companies and government necessitates a better understanding of *what works* in these relations. Thus, the second goal of this chapter is to

identify and discuss the different mechanisms used to involve Indigenous communities in resource development decisions and activities. This provides a broad framework in which the subsequent chapters of this volume can be situated. Establishing a better understanding of how Indigenous communities are engaged and consulted by industry and government, and the relationships which exist among these groups, is essential to creating solutions to what often seems like an intractable problem.

Processes

Historically, Indigenous Peoples were excluded from decisions about resource development. This has led many to posit a fundamentally exploitative relationship between local Indigenous communities that live close to resources and wealthy governments and corporations who desire to develop those resources (Howlett et al. 2011; Abele 1997; Green 2003). This approach tends to view Indigenous Peoples solely as the victims of resource development. For example, the Berger report (1978), which reviewed the impacts of a proposed pipeline in the McKenzie Valley in Northwest Territories, is widely seen as groundbreaking for recognizing the adverse impacts of resource development on Indigenous communities. However, the report was largely silent on Indigenous perspectives of the project, relegating them to the role of passive receivers of the impacts of development rather than active participants with control over the future of their people and culture (Angell and Parkins 2011).

Over time, several mechanisms or processes have emerged through which the interests, aspirations and perspectives of Indigenous Peoples and communities can be incorporated into the planning and implementation of projects that could affect them. These include the government's duty to consult, which is often conducted through environmental assessment or other regulatory processes; agreements signed between Indigenous communities and private companies; and

shared governance and management arrangements that could include Indigenous communities, government and industry. These processes occur within broader institutional contexts, most notably different governance and legal regimes in different provinces and different treaty relationships, including modern treaties, historic treaties, and instances where no treaty has been signed.

Importantly, we do not assume that either development in all cases or no development in any case is the end goal or most desirable outcome. In some cases, Indigenous communities have worked to stop or dramatically alter resource development activities that would take place on their traditional territories, while in others, they have been keen to participate in projects to improve their situation. We do argue that, whatever the outcome, processes should seek to empower Indigenous communities in decision making while increasing the legitimacy of decisions among all actors, regardless of the actual outcome, is valuable. Chataway describes the importance of how decisions are made:

> "The importance of process, in addition to good structures, is often overlooked. However, a brief reflection on one's own experiences with decision making indicates that the same outcome, depending upon how it is arrived at, can alienate, divide and anger us, or it can empower and reassure us. This sense of procedural justice, the sense that one has had a voice and been treated respectfully, is so important that it has been found to predict our level of trust in our political representatives, independent of whether decision are made in our favour or not. For instance, the almost universally opposed White Paper that proposed in 1969 to terminate the Indian Act, may have been largely acceptable to Aboriginal People if it had been developed through a broad-based decision-making process with Aboriginal People" (Chataway 2002, 79).

This is not to say that outcomes are unimportant. Indeed, there has been significant debate about whether procedural justice can be separated from substantive justice, meaning the extent to which decisions protect Indigenous rights, minimize harms and maximize benefits to Indigenous communities (Sossin 2010). But substantive justice can be difficult to determine: a

project can be seen as beneficial or harmful to Indigenous communities depending on its specific characteristics, such as the nature of the activity and the relationship with the community (Anderson 1999, 2002; Slowey 2009). In addition, different parties may have different assessments. Chapter Two of this volume examines how Indigenous Peoples, governments and industry understand consultation and engagement and what they see as the purpose. In Chapter Three, Bikowski and Slowey engage this debate in the context of unconventional energy extraction in Alberta and New Brunswick. They explore whether the design and implementation of consultation and engagement contributes to Indigenous Peoples' perception of a project, compared to more substantive outcomes like the impact on the standard of living in the community and past relations with the Crown.

Duty to Consult

While the duty is consult is founded in the Canadian Constitution and its emergence in case law can be traced back to the 1970s, a series of court decisions in the 2000s greatly increased its importance in resource development decisions. The Haida Nation v. British Columbia (2004) and Taku River Tinglit First Nation v. British Columbia (2004) decisions established the duty to consult in cases where Indigenous groups had a claim[2] to the land in question. The Haida Nation case involved the transfer and replacement of a logging license by the BC government in the traditional territory of the Haida Nation on the Queen Charlotte Islands. The courts ruled that the Haida Nation had a strong claim to the land and the provincial government's actions could affect this. Therefore, to maintain honourable relations with Indigenous Peoples, the government had a duty to consult with them and attempt to address any impacts the decision might have before moving forward. The Haida decision highlights the

[2] A claim could involve actual ownership or title to the land or specific rights of use such as hunting or fishing.

importance of process by indicating that consultation must be meaningful. Although, there are no criteria set out for what specifically constitutes meaningful consultation, the decision indicates that it must affect reconciliation between and the Aboriginal People and the Crown.

The Mikisew Cree First Nation (MCFN) v. Canada case (2005) extended the duty to consult to instances where treaty rights were already established. In this case, the courts found that the Government of Canada had to consult with the MCFN regarding a new winter road that could affect their hunting and trapping rights designated under Treaty 8.[3] In 2010, the Beckman v. Little Salmon/Carmacks First Nation case confirmed that even when modern treaties[4] have been signed and contain provisions for negotiation, the duty to consult remains and serves as a constitutional protection or safety net in the relationship. At issue in the case was the transfer of land from the Yukon Government to a private citizen, where Indigenous hunting and fishing rights had already been established through a modern land claims process. Further decisions, such as the Clyde Rive and Chippewas of the Thames have continued to refine and provide guidance on how the duty to consult should be implemented.[5]

While the duty to consult has been established, Indigenous Peoples have also been pursuing claims of land ownership or title. This would provide direct control over the land and decision-making authority on activities conducted within it. In 2014, the first judicial recognition of Aboriginal land title was made in the Tsilhqot'in v. British Columbia case. The decision was the result of a series of court cases over several decades with established the concept of

[3] Treaty 8 is one of the 11 numbered treaties signed between the Government of Canada and Indigenous people between 1871 and 1921. It encompasses parts of northern Saskatchewan, Alberta and BC and part of the Northwest Territories.
[4] Modern treaties are comprehensive land claim agreements signed in the last fifty years between the federal or provincial governments in Canada and Indigenous peoples. These agreements define indigenous rights and title and often establish greater self-governance among indigenous communities.
[5] For a history of the duty to consult see Newman (2017).

Aboriginal title and a test that had to be met to prove ownership of a specified piece of land. While there has been much speculation among experts, and concern by governments and industry about the impact on getting resource development projects approved and built, there are limitations to the decision's broader application. These limitations come from the high level of evidence required to prove ownership, the amount of territory over which claims can be made, and the powers that ownership grants (Coates and Newman 2014).

Despite legal rulings that the federal government alone can fulfill the duty to consult, it has delegated some aspects of the process to provinces, industry and arms-length administrative organizations. The predominant instance where duty to consult is delegated is the environmental review process. Bodies that conduct the duty to consult on behalf of the Crown include federal or provincial environmental assessment agencies, the National Energy Board, and the Nuclear Safety Commission. Combining Indigenous consultation with existing regulatory bodies and processes makes sense on the surface because they both inform government decision making (Lambrecht 2013). However, Indigenous leaders and scholars have argued that existing processes have not lived up to expectations in terms of creating meaningful input for Indigenous groups (Wismer 1996; Noble and Udofia 2015). Shortcomings identified in the academic literature include insufficient time; asymmetry in capacity between Indigenous communities and government or industry; exclusion of traditional Indigenous knowledge; ambiguity around who, or what, part of an institution is responsible for the duty to consult (Promislow 2013; Ritchie 2013); a focus on individual projects in isolation rather than the cumulative impact of development (Ritchie 2013); and a lack of clarity over when accommodation is required and what form it should take (Mullan 2011).

In addition to the above, there are other issues or complications with the implementation of the duty to consult. For example, Gardner et al. (2015) studied a proposed hydroelectricity dam in Ontario where the local Indigenous group was a proponent. The authors found that other Indigenous communities located upstream from the project were affected and were not sufficiently consulted. There is also the question of who should be consulted in cases where more than one group or actor claims to speak for a single community. This issue has arisen when communities have different positions than national or regional Indigenous organizations (Peach 2016). Multiple consultations can have an impact on Indigenous groups that goes beyond those from a single project, as psychological and cultural impacts can arise when Indigenous communities are continually required to make their case and explain their concerns (Booth and Skelton 2006). This is particularly true when the consultation process is perceived to be a rubber stamp rather than meaningful engagement and does not empower these groups in development decisions.

The research and analysis that has emerged on the duty to consult shows a process that is still working out flaws and can result in unintended consequences. It is essential to understand more about how the consultation process is functioning and what it looks like in practice. Governments in Canada have produced a plethora of guidance documents for public officials which outline what consultation entails and how it should be undertaken (Aboriginal Affairs and Northern Development Canada 2011; Newfoundland and Labrador 2013; Saskatchewan 2013). But this provides only a narrow window into the process. In their chapter comparing two mining projects, one in Nunavut and one in Nunatsiavut, Rodon, Therrien and Bouchard address this dilemma by examining whether assessment processes can contribute to meaningful consultation.

IBAs and Economic Development

The most common way industry has engaged and negotiated with Indigenous groups is through impact benefit agreements. IBAs are private agreements signed between industry and an Indigenous community which outline the expected impacts if a project moves forward and the benefits that will be provided to the community. Some view the emergence of IBAs as a negative development for Indigenous Peoples, while others see them in a more positive light.

Cameron and Levitan (2014) argue that IBAs essentially turn the duty to consult over to private companies and limit Indigenous communities' access to legal and political channels to voice their concerns. Similarly, O'Faircheallaigh (2010) argues that IBAs cannot be separated from political processes and community planning. While they may provide economic benefits, they can also affect Indigenous groups' ability to oppose the project and their access to judicial and regulatory recourse. Dylan et al. (2013) echo this sentiment by suggesting that Indigenous communities have little power when signing IBAs because they do not have the ability to veto development. The project could still go ahead without their involvement, leaving them with little leverage in negotiations. In addition, Indigenous communities have limited tools to address poverty and poor social conditions. This make them more likely to accept an agreement that does not maximize their benefits because it is the only opportunity to improve their situation.

Fidler and Hitch (2007) question whether the benefits of IBAs are shared fairly and equally within and across communities. In addition, there can be asymmetry of information in negotiations and Indigenous communities do not necessarily have the capacity to be involved as equals in the process. IBAs are usually private documents which prevents Indigenous communities from learning and gaining expertise in this area. To ensure that Indigenous communities see economic benefits from development, Shanks (2006) argues that revenue

sharing should be negotiated between governments and Indigenous groups rather than through IBAs with industry.

The benefits of IBAs are often tied to a specific project, which makes the benefits localized and short term. Coates and Crowley (2013) suggest a regional approach to skill development that allows workers to be mobile and find new jobs in other communities. They also propose an IBA renewal system that ensures benefits will be long-term and is flexible enough to adapt to changes in economic circumstances. One of the issues with IBAs has been that they tend to focus on economic goals rather than community or social outcomes. This is often referred to as development in the community vs development of the community (Beckley et al. 2008). While many IBAs now contain provisions for community development (Sosa and Keenan 2001), others argue that to avoid a piecemeal approach, agreements addressing social programs should be negotiated with government rather than industry (Knotsh and Warda 2009). There is evidence to suggest that social development and cohesion within a community are actually prerequisites to economic development (Chataway 2002).

Other scholars have taken a more positive view of IBAs and view them as complementary to government's duty to consult. According to Fidler (2010), IBAs can be mutually beneficial: the proponent increases the certainty that the project will go ahead and be on schedule while Indigenous groups have a voice in development and receive benefits from the project. Prno, Bradshaw and Lapierre (2010) undertake a study of three communities that signed IBAs and find that they are seeing benefits although not all that were outlined in the agreements. Gibson et al. 2014) argue it is possible to link IBAs to traditional values of reciprocity and mutual exchange in some Indigenous communities. They suggest these agreements mirror early relations between Indigenous peoples and European settlers and provide the means for this to be

restored to some extent. In this volume, Wyatt and Dumoe examine the linkages between governance, community engagement and economic development in their chapter on the Meadow Lake model of forestry.

Treacy, Campbell and Dickson (2007) provide a list of activities involved in consultation including: providing accurate and timely information, providing financial contributions for expert assistance to these groups, soliciting and confirming indigenous interests and concerns, offering to work together and share benefits, and fully documenting and sharing with government all interactions. But there is evidence to suggest that communities which have control and play an important decision-making role in development decisions experience the best outcomes in terms of community and social development (Rodon and Lévesque 2015). This theme is taken up by Rodon, Therrien and Bouchard in this volume as they seek to better understand if and how impact benefit agreements contribute to meaningful consultation of the Indigenous communities that are involved.

Modern Treaties and Co-management

The modern land claims process, also referred to as comprehensive agreements or modern treaties, have been championed as an example of a new era in Indigenous-state relations based on a nation-to-nation relationship and the goal of Indigenous self-governance (Martin and Hoffman 2008). This process seeks to address Indigenous rights that have not been dealt with or address grievances existing treaties have not fulfilled. Since the 1970s, negotiations between the federal government and Indigenous Peoples has led to thirty agreements that provide protection of rights, transfer of land and capital, participation in resource development environmental management, and in some cases provisions for self-governance.

But there are serious questions as to whether modern treaties have led to substantive changes for Indigenous Peoples. A comparison by Rygard (2000) of two modern treaties, the 1975 James Bay and North Quebec Agreement and 1999 Nisga'a Final Agreement, finds that both bore similarities to historic treaties which extinguished fundamental Indigenous rights. A 2002 study by Saku finds that communities that had signed modern treaties did not display better socio-economic outcomes than other communities. Saku concludes that by themselves, modern treaties do not lead to economic development. Another study by Dana et al. (2009), focusing on the Dene people in the NWT, finds that concerns about the effects of resource development on environmental, cultural and social conditions remain in these communities. However, Slowey (2007) argues that because the process of negotiation is still set solely by the state, recent agreements such as Paix des Braves have not fundamentally altered the institution of Canadian federalism or empowered Indigenous Peoples. She argues there has not been a movement towards a nation-to-nation relationship or treaty federalism. In this volume, Cameron et al. examine the history of land claims agreements in Yukon and argue that their presence is a primary reason that there have been few protests among Indigenous communities over resource development. Rodon et al. also address this debate by examining whether a land claims agreement facilitates meaningful consultation in the two cases they studied. McMillan looks outside the lands claim process to the unique experience of the Mi'kmaq people, through the history of the Mi'kmaq Rights Initiative and the Kwilmu'lw Maw-klusuaqn Negotiation Office (KMKNO).

Within modern treaties, smaller-scale collaborative arrangements regarding resource development are possible. O'Faircheallaigh (2007) proposes that Indigenous groups should be involved in the ongoing monitoring and implementation of environmental regulations. One of the

issues with Indigenous engagement is that it only occurs as a project is under review. A concern regarding environmental assessment processes is that monitoring and ensuring compliance with standards is often weak. Therefore, there is an opportunity to kill two birds with one stone by creating a system where Indigenous communities have a role in ongoing environmental monitoring. O'Faircheallaigh notes there would have to be provisions for inclusion and utilization of traditional ecological knowledge.

As Indigenous people have an important role in the development of Canadian resources, it is essential to understand how their cultures and perspectives influence resource management. The knowledge and perspectives that Indigenous Peoples have acquired throughout their long history living on the land are often referred to as traditional ecological knowledge (TEK). TEK can be distinguished from the processes of inquiry and knowledge-generation which conform to western-based notions of the scientific method and typically inform resource management decisions. Insight and information gathered through traditional methods first emerged as a way for Indigenous groups to demonstrate their ownership or rights to the land. The recognition and inclusion of TEK in decision-making has been a controversial issue, as Indigenous groups have sought to ensure the knowledge and wisdom they possess is given equal weight to scientific analysis performed by industry and government.

Indigenous perspectives and knowledge can contribute to the management of resources in Canada. Aboriginal involvement in resource development projects and regulatory processes, and the use of TEK, can increase the sustainability of development (Hill et al. 2012). For example, Innu and Inuit communities contributed to the inclusion of sustainable development as a criteria in the environmental assessment of a mining project located at Voisey's Bay, Newfoundland and Labrador (Gibson et al. 2005). However, the extent to which Indigenous involvement will

strengthen the quality and durability of resource development decisions will be determined by the process that is used (Reed 2008). The process must fully engage Indigenous groups in a meaningful way, to ensure resource development and management incorporates local knowledge. Not only will this increase the legitimacy of the process, it will improve the quality of environmental outcomes that are produced.

Indigenous perspectives and TEK have been particularly influential in the study of the forestry sector as they provide a different definition of sustainable forestry compared to that of industry (Karjala, Sherry and Dewhurst 2003). Indigenous approaches to sustainable forestry are place-based and are not connected to a human presence. In contrast, industry's approach is resource-based which focuses on the utility of forests to humans. Parsons and Prest (2003) go further to argue that Aboriginal forestry is a distinct approach to resource development that combines current forestry management models with traditional cultural practices. The authors argue this approach is becoming more common with increasing participation of Indigenous communities in forestry.

Indigenous Peoples are involved in the forestry industry in a variety of ways (Wyatt 2008). These include forestry by Aboriginals, forestry for Aboriginals and forestry with Aboriginals. According to Wyatt, forestry by Aboriginals is the most common: Aboriginals are involved but have little decision-making authority. He suggests all three could lead to better representation of Aboriginal People but the term 'Aboriginal forestry' should only refer to a situation where practices and values have been informed by Indigenous perspectives in a meaningful way.

Several lessons emerged from the study of Indigenous involvement in resource management: each project has unique features and a one-size-fits-all approach to management

will not work; TEK is not just about documentation or recording of knowledge, it is about respecting the relationship between knowledge and knowledge-holders; co-management is a social learning process for managing human use of resources, not just an institution for managing the resources; and economic development is a sustainable process towards community goals not just about jobs and business revenue (Wyatt et al. 2010). However, Wellstead and Stedman (2008) are pessimistic about the likelihood that government policy and programming will shift to reflect these lessons and move towards a model of forestry by aboriginals.

The lessons provided by the literature are critical to ensuring that TEK and Indigenous perspectives are not included perfunctorily in decision-making and instead have a real influence on the outcomes of resource management. Once again, there is a need to study how consultation and engagement is conducted to ascertain the role TEK and Indigenous perspectives play in the process and what influence they have on decision-making. For example, are certain consultation practices more amendable to the inclusion of TEK than others? What barriers currently exist to a more equitable weighting of different forms of knowledge in the consultation process? These questions are an important gap in the research that needs to be addressed.

The Structure of the Book

The chapters in this book present a series of case studies that cover a range of resource development sectors, including oil and gas, renewable energy, mining and forestry. Indigenous communities in all regions of the country, including the Maritimes, the North, Central, and Western Canada are represented. In Chapter 2, Boyd, Lorefice and Winter examine policy statements and guideline documents on consultation and engagement produced by Indigenous groups, government and industry, providing insight into each groups' perspective on approaches to as well as the barriers and challenges to consultation. In Chapter 3, Cameron, Marten and

Sharpe describe the development of modern treaties in Yukon, and how this has influenced resource governance in the territory. With Chapter 4, Rodon, Therrien and Bouchard examine the role of land claim agreements, impact assessment processes and impact benefit agreements in contributing to meaningful consultation for mining projects on Inuit territory. In Chapter 5, McMillan, Maloney and Gaudet review the history of the Mi'kmaq Rights Initiative and the Kwilmu'lw Maw-klusuaqn Negotiation Office in establishing the Mi'kmaq consultation and negotiation methods. Bikowski and Slowey (Chapter 6) explore what elements influence Indigenous communities' support or rejection oil and gas projects, comparing oil sands development in Alberta to shale development in New Brunswick. Lastly, in Chapter 7, Wyatt and Dumoe describe the governance structure, community engagement and economic development arising from the Meadow Lake model of forest development.

Finally, and perhaps most importantly, the Indigenous communities included in the case studies have played a variety of roles in the projects that have been proposed or developed on or near their land. For example, as outlined by Bikowski and Slowey, the Fort McKay First Nation has developed many business partnerships with the oil sands companies in Alberta operating on their traditional territory and, although disputes have occurred, they have largely worked with industry as partners. This situation is similar for Meadow Lake and its relationship with the forest industry, who partnered with Wyatt and Dumoe in their chapter. In contrast, the Elsipogtog First Nation has protested against proposed shale-gas development in New Brunswick, leading to acrimonious relations with the proponent and government. In other cases, such as the Inuit located near the Mary River mine, collaborating with Rodon, Therrien and Bouchard, and Mik'maq communities involved in the KMNKO process, partnering with McMillan, divisions emerged between the broader organization representing Indigenous interests

and the local communities. Studying these cases, and the others included in the book, will provide a better understanding of the agreements, organizations and mechanisms used to consult and engage Indigenous Peoples and their impact on the acceptance of resource development. It will also create insights and lessons that can improve the design and implementation of those processes and institutions.

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