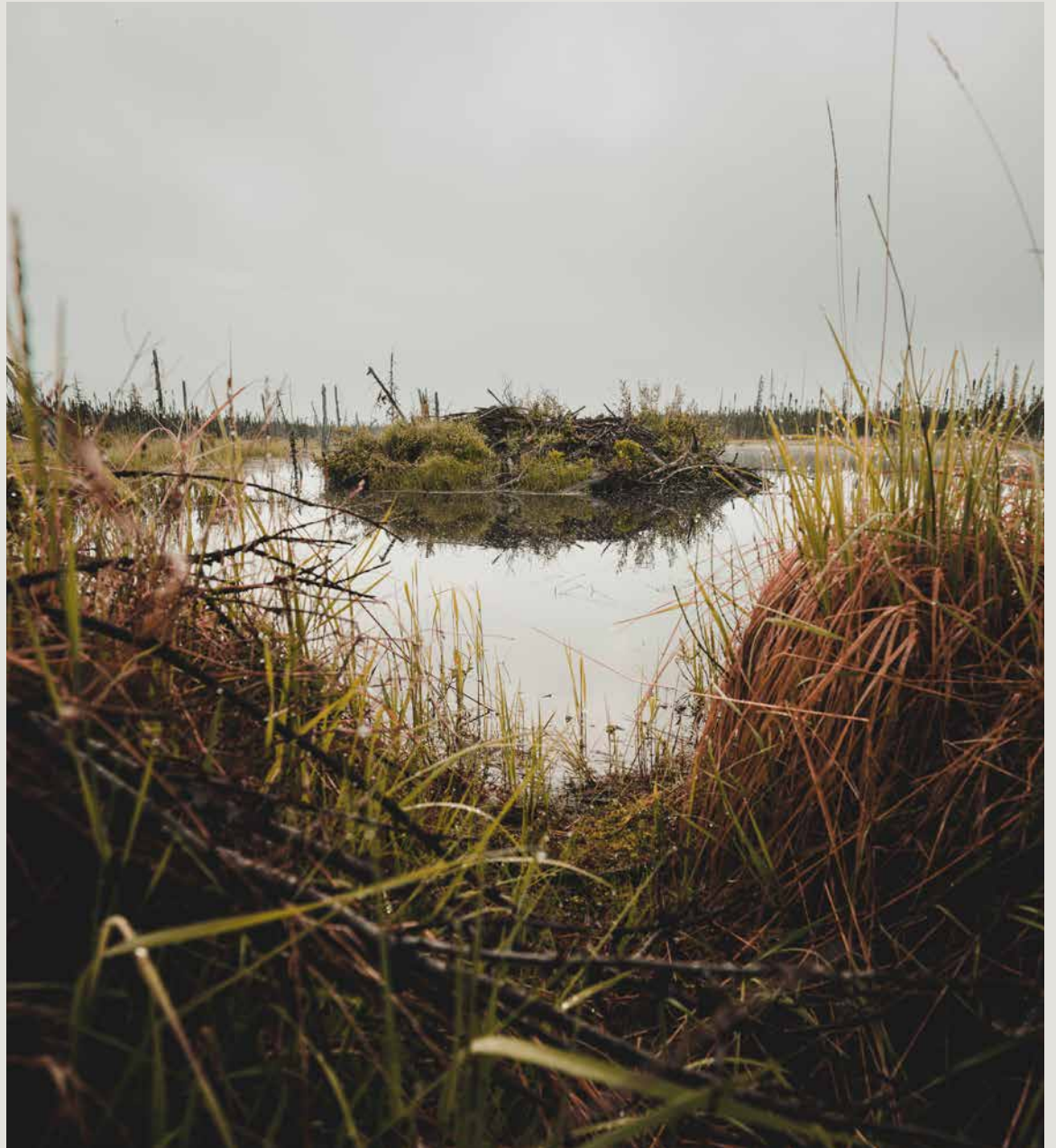


Indigenous Laws Module

03



AT A GLANCE

What is in the Indigenous Laws Module

This Module deals with how First Nations use their own laws in the environmental assessment (EA) process. It includes information and discussion about the revitalization and application of Indigenous law to EA processes, drawing on the work of Indigenous scholars and Knowledge Holders, including lawyers and academics, who have focused on identifying and asserting Indigenous laws in the Canadian legal system. Those Indigenous laws are based on knowledge provided by Elders, Indigenous lawyers and academics, and Knowledge Holders. This Module also considers sources and historic interpretation of Indigenous law, and sets out examples of how some First Nations have revitalized and applied Indigenous law in an EA context.

What is included in this Module is not an exhaustive list of Indigenous law sources or practices First Nations can draw on. Many First Nations may find their laws rooted in other processes and sources, which do not necessarily fit neatly within the frameworks and categories that are discussed here. There are multiple sources for Indigenous laws and they can be expressed in different forms and structures. First Nations should consider the following information as offering some tools that can help First Nations structure their own unique laws, but they are not the only tools that are available.

With that in mind, the Module offers several methods and sources that First Nations may

consider in identifying their own laws for the purpose of participating and asserting their laws in EA processes. This Module is divided into the following sections:

Section 1: Sources and Forms of Indigenous Law

Section 2: Methods for Revitalizing Indigenous Law

Section 3: Examples and Case Studies of Indigenous Law in Action in EA Processes

As discussed in the Canadian Legal System Module, when we talk about EA, we are referring to processes required under federal and provincial law to review the possible environmental impacts of a project before it is approved. The focus is on EA under federal and provincial laws. However, many First Nations across Canada have conducted their own EA for a project, whether by asserting jurisdiction over projects proposed in the First Nation's traditional territory or EAs for projects on reserve, and we include examples of these types of EAs in this Module too. The focus of the Indigenous Laws Module is about **how First Nations have guided and informed, and can continue to guide and inform, the EA process based on their own laws.**

SECTION 1

Sources and Forms of Indigenous Law

Indigenous law refers to First Nations' own legal systems that govern their relationships, that they use to manage and relate to their lands and waters, and that they use to resolve conflicts. First Nations always had their own legal systems, but many of those systems were displaced by the imposition of foreign laws and systems through colonialism.¹ Despite that displacement, First Nations' legal systems still exist. This section will review some sources and forms of Indigenous law.

It is important to note that First Nations often have different sources, experiences and understandings of their Indigenous laws. Indigenous law informs how First Nations' make political and social de-

isions, and informs how First Nations manage and relate to lands, waters, animals, and other people.² For some, Indigenous legal traditions and principles are fundamental in terms of how they guide behaviours and understandings of how to interact with lands and waters. As such, it can be challenging for a First Nation to identify and communicate very specific legal principles that need to be followed in federal or provincial EAs. This is even more difficult because of the history of colonialism that Indigenous Peoples have been subjected to in Canada. Colonialism functioned to reduce, if not entirely deny, the existence of Indigenous law.

In this context, we draw on the work of Indigenous law scholars, such as Professors John Borrows and Val Napoleon, about identifying and revitalizing Indigenous laws. The work of scholars like Dr. Borrows and Dr. Napoleon has been focused on advancing the understanding



- 1 Manitoba, Aboriginal Justice Inquiry of Manitoba. 1999. *The justice system and Aboriginal People*, vol 1 (Winnipeg), at chapter 2, p. 1.
- 2 Napoleon, V. *Thinking about Indigenous legal orders*. 2007. National Centre for First Nations Governance, at p. 2.

of Indigenous legal traditions within the Canadian legal system.

This section also draws on the work of several other Indigenous law academics including Darcy Lindberg, Naomi Metallic and Hadley Friedland.

Sources of Indigenous Law

Indigenous law lives in many places. These places might be different for different First Nations.

Five Sources of Indigenous Law

Dr. Borrows, a legal scholar and member of the Chippewas of Nawash Unceded First Nation, talks about five sources of Indigenous law:³ sacred law, natural law, deliberative law, positivistic law and customary law.

The following section reviews these types of law and provides some examples on how they can be applied. Importantly, many expressions of Indigenous law rely on multiple types of law. For example, a land-based

learning might rely on sacred knowledge about animals or sacred sites, and so help to inform law, while one might learn about natural law through storytelling and oral history shared by Elders. Given that, the following types of law are described more categorically than it may work in practice.

1. Sacred Law

Dr. Borrows explains that Indigenous “[l]aws can be regarded as sacred if they stem from the Creator, creation stories, or revered ancient teachings that have withstood the test of time.”⁴ Sacred laws are given the “highest respect” because they are from the Creator, and “contain instructions about how all beings should relate to specific territories.”⁵

An example of sacred law is the Anishinaabe principle of **minopimàdiziwin**. According to *minopimàdiziwin*, the land is not to be exploited for human gain. *Minopimàdiziwin* requires that Anishinaabe create a reciprocal relationship with land and “achieve balance with nature.”⁶

Sources of Law



Sacred law
manidoo-inaakingewin



Natural law
akinoomagewin



Deliberative law
dazhidaa'idiwin inaakingewin



Positivistic law
ozhi'bii-inaakingewin



Customary law
kinwezhawewin

³ Borrows, J. *Canada's Indigenous constitution*. 2010. University of Toronto Press, at 33-66.

⁴ Borrows, J. *Canada's Indigenous constitution*. 2010. University of Toronto Press, at 34.

⁵ Borrows, J. *Canada's Indigenous constitution*. 2010. University of Toronto Press.

⁶ Sioui, M., & Mcleman, R. 2014. Asserting mino pimàdiziwin on unceded Algonquin territory: Experiences of a Canadian 'non-status' First Nation in re-establishing its traditional land ethic. 2014. 10:4 *AlterNative: An International Journal of Indigenous Peoples*, at 365.

This reciprocal relationship demands that people live in balance with all created beings, and posits that the land is not an object to be used for human ends but a “member of the community who demands the highest respect.”⁷ Eva Petoskey, a former elected official of the Grand Traverse Band of Ottawa and Chippewa Indians (a Nation located in Michigan), described *Minopimàdiziwin* thus:

... [I]f you were to be standing in your own center, then out from that ... are the circles of your immediate family. And then out from that your extended family, and out from that your clan. And then out from that other people within your tribe. And out from that people, other human beings within the world, other races of people ... And out from that, the other living beings ... the animals, the plants, the water, the stars, the moon and the sun, and out from that, the spirits, or the manitous, the various spiritual forces within the world. So when you say that, mino-bimaadziwin, you’re saying that a person lives a life that has really dependently arisen within the web of life. If you’re saying that a person is a good person, that means that they are holding that connection, that connectedness within their family, and within their extended family, within their community.⁸

2. Natural Law

Natural laws are described as being “written on the earth.”⁹

A natural law may be based on observing how a plant interacts with an insect, or how animals interact with each other; the First Nation draws legal principles from that experience.¹⁰

An Elder or Knowledge Holder might practise natural law by “recognizing and protecting the relationship between butterflies and milkweed,” or otherwise understanding how different animals or objects in the natural world interact.¹¹

An example of this type of law is the Taku River Tlingit First Nation’s natural law. This is often associated with Tlingit Traditional Knowledge, and works to

preserve woodland caribou herds in northern British Columbia and Yukon.¹²

Tlingit Elders and Knowledge Holders drew from both on the land teachings and oral histories in describing caribou migration and settlement practices.¹³ Specifically, Elders used natural law to understand that caribou, in the winter, used low-elevation forests, especially mature lodgepole pine with lichen ground cover. Elders also indicated that caribou herds used low-elevation valleys and lakes as predator escape terrain.¹⁴

Collectively, interviews with Elders about Traditional Knowledge helped to identify their natural law, and can be used to inform and create a legal framework that supports ecological revitalization efforts.

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- ⁷ Maclean, Y.Y. 2021. Land ethics in conflict. 1:2 *Aletheia*, the Arts and Science Academic Journal, at p. 7.
 - ⁸ Petoskey, E. 2012. 40 years of the Indian Civil Rights Act: Indigenous women’s reflections. In Carpenter K.A., Fletcher M.L.M., & Riley A.R. *The Indian Civil Rights Act at forty*. Los Angeles: UCLA American Indian Studies Center, 39 at 47.
 - ⁹ Napoleon, V., & Friedland, H. 2015. *Indigenous legal traditions core workshop materials*. Victoria: University of Victoria, at 4.
 - ¹⁰ Borrows, J. 2010. *Canada’s Indigenous constitution*. University of Toronto Press, at 28-29.
 - ¹¹ Borrows, J. 2010. *Canada’s Indigenous constitution*. University of Toronto Press, at 30
 - ¹² Taku River Tlingit First Nation, Polfus J.L., Heinemeyer K., et al. 2014. Comparing traditional ecological knowledge and western science woodland caribou habitat models. *The Journal of Wildlife Management*, 78(1): 112-121.
 - ¹³ Taku River Tlingit First Nation, Polfus J.L., Heinemeyer K., et al. 2014. Comparing traditional ecological knowledge and western science woodland caribou habitat models. *The Journal of Wildlife Management*, 78(1): 117.
 - ¹⁴ Taku River Tlingit First Nation, Polfus J.L., Heinemeyer K., et al. 2014. Comparing traditional ecological knowledge and western science woodland caribou habitat models. *The Journal of Wildlife Management*, 78(1), at page 117.

The Gitksan's verbal records about past interactions with the local environment, known as *adaawk*, also show how oral history can represent the practice of natural law. This suggests that First Nations might look to oral histories to represent natural law in addition to on the land teachings. The Gitksan are from the northwest coast of British Columbia, and they form part of the Tsimshian language family.¹⁵ The *adaawk* (collective oral history) tells of the origins and migrations of the Gitksan to their current territories and establishes ownership over their land and resources. To communicate *adaawk* and ensure that actions are compliant with *adaawk*, *adaawk* are recounted at Gitksan feasts.¹⁶

3. Deliberative Law

Deliberative law is created when individuals speak to each other. The conversation could involve one community member convincing another of their point of view, community members sharing how they arrived at opposing opinions, or community members debating one decision over another.¹⁷

Dr. Borrows explains that deliberative law can “adapt to changing circumstances in accordance with the needs and priorities of members and in response to external

pressures.”¹⁸ In other words, as circumstances change, First Nations can revise laws to ensure that laws are responsive to contemporary pressures. As well, deliberative law allows community members to call out outdated and unhelpful practices, ensuring that laws are not oppressive.¹⁹

The Navajo philosophy of *beehaz aoanii* shows how deliberative law is practised.²⁰ The Navajo use the Peacemaker Ceremony to draw a connection between spirituality and law when applying Navajo law to modern conflicts.²¹ This model is based on the Navajo tradition of “talking things out” and involves building a talking circle between conflicting parties. The Navajo delegate an Elder

or Knowledge Holder as the *naat’anni*, who sits in the middle of the talking circle and guides the conversation. The *naat’anni* leads the “justice” process by encouraging dialogue and applying Navajo law to the conflict.²² This person relies on storytelling to restore “harmony and good relations” and help the parties problem-solve.²³

Another example of deliberative law is the Haida use of the Potlach. The people of the Haida Nation have occupied Haida Gwaii (located off the western coast of British Columbia) since time immemorial.²⁴ The Haida have clans with hereditary Chiefs²⁵ who are appointed by the matriarchs of the clans.²⁶ The pot-

¹⁵ Napoleon, V. 2019. Did I break it? Recording Indigenous (customary) law. 1:22 *PER* 2, at 3.

¹⁶ Napoleon, V. 2019. Did I break it? Recording Indigenous (customary) law. 1:22 *PER* 2, at 18.

¹⁷ Borrows, J. 2010. *Canada’s Indigenous constitution*. University of Toronto Press, at 44.

¹⁸ Borrows, J. 2010. *Canada’s Indigenous constitution*. University of Toronto Press, at 47.

¹⁹ Napoleon, V. & Friedland, H. 2015. *Indigenous legal traditions core workshop materials*. Victoria: University of Victoria, at 4.

²⁰ Pinto, J. 2016. Peacemaking as ceremony: The mediation model of the Navajo Nation. *The International Journal of Conflict Management*, 11(3).

²¹ Pinto, J. 2016. Peacemaking as ceremony: The mediation model of the Navajo Nation. *The International Journal of Conflict Management*, 11(3), at 165.

²² Pinto, J. 2016. Peacemaking as ceremony: The mediation model of the Navajo Nation. *The International Journal of Conflict Management*, 11(3), at 170.

²³ Pinto, J. 2016. Peacemaking as ceremony: The mediation model of the Navajo Nation. *The International Journal of Conflict Management*, 11(3), at 172.

²⁴ Council of the Haida Nation. March 2022. *History of the Haida Nation*. Council of the Haida Nation. <https://www.haidanation.ca/haida-nation/>

²⁵ Quail, S. 2014. Yah’guudang: The principle of respect in the Haida legal tradition. 47:1 *UBC L Rev*, 673 at 649.

²⁶ Quail, S. 2014. Yah’guudang: The principle of respect in the Haida legal tradition. 47:1 *UBC L Rev*, 673.

latch is central to the Haida's traditional system of governance.²⁷ In 2016, a potlatch was hosted to strip two hereditary Chiefs of their titles. They were being stripped of their titles because they had supported Enbridge's Northern Gateway Pipeline, contrary to Haida community consensus to oppose the pipeline.²⁸ The Haida Elders considered whether the Chiefs' actions had breached the community consensus, and ultimately removed the Chiefs for breaching the law.

4. Positivistic Law

Positivistic law is used to describe rules and teachings that people follow solely because of the authority of the person proclaiming them. Positivistic law could be recorded in agreements, treaties, judgments, statutes, songs, stories, wampum belts, scrolls, totem poles, button blankets and rocks.²⁹

The *Tekeni teyohá:te* (Two Row Wampum) is one example of positivistic law. In 1613, the *Tekeni teyohá:te* recorded a diplomatic treaty between the Dutch and Haudenosaunee. Depicted as two parallel white lines on a purple background, the Two Row Wampum represents and codifies the intended relationship between the Dutch and Haudenosaunee. The *Tekeni teyohá:te* depicts two rivers, one for Haudenos-

aunee canoes and the other for Dutch vessels, travelling side by side but never interfering with one another.³⁰ The belt is an example of positivistic law because it represents a treaty between two nations and the treaty derives its authority from the inherent jurisdiction of the nations that entered into the treaty.

A modern example of positivistic law are by-laws passed by First Nations governments. Under the *Indian Act*, Chief and Council pass by-laws on reserve with respect to local matters and the community members.³¹ Naomi Metallic, a lawyer and law professor from the Listuguj Mi'gmaq First Nation, discusses how recent amendments to the *Indian Act* empower First Nations to legislate in accordance with Indigenous legal principles and self-government.³² The *Indi-*

an Act is a law that has been imposed on First Nations and part of the legal system that has served to undermine First Nations' own legal traditions. For that reason, many First Nations find the *Indian Act* challenging and constraining to work within. However, the *Indian Act's* by-law powers on reserve do allow First Nations to exercise control over local matters, including the areas of child welfare, social assistance and education. As such, some First Nations have used those powers to exercise their jurisdiction. For example, Spallumcheen First Nation passed the *Spallumcheen Indian By-law #3 – A By-law of the Care of our Indian Children*, in 1980.³³ This by-law relies on both the *Indian Act* and the inherent right of self-determination in giving the First Nation the power “to provide for the health of residents on the reserve,”

²⁷ Quail, S. 2014. Yah'guudang: The principle of respect in the Haida legal tradition. 47:1 *UBC L Rev*, 673.

²⁸ Kung, E. September 2016. *Field notes from the Haida Gwaii potlatch: Why government and industry should take heed of Indigenous governance decisions*. West Coast Environmental Law. <https://www.wcel.org/blog/field-notes-haida-gwaii-potlatch-why-government-and-industry-should-take-heed-indigenous>

²⁹ Borrows, J. 2016. Heroes, tricksters, monsters, and caretakers: Indigenous law and legal education. 61:4 *McGill LJ*, 795 at 821.

³⁰ Hawkins, C. 2020. *Across the Great Water: Indigenous tobacco and Haudenosaunee diplomacy in early modern England, 1550-1750*. Edmonton: University of Alberta, at 29-30.

³¹ Metallic, N. 2016. *Indian Act* by-laws: A viable means for First Nations to (re)assert control over local matters now and not later. 67:1 *UNB*, 211 at 215-16.

³² Metallic, N. 2016. *Indian Act* by-laws: A viable means for First Nations to (re)assert control over local matters now and not later. 67:1 *UNB* 211 at 212.

³³ Metallic, N. 2016. *Indian Act* by-laws: A viable means for First Nations to (re)assert control over local matters now and not later. 67:1 *UNB*, 211 at 219.

the power over “the observance of law and order,” and the power over “the prevention of disorderly conduct and nuisances.”³⁴

5. Customary Law

Customary laws are created through repetitive social interactions and are accepted as binding by those who participate in the interactions. Customary law relies on unspoken and intuitive agreements about how relationships should be regulated and what conduct is appropriate.³⁵ Customary law may be found in oral and written traditions, opinions of Elders or community consensus.³⁶

An example of customary law is the Anishinaabek custom of treating the environment as a participant in legal decision-making.³⁷ This Anishinaabek customary law can be seen in the *Nibi Declaration of Treaty #3*, which was ratified in 2019 at the Anishinaabe Treaty #3 Chiefs National Assembly.³⁸ The Declaration voices the relationship with Nibi (water) that all Anishinaabe have.

The declaration requires that the spirit of Nibi be central to decision-making and governance, and it follows Anishinaabek customary law because it respects the environment’s desire to be a decision-maker.³⁹

Examples of Indigenous Laws

Cree Law: Five Teachings

Darcy Lindberg, a Cree lawyer and assistant law professor, talks about five foundational ethical teachings which root Cree law and the good way:

- *Tâpwêwin* (truthfulness);
- *Tapateyimisôwin* (humility);
- *Wâhkôtowin* (law of relating);
- *Miyo-wîcêhtowin* (good aid/assisting); and
- *Witaskewin* (neighborliness).⁴⁰

These five Cree law foundational tenets derive from various sources described by

Dr. Borrows, including land-based natural law teachings, oral history deliberative law and other sources. Dr. Lindberg further describes how Cree use other vehicles for legal transmission, including dreaming.⁴¹ “[D]reams can be legal, but their legality is dependent upon their relation to these other systems of deliberation, and the interpretation that is offered by these deliberative mechanisms.”⁴² Dreaming relies on multiple sources and deliberative frameworks for their interpretation into law. Elders engage in deliberative law practices, such as storytelling or ceremonial practices, to interpret dreams and then suggest what legal impact they might have.⁴³

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- 34** Metallic, N. 2016. *Indian Act* by-laws: A viable means for First Nations to (re)assert control over local matters now and not later. 67:1 *UNB*, 211 at 219.
- 35** Napoleon, V., & Friedland, H. 2015. *Indigenous legal traditions core workshop materials*. Victoria: University of Victoria, at 5.
- 36** Borrows, J. 2010. *Canada’s Indigenous constitution*. University of Toronto Press, at 63.
- 37** Craft, A., & King, L. 2021. Deliberative constitutional amendments. 13:4 *Water*, 532 at 541.
- 38** Grand Council Treaty #3. May 2019. *Nibi (water) declaration unanimously supported at the Anishinaabe Treaty #3 Chiefs National Assembly*. Grand Council Treaty #3 <http://gct3.ca/nibi-water-declaration-unanimously-supported-at-the-anishinaabe-treaty-3-chiefs-national-assembly/>
- 39** Craft, A., & King, L. 2021. Deliberative constitutional amendments. 13:4 *Water*, 532 at 541.
- 40** Lindberg, D. Undated. *The richness of Witaskewin-Indigenous law and legal ethics teaching*. Presented by the Indigenous Initiatives Office, Faculty of Law, University of Toronto. <https://www.law.utoronto.ca/programs-centres/programs/indigenous-initiatives-office/iio-speaker-series>
- 41** Lindberg, D. 2017. *Kihcitwâw kîkway meskocipayiwin (sacred changes): Transforming gendered protocols in Cree ceremonies through Cree law*. University of Victoria.
- 42** Lindberg, D. 2017. *Kihcitwâw kîkway meskocipayiwin (sacred changes): Transforming gendered protocols in Cree ceremonies through Cree law*. University of Victoria, at 2.
- 43** Lindberg, D. 2017. *Kihcitwâw kîkway meskocipayiwin (sacred changes): Transforming gendered protocols in Cree ceremonies through Cree law*. University of Victoria.

Cree Elder Doreen Spence affirms this process of oral stories and oral institutions interacting with other sources of Indigenous law. As Spence explains, Elders use their knowledge to apply Indigenous law in a way which best meets the needs of the community at a specific moment in time.⁴⁴ Elders, honoured for their knowledge and understanding of cultural and spiritual protocol within a Nation, use that knowledge to provide guidance and interpretation for their community.⁴⁵

Anishinaabe Law

Anishinaabe law is centred in relationships.⁴⁶ Anishinaabe-Métis lawyer and law professor Aimée Craft shares that “the Great Spirit instructed [Anishinaabe] to honour all of life and respect all of Creation.”⁴⁷ The relationship between Anishinaabe and other life informs a legal system that is structured relationally, with a realm of responsibilities to other creation. In Anishinaabe law, Professor Craft explains: “[W]hen considering the impact of our actions, we do not think in terms of parties with a direct interest, but rather we evaluate the many combinations of relationships within a broader web of relationships that exist within Creation.”⁴⁸

This reciprocity extends to include legal relationships to rocks, trees and water. For Anishinaabe, natural objects such as water are treated as actors in a relationship. In Anishinaabe law, water is an independent agent which interacts with other actors.⁴⁹

Anishinaabe law is non-hierarchical, with each level of law being part of a set of concentric circles dependent on each other for a complete legal understanding.⁵⁰ These levels include spiritual law, natural law and customary law.

Spiritual law is considered the Creator’s Law. This law is given to Anishinaabe through ceremony, creation stories, and laws otherwise passed through the Creator’s instructions.⁵¹ These are considered “an underlying set of normative values that reveal themselves to us regularly throughout our lives.”⁵²

Natural law derives from spiritual law, and is learned from the land and other beings in Creation.⁵³ This form of law, for Anishinaabe, is learned through obser-

⁴⁴ Spence, D. *The crucial role of Indigenous elders*. <https://www.youtube.com/watch?v=lpvy8yVTVoQ>

⁴⁵ Stiegelbauer, S.M. 1996. What is an Elder? What do Elders do? First Nation Elders as teachers in culture-based urban organizations. *The Canadian Journal of Native Studies*, XVI: 1.

⁴⁶ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 56.

⁴⁷ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 56.

⁴⁸ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 56.

⁴⁹ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 58.

⁵⁰ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 58.

⁵¹ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 59.

⁵² Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 59.

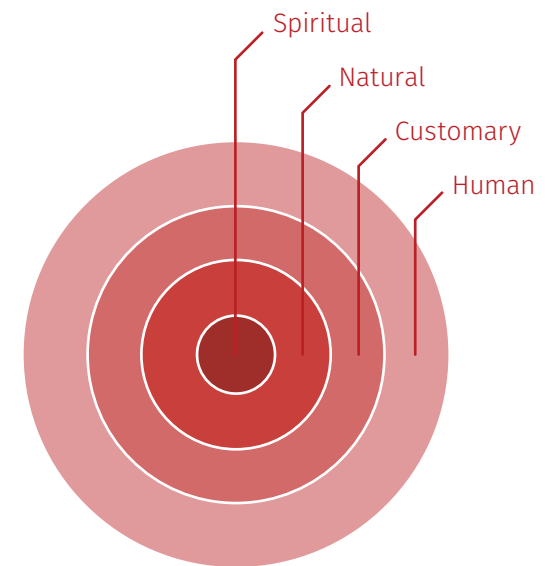
⁵³ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 59.

vation of how beings interact with each other. Anishinaabe natural law shows that balance is necessary between human relationships to other beings. Recognizing responsibilities to each other is necessary under natural law, both for the goal of working toward *mino-biimaadiziwin* (collective well-being) and for fulfilling the call to love based on the Creator's spiritual instructions.

Customary law is the application of these spiritual and natural law teachings to human relationships.⁵⁴ Some Elders explain Anishinaabe customary law as the Seven Grandfather and Grandmother teachings of love, honesty, respect, courage, humility, wisdom and truth.⁵⁵

Collectively, these forms of law each inform Anishinaabe law and often work in tandem. Consider the *Manito Aki Inakonigaawin*, adopted by the Grand Council of Treaty #3. *Manito Aki Inakonigaawin* was officially written and ratified by Elders of the Nation of Treaty #3 in 1997. In the spring and summer of 1997, a

gathering of Elders was held in Kay-Nah-Chi-Wah-Nung at Manito Ochi-waan. The Elders brought the written law through ceremony, where the spirits approved this law and respectfully petitioned the National Assembly to adopt it as a temporal law of the Nation. A traditional validation process was held through a shake-tent ceremony. Elders and Knowledge Holders worked extensively with the traditional shaker to decide the exact question to ask during the ceremony. This would allow for a clear understanding and the greatest certainty when asking the spirits for guidance in regards to writing the law.⁵⁶



⁵⁴ Craft, A. Undated. Navigating our ongoing sacred legal relationship with Nibi (water). *Special Report: UNDRIP implementation, More reflection on the braiding of international law, domestic law, and Indigenous laws*. Centre for International Governance Innovation, at p. 60.

⁵⁵ McGregor, D. 2013. Indigenous women, water justice and zaagidowin (love). 30:2-3 *Can Woman Stud*, 71, at 71-78.

⁵⁶ Grand Council Treaty #3. Undated. *Manito Aki Inakonigaawin*. <http://gct3.ca/land/manito-aki-inakonigaawin/>

SECTION 2

Methods for Revitalizing Indigenous Laws

Just as there are various sources of Indigenous laws and those sources may vary among First Nations, so too there are various means for revitalizing and asserting those Indigenous laws.

Some First Nations may choose to preserve their laws orally and others in writing. There are different frameworks and tools that First Nations use to preserve their laws, such as oral histories, consultation protocols, or written legal codes. Any and all of these may be used by First Nations when engaging in EA processes.

Whatever the framework, a First Nation may first want to engage in a process of identifying the central principles of their

Indigenous law in order to then revitalize and assert that law. This section summarizes two suggested methods for doing so: the participatory method and the case brief model.

1. A Participatory Method of Revitalizing Laws

The aim of the work of revitalizing Indigenous law is to identify Indigenous legal principles from various community sources, such as interviews with Elders and Knowledge Holders and research about oral traditions and histories. Then, that information is put into a format that can be used in Canadian legal frameworks, such as an EA process.

Typically (though not always), that is in a written format such as a statement of legal principles, a consultation or engagement protocol, or a declaration.

On the following page is a summary of one method that draws on best practices from organizations that work with First Nations on revitalizing their Indigenous laws – namely, the Indigenous Law Resource Unit⁵⁷ and West Coast Environmental Law.⁵⁸

⁵⁷ Indigenous Law Research Unit: A research unit at the University of Victoria's Faculty of Law. ilru.ca

⁵⁸ West Coast Environmental Law: Transforming the legal landscape. wcel.org

A Participatory Method for Revitalizing Laws



What is your First Nation's goal?

- Write down your laws to give to others?
- Create a Land Code?
- Develop a Consultation Protocol?



Gather your resources

- Where can you find about oral history, land-based learnings and other teachings?
- E.g., interview Elders, find historical records, transcripts from court claims



Analyze your sources to understand the legal principles

- What legal principles are in the information you collected?
- E.g., what do the oral histories and stories tell you about how to care for the environment or how to interact with others?



Gather the legal principles and create a framework

- Develop a clear framework, keeping in mind your goal. Clearly state the legal principles so that they can be asserted and enforced
- E.g., draft your law, Land Code or protocol



Report back to your First Nation

- Take the framework back to your First Nation for comment and feedback
- E.g., hold workshops, host engagement sessions



Revise the framework and report back

- Incorporate feedback and comments and report back to your First Nation

2. Case Brief Model for Revitalizing Indigenous Laws

Dr. Borrows provided a model for synthesizing Indigenous law⁵⁹ that treats First Nations stories as similar to case law from Canadian courts, and those stories are used to inform and create legal principles. Canadian law that comes from court cases is referred to as **precedent**.

Dr. Borrows describes how First Nations stories are similar to case law precedent, as they provide a reason for and reinforce consensus about broad principles. They justify deviations from generally accepted standards, and provide moral and cultural sanctions if precedent is violated.⁶⁰ As with court cases, oral stories can be used as a record of fact patterns and the moral sanctions for breaking Indigenous law.⁶¹

Dr. Hadley Friedland, an associate law professor at the University of Alberta, and

⁵⁹ Borrows, J. 1996. With or without you: First Nations law (in Canada). 41 *McGill L.J.* 629, at 646-665.

⁶⁰ Borrows, J. 1996. With or without you: First Nations law (in Canada). 41 *McGill L.J.* 629, at 647.

⁶¹ Borrows, J. 1996. With or without you: First Nations law (in Canada). 41 *McGill L.J.* 629, at 647.

Dr. Val Napoleon, a legal scholar and a member of the Saulteau First Nation and adopted member of the Gitanyow (Gitxan) House of Luuxhan, have built on Dr. Borrows' practice of "briefing" Indigenous oral stories.⁶² The case brief model is similar to what lawyers practising Canadian law do to summarize the legal principles that have been established or discussed in a court decision. You can use the case brief model to summarize the legal principles of oral history in a story.

This process for creating a set of legal standards from oral history can take place through two steps:

Step 1 – Identify single Indigenous oral histories and consider their legal meaning through the case brief model; and

Step 2 – Collect several oral stories and find the legal standard that comes from all of those stories.

Step 1 – Case Brief Model: Individual Oral Stories

The following is how you would structure a **Case Brief** for each individual oral story.⁶³

Case Brief:

- What is the name of the story?

Issue/Problem:

- What is the main human problem you are looking at within the story?
- What is the story trying to tell you?

Facts:

- What are the main parts of the story?
- Focus on the parts that matter to the issue or the main problem that you are looking at within the story.

Decision/Resolution:

- What is the resolution to the problem? Is there a decision that resolves the problem? If there is no clear human decision, what action resolves the problem?
- It is important to think back to the issue or problem you identified. Most stories have many decisions, and the key is focusing on what decision or action leads to the resolution to the particular issue or problem you are looking at.

Reason:

- What is the reason behind the decision or resolution? Is there an explanation in the story? If not, can you infer what the reasons are?

It is the shared and collective reasoning that makes this a legal analysis. Sometimes the stories state the reasons explicitly, meaning the reasons are stated clearly, and at other times the reasons are implicit, meaning you have to do some thinking to figure out the reasons. In either case, the task is to consider **the "why"** behind the decision or response.

After "briefing" an individual oral story, First Nations can then either use the individual law or moral teaching provided in the law, or move on to Step 2 as a way to continue building a larger legal framework based on multiple stories.

Step 2 – Case Brief Model: Multiple Oral Cases

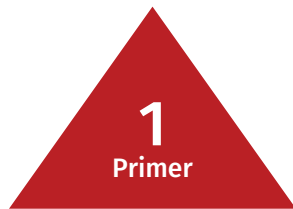
Dr. Friedland and Dr. Napoleon suggest a second step that has three stages: (1) Primer, (2) Synthesis, and (3) Preliminary Legal Theory.

1. Primer

Contextualize the story within the po-

⁶² Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16.

⁶³ Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16, at 23.



litical structure, legal order and history of the First Nations in order to inform the legal analysis. This is like a back-grounder on the individual First Nation so you can understand how the story fits within the culture and so you can understand the relevance of the story.

2. Synthesis

The synthesis stage is crucial. At this stage, First Nations can consider different elements of stories together and develop useful standards that explain, justify or are consistent with a group of particular legal decisions.⁶⁴ During synthesis, you are pulling standards from individual stories; together, these standards inform what the First Nation's law is and how it operates in response to a particular issue or in a particular context.⁶⁵

Through processing multiple stories from multiple Elders and Knowledge Holders, you can develop a broad analytical framework, that includes the following information:

1) Legal processes: Who are the primary decision makers? What are the steps involved in coming to a decision or resolution?

2) Legal responses and resolutions: What principles govern appropriate resolutions to harms and conflicts between people?

3) Legal obligations: What are the 'shoulds'? What principles govern individual and collective responsibilities?

4) Legal rights: What should people be able to expect from others – procedurally and/or substantively?

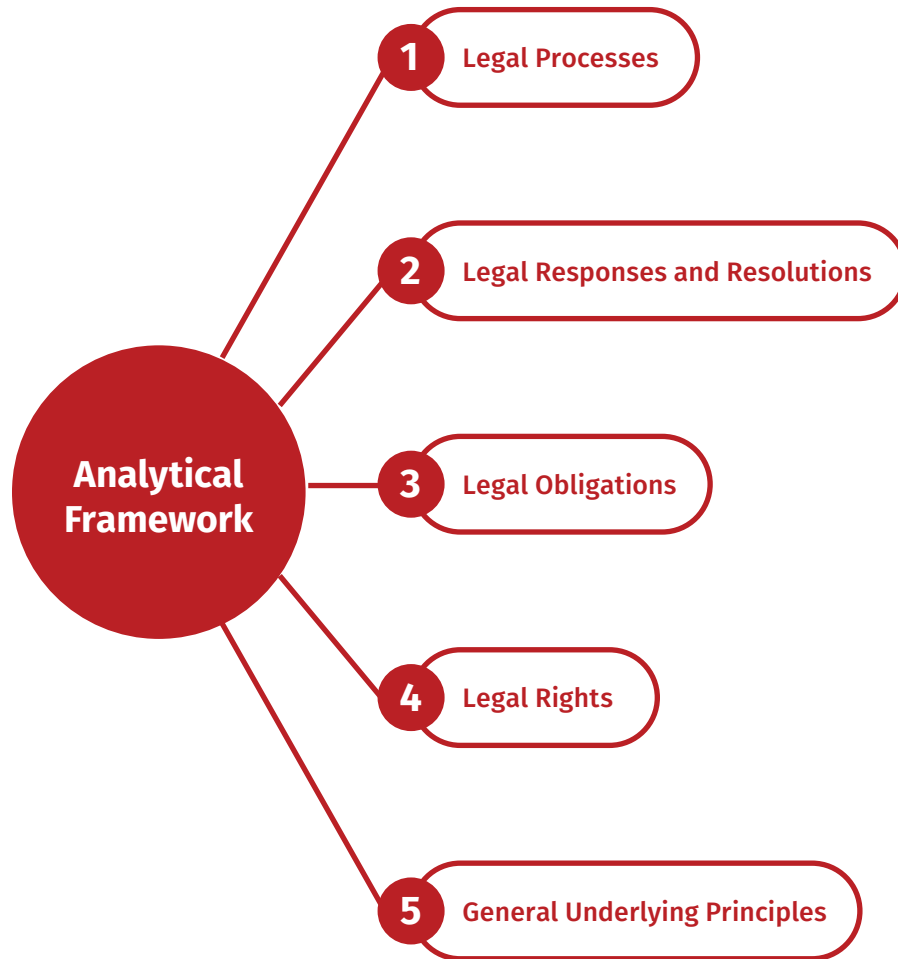
5) General underlying principles: What are other recurring themes? What are the principles that guide the expression and application of the law?

This system organizes information about the Indigenous law, whether collected through the case brief method or through observing other sources of law discussed earlier in this Indigenous Laws Module, and allows the information to be applied, added and adapted to present circumstances.⁶⁶

⁶⁴ Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16, at 28.

⁶⁵ Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16, at 28.

⁶⁶ Friedland, H., & Napoleon, V. 2015-16. Gathering the threads: Developing a methodology for researching and rebuilding Indigenous legal traditions. 1 *Lakehead LJ* 16, at 28 and 29.



3. Preliminary Legal Theory

The synthesis of Indigenous law through the compilation of relevant oral history can also support the development of a broader statement of a First Nation's legal theory or their Indigenous law. This can be helpful for First Nations interested in fully developing a legal code to be applied in different contexts – for example, in an EA process.

Resources to Help with the Process

First Nations approach the task of revitalizing Indigenous laws in different ways. For example, the Anishinaabek Nation's Legal Department launched the Revitalization of Anishinaabek Legal Traditions initiative. That initiative brought together Knowledge Holders from each of the Anishinaabek First Nations to share knowledge and to dialogue as to how Indigenous laws and customs might be successfully revitalized and implemented into the modern context.⁶⁷

Organizations and academic institutions are also good resources for First Nations. The Indigenous Law Research Unit (ILRU) is an academic institute dedicated to the revitalization of Indigenous laws and governance. ILRU partners with Indigenous communities to articulate their own legal principles and processes, on their own terms. ILRU collaborates with communities by invitation and focuses on the legal questions that drive the Nation's needs and goals.⁶⁸

⁶⁷ Ontario, Union of Ontario Indians. 2018. *Revitalization of Anishinabek legal traditions – Regional sessions – Final summary report*. North Bay: Anishinabek Nation Legal Department, at 4.

⁶⁸ University of Victoria. 2022. *Indigenous Law Research Unit (ILRU)*. University of Victoria Law. <https://www.uvic.ca/law/about/indigenous/indigenoulawresearchunit/index.php>

SECTION 3

Examples and Case Studies of Indigenous Law in Action in EA Processes

Many First Nations have created their own consultation and EA processes.⁶⁹ These processes tell governments and proponents how to engage with First Nations when developing in their territories.⁷⁰ In this section, we summarize case studies of how First Nations have asserted their Indigenous laws in various contexts. In some cases, this includes First Nations creating their own EA process, or defining how they participate in provincial and federal EA processes and consultation with the Crown. For others, First Nations have asserted their Indigenous laws through direct action on the land.

⁶⁹ Leclair, J., Papillon, M., & Forget, H. 2019. Les protocoles de consultation autochtones au Canada : Un modèle de convergence des systèmes juridiques autochtones et étatique ? *Recherches amérindiennes au Québec*, 25 at 26.

⁷⁰ Leclair, J., Papillon, M., & Forget, H. 2019. *Les protocoles de consultation autochtones au Canada : Un modèle de convergence des systèmes juridiques autochtones et étatique ? Recherches amérindiennes au Québec*, 25 at 29.

CASE STUDY

DESHKAN ZIIBIING DEVELOPS DUTY TO CONSULT PROTOCOL

Deshkan Ziibiing, known as the Chippewas of the Thames (“Chippewas”) are Anishinaabeg people who originally migrated to the Great Lakes area from the north-eastern region of North America. The majority of Southwestern Ontario is their modern traditional territory.⁷¹

In February 2013, Enbridge filed an application requesting that the National Energy Board (NEB) allow Enbridge to reverse the flow and increase the capacity of an oil pipeline called “Pipeline 9.”⁷² Pipeline 9 runs through the Chippewas’ traditional territory.⁷³

The Chippewas were opposed to the changes to Pipeline 9 because the pipeline was 40 years old and at risk of breaking. According to then-Chippewas Chief Myeengun Henry, “When a pipeline breaks, it devastates rivers and people and land.”

⁷¹ Deshkan Ziibiing Chippewas of the Thames First Nation. March 2022. *Welcome to Chippewas of the Thames First Nation*. Deshkan Ziibiing Chippewas of the Thames First Nation. <https://www.cottfn.com/>

⁷² Canadian Free Press. March 2014. Enbridge Line 9 pipeline reversal approved by energy board. *CBC News* <https://www.cbc.ca/news/canada/montreal/enbridge-line-9-pipeline-reversal-approved-by-energy-board-1.2562169>

⁷³ CBC News. July 2017. Line 9 Supreme Court ruling will be crucial for Chippewas of the Thames. *CBC News* <https://www.cbc.ca/news/canada/london/chippewas-line9-court-ruling-1.4219737>

CASE STUDY

To decide whether to approve the changes to Pipeline 9, the NEB held public hearings. After the hearings, the NEB approved the pipeline changes but imposed three conditions on Enbridge – all of which were aimed at involving First Nations in environmental management of the pipeline.⁷⁴

Unhappy with the NEB's decision to approve the changes to Pipeline 9, the Chippewas took Enbridge to Federal Court, and then to the Federal Court of Appeal. Finally, the case was heard at the Supreme Court of Canada ("SCC"). The SCC found that the NEB had a duty to consult with the Chippewas. However, in this case, the SCC found that the NEB had met its duty to consult.⁷⁵

In November 2016, the Chippewas decided to create their own protocol for consultation called *Wiindmaagewin*. *Wiindmaagewin* outlines the Chippewas' expectations regarding proponent and government consultation within their traditional territory.⁷⁶ As made clear in *Wiindmaagewin*, the Chippewas expect proponents and governments to follow the principles of inter-societal governance and communication when consulting with the Chippewas.⁷⁷

Wiindmaagewin's purpose is to protect the Chippewas' watersheds, relationships and rights.⁷⁸ It also sets out the legal principles that will be used when interpreting *Wiindmaagewin*. These principles are:⁷⁹

1. *Gdinawendimi*: We are all related.
2. *MIno-bmaadiziwin*: The good life is possible by living in accordance with the Seven Grandfather and Grandmother teachings – *Nbwaakaawin* (wisdom), *Zaagidiwin* (love), *chi* (respect), *akde'ewin* (bravery), *Gwakwaadiziwin* (honesty), *Dbaadendiziwin* (humility) and *Debwewin* (truth). All proponents must demonstrate how the proposed project meets these teachings.
3. *Naaknigewin*, or law. All consultation and discussion must respect the Creator's law.
4. Anishinaabe *dbendizawin*, or Anishinaabe independence and self-determination. The Anishinaabe were created to live as an independent people. All proposals must respect the Creator-given independence of the Anishinaabeg.

74 CBC News. July 2017. Line 9 Supreme Court ruling will be crucial for Chippewas of the Thames. *CBC News* <https://www.cbc.ca/news/canada/london/chippewas-line9-court-ruling-1.4219737>, at para 24.

75 CBC News. July 2017. Line 9 Supreme Court ruling will be crucial for Chippewas of the Thames. *CBC News* <https://www.cbc.ca/news/canada/london/chippewas-line9-court-ruling-1.4219737>, at paras 5, 46.

76 *Wiindmaagewin - Consultation Protocol*. 2016. Chippewas of The Thames First Nation.

77 *Wiindmaagewin - Consultation Protocol*. 2016. Chippewas of The Thames First Nation, at 7.

78 *Wiindmaagewin - Consultation Protocol*. 2016. Chippewas of The Thames First Nation, at 4.

79 *Wiindmaagewin - Consultation Protocol*. 2016. Chippewas of The Thames First Nation, at 8.

CASE STUDY

AAMJIWNAANG FIRST NATION'S CONSULTATION PROTOCOL

The Aamjiwnaang First Nation is a First Nations community of about 1,000 Anishinaabek people residing on reserve along the shores of the St. Clair River. The Aamjiwnaang's traditional territory covers much of Southwestern Ontario and the Great Lakes Region, including significant territory in what is now Michigan.⁸⁰

Aamjiwnaang's reserve lands are bordered by industrial and petrochemical developments, and there are concerns about the short- and long-term impacts of these industries. As a result of the industrial projects, the Aamjiwnaang decided to create a consultation protocol called the New Protocol.⁸¹

The New Protocol replaced a 2011 protocol where proponents had to meet 23 steps for consultation. The Aamjiwnaang wanted a refreshed protocol that would be more efficient and allow them to meet

timelines for recommendations to the province, Canada and developers.⁸²

The New Protocol was developed through a community-led process. During community engagement sessions organized by the Aamjiwnaang's Environmental Coordinator, members contributed opinions on how consultation should take place. For instance, the community decided when Chief and Council would participate in consultation, when community members would be informed about projects, and when community members would give opinions about proposals.⁸³

The New Protocol requires that when a proponent wants to build something new, install something, change a piece of equipment, or change the current layout of the land within Aamjiwnaang's traditional territory, the proponent must inform the Aamjiwnaang of their plan. For each submission, a project summary is created and then reviewed by the Nation's Environment Committee. The Environment Committee then makes recommendations to Chief and Council regarding the type of engagement needed from the proponent. The proponent must also provide capacity funding to ensure full and meaningful involvement by the Aamjiwnaang.⁸⁴

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- 80** *Consultation protocol – Aamjiwnaang.* 2018. Aamjiwnaang First Nation, at 1. <https://www.aamjiwnaang.ca/wp-content/uploads/2018/07/Aamjiwnaang-Consultation-ProtocolExternal.pdf>
- 81** *Consultation protocol – Aamjiwnaang.* 2018. Aamjiwnaang First Nation, at 1. <https://www.aamjiwnaang.ca/wp-content/uploads/2018/07/Aamjiwnaang-Consultation-ProtocolExternal.pdf>
- 82** Graf, C. February 2018. Aamjiwnaang developing consultation protocol. *Anishinabek News* <http://anishinabeknews.ca/2018/02/23/aamjiwnaang-developing-consultation-protocol/>
- 83** Graf, C. February 2018. Aamjiwnaang developing consultation protocol. *Anishinabek News* <http://anishinabeknews.ca/2018/02/23/aamjiwnaang-developing-consultation-protocol/>
- 84** Aamjiwnaang First Nation. March 2022. Environment projects. Welcome to Aamjiwnaang First Nation. <https://www.aamjiwnaang.ca/environment-projects/>

CASE STUDY

STK'EMLUPSEMC TE SECWÉPEMC NATION (SSN)'S ASSESSMENT PROCESS

Stk'emlupsemc te Secwépemc Nation ("SSN") is made up of the Tk'emlúps te Secwépemc and Skeetchestn Indian Band, one of the seven historic divisions of Secwepemc Nation. The Secwepemc people occupy a vast territory in the interior of what is now British Columbia.⁸⁵

The SSN created an assessment process in response to a proposed copper and gold mine within a culturally important place on the SSN's traditional territory.

In 2015, following British Columbia's assessment that SSN had a strong claim to title and rights in the area, SSN made a formal declaration of title to the area where the proposed mine would be located. SSN insisted that they conduct their own project assessment that would respect Aboriginal rights and title, and that would include giving SSN jurisdiction over how the land is to be used.

SSN's assessment process was based in Indigenous laws, customs and knowledge. Its EA process included independent expert reviews, community information sessions, a review hearing, and assessments of tangible and intangible impacts (e.g., impacts of a cultural and spiritual nature).⁸⁶ SSN's assessment integrated western and Traditional Knowledge. During SSN's assessment, more than 80 experts and Knowledge Holders shared their findings. In March 2017, after completing its EA, SSN announced it would not consent to the mine because the mine would negatively impact air and water quality, and irreversibly affect SSN's traditional territory.

Within two months of SSN's announcement, more than 30 organizations across Canada signed a declaration supporting SSN's assessment process and decision.⁸⁷

The information provided through the SSN assessment process was embedded and considered in both the federal and provincial EA. It informed the federal EA decision maker's decision that the project was likely to cause significant adverse environmental effects and cumulative effects to Indigenous heritage as well as the current use of lands and resources. Canada ultimately decided that the environmental effects could not be justified, and the project was not approved.⁸⁸

85 Tk'emlúps te Secwépemc. March 2022. Our land. <https://tkemlups.ca/profile/history/our-land/>

86 Stk'emlupsemc te Secwépemc Nation. 2015. *SSN project assessment process: Proposed Ajax project*. Stk'emlupsemc te Secwépemc Nation. https://miningwatch.ca/sites/default/files/ssn_project_review_process_1page_0.pdf

87 Mining Watch Canada & Stk'emlupsemc te Secwépemc Nation. December 2017. *Help protect Pípsell*. <http://protectpipsell.ca/>

88 Mascher, S. June 2019. Aligning Canadian impact assessment processes with the principles of UNDRIP. *CIGI*. <https://www.cigionline.org/articles/aligning-canadian-impact-assessment-processes-principles-undrip/>

CASE STUDY

TSLEIL-WAUTUTH NATION (TWN)'S INDEPENDENT ASSESSMENT OF KINDER MORGAN'S TRANS MOUNTAIN EXPANSION PROJECT

The Tseil-Waututh Nation (“TWN”) are a Coast Salish nation whose territory includes Burrard Inlet.⁸⁹

In 2009, TWN adopted a Stewardship Policy, which is an expression of Tseil-Waututh jurisdiction and law. The Stewardship Policy mandates that TWN review any proposed development inside TWN’s Consultation Area. The Consultation Area encompasses the waters and lands traditionally used by TWN.⁹⁰

Under the authority of the Stewardship Policy, TWN created an EA process.⁹¹

In May 2015, TWN applied their EA process to Kinder Morgan’s Trans Mountain Expansion Project (TMEX). The project proposed to expand the Trans Mountain pipeline system, and would result in a seven-fold increase of tanker traffic through Burrard Inlet. The facilities and the last 28 kilometres of the pipeline are in the heart of TWN territory.⁹²

TWN’s EA was grounded in TWN Law (*snəwayəł*) and backed by scientific and anthropological expert evidence.⁹³ TWN’s EA concluded that the TMEX proposal had the potential to deprive past, current and future generations of control and benefit of the water, land, air and resources in their territory. The EA recommended that Chief and Council withhold TWN’s support for the TMEX proposal. Based on the recommendations, Chief and Council passed a resolution banning the project.⁹⁴

In May 2016, following the TWN EA, the NEB issued a report recommending that the federal government approve TMEX. The federal government followed the NEB’s recommendation. In August 2018, a Federal Court of Appeal quashed the federal government’s approval of TMEX.⁹⁵ However, in June 2019, the federal government re-approved the project. And in February 2020, the Federal Court of Appeal dismissed an appeal regarding the re-approval. The SCC declined to hear an appeal of the Federal Court decision.

As of the time of publication of the Toolkit, pipeline construction has continued as planned.⁹⁶

- ⁸⁹ Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227 at 246.
- ⁹⁰ Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227 at 246.
- ⁹¹ Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227 at 247.
- ⁹² Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227 at 247.
- ⁹³ Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227, at 248.
- ⁹⁴ Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227, at 249-50.
- ⁹⁵ Canada Energy Regulator. September 2020. Project background. Canada Energy Regulator. <https://www.cer-rec.gc.ca/en/applications-hearings/view-applications-projects/trans-mountain-expansion/project-background.html#wb-cont>
- ⁹⁶ Rader, J. May 2020. Stop Trans Mountain: The First Nations’ movement against the Trans Mountain Expansion Project. Washington Environmental Council. <https://waconservationaction.org/stop-transmountain-the-first-nations-movement-against-the-trans-mountain-expansion-project/>

CASE STUDY

GITANYOW HEREDITARY CHIEFS DEVELOP ASSESSMENT PROCESS

The GWSAP requires all actors (e.g., companies, governments) to follow Gitanyow strategic direction, such as the *Gitanyow Lax'yip Land Use Plan*. The GWSAP also prohibits projects from accessing the *Lax'yip* without consent of the impacted *Wilp* (House). Everything in the GWSAP is Gitanyow-led to uphold *Ayookxw* and ensure *Wilp* sustainability.⁹⁸

The *Lax'yip* (territories) of the Gitanyow peoples are in the middle-Nass Watershed and upper Skeena Watershed, located along the western coast of what is now British Columbia.

In Gitanyow *Ayookxw* (law), Gitanyow hereditary Chiefs have the right and responsibility to possess, manage, protect and pass on the land and water of their territories sustainably from generation to generation.⁹⁷

At the start of 2021, the Gitanyow released their *Gitanyow Wilp Sustainability Assessment Process (GWSAP)*. The GWSAP sets out requirements for assessing proposed projects in Gitanyow *Lax'yip*.

The GWSAP follows Gitanyow *Ayookxw*. The GWSAP sets out the Gitanyow's own process for assessing new projects, and provides for Gitanyow monitoring, assessment and response for past and ongoing impacts on the *Lax'yip*.

97 West Coast Environmental Law. 2022. Environmental assessment. West Coast Environmental Law. <https://www.wcel.org/program/sharing-stories/environmental-assessment>

98 Marsden/Naxginkw, T., & Smith, G. April 2021. Indigenous law in action: Gitanyow launches its ground-breaking Wilp Sustainability Assessment Process. West Coast Environmental Law. <https://www.wcel.org/blog/indigenous-law-in-action-gitanyow-launches-its-groundbreaking-wilp-sustainability-assessment>

CASE STUDY

MOHAWK COUNCIL OF AKWESASNE'S EA PROCESS

The Mohawk Nation at Akwesasne straddles the United States and Canadian borders on both banks of the St. Lawrence River.⁹⁹ The Mohawk Council of Akwesasne (“MCA”), the Canadian arm, includes members from Kana:takon (Saint Regis, Quebec), Kawehno:ke (Cornwall Island, Ontario) and Tsi:Snaihne (Snye, Quebec).¹⁰⁰ On the American side, Akwesasne is represented by the Saint Regis Mohawk Tribe (“SRMT”).¹⁰¹

The MCA conducts its own EAs for projects on its lands. It has Mohawk EA officers and conducts around 30 EAs each year.¹⁰² MCA’s EA process is based on traditional teachings. The EA process uses the *Ohen:ton Karihwateh:kwen* (The Words That Come Before All Else) as its environmental framework, and *Sken:nen* (Peace), *Kasatstensera* (Power) and *Ka’nikonriio* (Good Mind) as its guiding principles.¹⁰³

Similarly, the SRMT conducts its own EAs. The SRMT EA process is based on looking ahead seven generations; being aware that there are limited resources available and ensuring that all resources are taken into account when considering a project.¹⁰⁴ The SRMT EA process incorporates the Thanksgiving Address and considers all things that Mohawk people are thankful for.¹⁰⁵ The theme of the Thanksgiving Address – “Now our minds are one” – is central to the EA process. SRMT believes that if that theme is considered in the EA process, all people will benefit, including proponents.¹⁰⁶

Sections of the Thanksgiving Address are quoted throughout the EA documents and guide the information that SRMT collects from proponents. For example, for the section on animals, the EA form quotes from the Thanksgiving Address: *“We give thanks and greetings to the animal life. They are still living in the forests and other places. They provide us with food and this gives us peace of mind knowing that they are still carrying out their instructions as given by the Creator. We therefore give greetings and thanks to our animal brothers. Now our minds are one.”* Applicants are then required to provide detailed information on animals observed at the site area, the habitat and forage at the site, and whether calving or birthing grounds are present.

⁹⁹ Quebec, Public Inquiry Commission on Relations Between Indigenous Peoples and Certain Public Services in Quebec. 2019. *Final report*. Ottawa: Library and Archives Canada, at 107.

¹⁰⁰ Akwesasronon, Mohawk Council of Akwesasne. 2018. *Annual Report: 2017-2018*. Akwesasronon: Mohawk Council of Akwesasne, at 6.

¹⁰¹ Saint Regis Mohawk Tribe. March 2022. *History of tribal government*. Saint Regis Mohawk Tribe. <https://www.srmt-nsn.gov/about/history-of-tribal-government>

¹⁰² Mohawk Council of Akwesasne Environment Program. <http://www.akwesasne.ca/environment/>

¹⁰³ Mohawk Council of Akwesasne Environment Program. <http://www.akwesasne.ca/environment/>

¹⁰⁴ Saint Regis Mohawk Tribe Environmental Assessment Form. <https://dvc479a3d0ke3.cloudfront.net/uploads/environment/Environmental-Assessment-Form.pdf>

¹⁰⁵ Saint Regis Mohawk Tribe Environmental Assessment Form. <https://dvc479a3d0ke3.cloudfront.net/uploads/environment/Environmental-Assessment-Form.pdf>

¹⁰⁶ Saint Regis Mohawk Tribe Environmental Assessment Form. <https://dvc479a3d0ke3.cloudfront.net/uploads/environment/Environmental-Assessment-Form.pdf>

CASE STUDY

DOKIS FIRST NATION
DEVELOPS LAND CODE

The traditional territory of the Dokis First Nation (“Dokis”) is roughly 40,000 acres between what are now the Districts of Sudbury, Parry Sound and Nipissing.¹⁰⁷ Today, the Dokis reserve lands cover approximately 155 square kilometres of land southwest of Lake Nipissing on the French River. The reserve lands are composed of two large islands, with the main settlement located on the northern island called *Okikendawt* Island. The second island is a large Southern Peninsula that is generally used by the Dokis for hunting, fishing, camping and hiking.¹⁰⁸

In 2003, the Dokis signed on to the *Framework Agreement on First Nation Land Management*¹⁰⁹ and in 2013, the Dokis passed the *Dokis First Nation Land Management Code* (“Land Management Code”).¹¹⁰ Because the Dokis opted into the First Nations Land Management Act, and subsequently adopted its Land Manage-

ment Code, their reserve lands are no longer managed pursuant to the *Indian Act*.

The Land Management Code allows the Dokis to protect and respect the land and the gifts from the Creator, and states that the Dokis First Nation has the right to govern itself and has jurisdiction for Dokis land and resources.¹¹¹

Under the Land Management Code, the Dokis have the jurisdiction to conduct EAs for projects proposed on Dokis First Nation reserve lands. For example, recently, the Dokis assessed the environmental impact of expanding hydro services to new homes on reserve. The Dokis determined that the project would have negligible environmental impacts.¹¹²

107 Blacklaws, K. 2014. *Integrating the eagles: Members of Dokis First Nation reflect on public education in Ontario, 1960-1980*. North Bay: Nipissing University, at 7.

108 Dokis First Nation. March 2022. About Dokis F.N. Dokis First Nation <https://www.dokis.ca/history-of-treaties/>

109 Indigenous Services Canada. February 2022. *First Nations lands management*. Government of Canada. <https://www.sac-isc.gc.ca/eng/1327090675492/1611953585165>

110 Indigenous Services Canada. February 2022. *First Nations lands management*. Government of Canada. <https://www.sac-isc.gc.ca/eng/1327090675492/1611953585165>

111 Dokis First Nation. March 2022. *Dokis First Nation Land Management Code*. Dokis First Nation. <https://labrc.com/resource/land-codes/>

112 Impact Assessment Agency of Canada. November 2019. Dokis First Nation hydro line servicing. Government of Canada. <https://iaac-aeic.gc.ca/050/evaluations/proj/80259>

CASE STUDY

KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION ISSUES MINING MORATORIUM

Kitchenuhmaykoosib Inninuwig First Nation (KI) is a remote First Nation on the shores of Big Trout Lake, 500 kilometres northwest of what is now Thunder Bay. Big Trout Lake is a headwater lake that flows north into Hudson's Bay. KI's traditional territory encompasses much of this watershed.¹¹³

KI's relationship to the land is grounded in Kanawayandan D'aaki (keeping the land). According to KI spokesperson John Cutfeet, Kanawayandan D'aaki means protecting the land by respecting relationships with the land and animals.¹¹⁴

KI has developed a resource development protocol. The protocol indicates that KI is not opposed to development on its traditional lands but wishes to be a full partner in any development.¹¹⁵

When Platinex, a mining company, acquired mining claims on KI's traditional territory, Platinex had several meetings

with KI members, including the Chief, the Band Council and certain individuals. However, during these meetings, the KI consultation protocol was not followed.¹¹⁶

Per KI's protocol, development decisions require community agreement.¹¹⁷ As such, in 2004 and again in 2005, KI refused to sign an agreement with Platinex because KI's ongoing consensus was that exploratory drilling should not be permitted.¹¹⁸

Finally in 2005, on two separate occasions, KI informed Platinex that KI did not consent to any exploration on its traditional territory.¹¹⁹ Again in 2006, KI wrote to Platinex prohibiting them from conducting any exploratory drilling on KI territory.¹²⁰

In February 2006, KI became aware that their moratorium had not been respected and that Platinex had sent a drilling team to Nemeigusabins Lake.¹²¹

In response, the Chief and Deputy Chief hand-delivered a letter to Platinex's drilling crew demanding that Platinex cease all exploratory activities.¹²² After the Chief and KI members made radio announcements, crowds of KI members arrived at the camp.¹²³ Frightened by the KI presence, Platinex's drilling crew abandoned the site.¹²⁴ KI then decommissioned all of Platinex's drilling equipment.¹²⁵

- 113** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwig: Extraction and the role of law in KI's struggle for self-determination*. 7:1 *Contours*, at 2.
- 114** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwig: Extraction and the role of law in KI's struggle for self-determination*. 7:1 *Contours*, at 2.
- 115** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 19. eng/1327090675492/1611953585165
- 116** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 22. eng/1327090675492/1611953585165
- 117** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 21.
- 118** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 22.
- 119** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at paras 23 and 25.
- 120** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 30.
- 121** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 32.
- 122** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 33.
- 123** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 34.
- 124** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 37.
- 125** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 40.

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Platinex sued KI for \$10 billion in damages and gained an injunction to remove KI from the exploration site.¹²⁶ KI responded, seeking an injunction against Platinex – meaning that they asked the court to order that Platinex stop all exploration and mining activities on their lands because those activities stood to cause irreparable harm to KI, harm that could not be compensated through money or damages. At the injunction hearing, the judge sided with KI and ordered Platinex to halt all activities until consultation was undertaken.¹²⁷ The judge found that Platinex’s drilling activities would have an irreparable harm on KI’s existing treaty land entitlement claim.¹²⁸

However, in October 2007, a judge ordered that KI allow Platinex onto the land for specific drilling.¹²⁹ KI publicly stated that they would not allow Platinex onto their land.¹³⁰

Platinex then asked the court to allow it to start drilling and to order that KI not prevent the drilling. The judge made the order as requested.¹³¹

KI then made public statements that it would not allow Platinex onto their territory. In response to the statements, Platinex brought KI to court again. The court found the Chief and five Councillors in contempt of court. The Chief explained that he did not mean to disrespect the court, but that KI had to follow their own law. In March 2008, the

judge sentenced the Chief and Councillors to six months in jail.¹³²

KI held a rally along with Ardoch Algonquin First Nation and Grassy Narrows First Nation (who were fighting similar encroachments). The Court of Appeal overturned the Chief and Councillors’ sentence on the basis that the sentences were too harsh for a few reasons, including that the protests had been peaceful and for a limited purpose.¹³³

Following the Court of Appeal decision, Platinex tried to access their mining claims once more. People from KI went out to Nemeigusabins Lake and circled in boats and canoes, preventing the floatplane from landing. Platinex then sued Ontario for damages, eventually settling for a \$5 million payout and a guarantee of future royalties if a mine was ever built. Finally, Ontario withdrew the area of Platinex’s former claims, so it is not available for mining.¹³⁴

- 126** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwug: Extraction and the role of law in KI’s struggle for self-determination*. 7:1 *Contours*, at 3.
- 127** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at paras 138-39.
- 128** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at paras 79.
- 129** Bigué, A. & Hudon, M-A. 2008. *Aboriginal protest against mining exploration: The paramountcy of the rule of law*. 3:2 *Bus L Quarterly*, at 29.
- 130** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwug: Extraction and the role of law in KI’s struggle for self-determination*. 7:1 *Contours*, at 4.
- 131** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwug: Extraction and the role of law in KI’s struggle for self-determination*. 7:1 *Contours*, at 4.
- 132** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 ONCA 533 (CanLII), <https://canlii.ca/t/1z9q0> at para 1.
- 133** *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534 (CanLII), <https://canlii.ca/t/1z9q1> at para 69.
- 134** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwug: Extraction and the role of law in KI’s struggle for self-determination*. 7:1 *Contours*, at 6.

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MI'KMAQ AND ALTON GAS

Nova Scotia conducted an EA of the project. As part of the EA, a Mi'kmaq Ecological Knowledge Study (“MEKS”) was conducted in December 2006. The MEKS strongly recommended that Alton Gas and Nova Scotia meet with Mi'kmaq leadership because “the likelihood of infringements on Mi'kmaq use activities is highly possible.”¹³⁹ Despite the MEKS, in 2007, the Nova Scotia Minister responsible for the EA issued an EA approval with conditions related to a monitoring program for fish and fish habitat.¹⁴⁰

Between 2007 and 2014, Nova Scotia undertook to consult with SFN through the Assembly of Nova Scotia Mi'kmaq Chiefs' negotiating body – Kwilmu'kw Maw-klu-suaqn Negotiation Office (“KMKNO”).¹⁴¹ In 2013, SFN left KMKNO and began negotiating with Nova Scotia directly.¹⁴²

In 2014, the Nova Scotia Department of Environment wrote to SFN informing them that project construction would begin after the project received the remaining regulatory approvals.¹⁴³ SFN responded that “the Band has never been properly and adequately engaged in meaningful consultations with these matters, nor has any consent, informed, or otherwise, as to the operation of these projects been given.”¹⁴⁴

Then the construction started. A wave of protests erupted in response.

Since time immemorial, Mi'kmaq communities have known the Sipekne'katik River as their expressway, as a source of food and medicines, and as a significant part of the Mi'kmaq cultural identity. Sipekne'katik First Nation (“SFN”) is one Indian Act band formed from the Mi'kmaq people.¹³⁵

Alton Gas, a Calgary-based company, wanted to undertake a project on SFN's traditional territory. The project would create two underground salt caverns, each the size of an office building, to store natural gas.¹³⁶ Flushing the caverns would create an enormous amount of salt brine wastewater, which Alton Gas would dump into the Sipekne'katik River.¹³⁷ Dumping salt brine wastewater would place the ecosystem at risk, which would impact the inherent and treaty rights of Mi'kmaq peoples to access and use the river for food, livelihood and ceremony.¹³⁸

135 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 18.

136 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 10.

137 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 13.

138 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 95. Inninuwig First Nation, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 40.

139 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at paras 15-18.

140 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 21.

141 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 19.

142 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl>.

143 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 24.

144 *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 25.

- 145** Vandervoorde, A. 2019. *Changing culture, changing world: A gramscian approach to ontologies in radical environmental movements*. Vienna: Universitat Wien, at 27.
- 146** Withers, P. October 2014. \$100 million Alton gas project delayed over Mi'kmaq concerns. *CBC News*. <https://www.cbc.ca/news/canada/nova-scotia/100-million-alton-gas-project-delayed-over-mi-kmaq-concerns-1.2817335>
- 147** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 46.
- 148** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 47.
- 149** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 48.
- 150** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 49.
- 151** Waldron, I.R. 2018. Women on the frontlines – Grassroots movements against environmental violence in Indigenous and Black communities in Canada. 5:2 *Kalfou*, at 261.
- 152** Waldron, I.R. 2018. Women on the frontlines – Grassroots movements against environmental violence in Indigenous and Black communities in Canada. 5:2 *Kalfou*, at 260.
- 153** Waldron, I.R. 2018. Women on the frontlines – Grassroots movements against environmental violence in Indigenous and Black communities in Canada. 5:2 *Kalfou*, at 164.
- 154** Alta Gas. October 2021. Alton Natural Gas storage project update. Alton Gas. <https://altonnaturalgasstorage.ca/>

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The Mi'kmaq slowed traffic near a major highway calling attention to the river's cultural and political value. Non-Indigenous allies added their voices to the Mi'kmaq. For example, the Shubenacadie River Commercial Association, the Striped Bass Association, East Hants Fracking Opposition Group, Ecology Action Centre, Council of Canadians, Amnesty International and many others all spoke out in support of SFN.¹⁴⁵

Due to the outrage, the Nova Scotia government halted part of the construction work until Alton Gas carried out further consultation with SFN.¹⁴⁶

Then, in 2016, the Nova Scotia Department of Environment issued final approvals to Alton Gas.¹⁴⁷ SFN appealed the decision,¹⁴⁸ but the Minister rejected the appeal.¹⁴⁹ So SFN appealed to the Nova Scotia courts.¹⁵⁰

While SFN was appealing the decision, SFN members held a demonstration against the project in front of the Nova Scotia Legislature.¹⁵¹ Joined by non-Indigenous allies, SFN also organized highway blockades, a development site encampment and educational events about the project.¹⁵² The Supreme Court of Nova Scotia reversed Nova Scotia's decision that the project could go ahead and ordered that the Crown conduct more consultation with SFN.¹⁵³

In 2021, Alton Gas announced that it would not continue development and that it plans to decommission the project in consultation with the Mi'kmaq. Alton Gas stated that “the project has received mixed support, challenges and experienced delay.”¹⁵⁴

REFERENCES

See the References & Resources Module for a full list of references to this section.